GOVERNMENT ATTORNEY'S OFFICE
DIRECTORATE FOR STATE LEGAL SERVICES

SUBDIRECTORATE-GENERAL OF LITIGATION SERVICES

IN THE CASE OF AN ARBITRATION UNDER THE CONVENTION OF 1965 ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (ICSID CONVENTION)

AND

UNDER THE ENERGY CHARTER TREATY
(ICSID ARBITRATION CASE NO. ARB/14/1)

BETWEEN:

MASDAR SOLAR & WIND COOPERATIEF U.A.

Claimant

and

THE KINGDOM OF SPAIN

Respondent

RESPONDENT'S REJOINDER ON THE MERITS AND REPLY ON JURISDICTION

ARBITRATORS:
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I. LIST OF PRINCIPAL ABBREVIATIONS

"ADFEC":	Abu Dabi Future Energy Company.
"Act 15/2012":	Act 15/2012, of 27 December 2012, on tax measures for energetic sustainability.
"Act 24/2013":	Act 24/2013, of 26 December, on the Electricity Sector.
"Act 54/1997" or "LSE 1997":	Act 54/1997, of 27 November 1997, on the Electricity Sector. It was repealed by Act 24/2013, of 26 December 2013, on the Electricity Sector, in the terms stipulated in its sole Repealing Provision.
AEE	Spanish Wind Association
APPA	Association of Renewable Energy Producers
"BIT":	Bilateral Investment Treaty.
"TFEU":	Consolidated version of the Treaty on the Functioning of the European Union, published in the Official Journal of the European Union on 26 October 2012.
"CPI-IP":	Consumer Price Index with constant taxes, excluding unprocessed food and energy products.
"CPI":	Consumer Price Index.
"CJEU":	Court of Justice of the European Union.
"Spanish Cabinet Meeting Decision of 2009":	Decision of 19 November 2009, proceeding to the management planning of the projects or facilities submitted to the administrative register for pre-assignment of remuneration for electric energy production plants, specified in Royal Decree Law 6/2009, of 30 April, adopting certain measures in the energy sector and approving the social tariff.
"Directive 2001/77/EC":	Directive 2001/77/EC of the European Parliament and of the Council, of 27 September 2001, on the promotion of electricity produced from renewable energy sources in the internal electricity market.
"Directive 2009/28/EC":	Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.
"DGPEM":	Directorate General for Energy Policy and Mines of the Spanish Ministry of Industry, Energy and Tourism.
"DCF":	discounted cash flow.
"Intra-EU Dispute":	dispute between an investor of the EU and an EU Member State.

"Abu Dhabi emirate":	Emirate that is part of the federation of Emirates, United Arab Emirates.
"ECT":	Energy Charter Treaty, executed in Lisbon on 17 December 1994.
"EU":	European Union.
"Gemasolar Servert Report":	Expert report of SERVERT Engineering: "160608-GEMASOLAR_Lifetime_Analysis-signed" of 06/2016, produced by Engineer Mr. Jorge Servert
"Servet Valle I y II Report":	Expert report of SERVERT Engineering: "160608-Valle_I y II_Lifetime_Analysis-signed" of 06/2016, produced by Engineer Mr. Jorge Servert
"Brattle Regulatory Expert Report":	Expert report on Changes in Spanish regulation for concentrated electrical energy facilities prepared by The Brattle Group on 21 January 2015, that accompanies the Memorial on the Merits submitted by the Claimant in this arbitration.
"Brattle Damages Expert Report":	Expert report on financial Damages prepared by The Brattle Group that accompanies the Memorial on the Merits submitted by the Claimant in this arbitration.
"Accuracy expert report on the Claimant and its claim":	Financial-economic Expert Report on the Claimant, its claim and the thermosolar plants dated 15 September 2015, prepared by Accuracy, that accompanies this Respondent's Counter-Memorial, Jurisdictional Objections and Request for Bifurcation.
"Accuracy expert report on Incentives":	Financial-economic Expert Report on the incentives to the thermosolar sector dated 15 September 2015, prepared by Accuracy, that accompanies this Respondent's Counter-Memorial, Jurisdictional Objections and Request for Bifurcation.
"This arbitration" or "the present arbitration":	ICSID Arbitration case ARB/14/1, formally instituted by Masdar Solar & Wind Cooperatief U.A. against the Kingdom of Spain.
"IDAE":	Institute for Diversification and Saving of Energy.
"Intra-EU Investment":	investment realized in the EU by an EU investor.
"Claimant" or "Masdar":	Masdar Solar & Wind Cooperatief U.A.
"Masdar":	Masdar Solar&Wind Cooperatief U.A. (the Claimant refers to it as Masdar Solar).
"This Statement", "this statement" or "the present Memorial":	Memorial of Rejoinder on the Merits and Counter-Memorial on Jurisdiction of the Kingdom of Spain, of 10 June 2016
"MINETUR":	Ministry of Industry, Energy and Tourism.
"NCC":	National Competition Commission.

"NEC":	National Energy Commission. It is the Spanish energy systems Regulating Body. Since 7 October 2013, its functions are taken over by the National Markets and Competition Commission.
"NMCC":	National Markets and Competition Commission.
"OR":	Ordinary Regime.
PROTERMOSOLAR	The main association for solar thermal technology
"RAIPRE":	Administrative Register of Special Regime Electricity Production Facilities. It makes up Section two of the RAIPEE.
"RAIPEE":	Administrative Register of Electricity Production Facilities, wherein all producers of electrical power are registered.
"RE":	Renewable Energy.
"Royal Decree 1432/2002":	Royal Decree 1432/2002, of 27 December, on the methodology of the average reference tariff.
"Royal Decree 1614/2010":	Royal Decree 1614/2010, of 7 December, regulating and modifying certain aspects related to electric energy production using thermoelectric solar and wind power technologies.
"Royal Decree 2818/1998":	Royal Decree 2818/1998, of 23 December 1998, on production of electric energy by installations supplied with renewable energy, waste or cogeneration resources or sources.
"Royal Decree 413/2014":	Royal Decree 413/2014, of June 6 2014, which regulates the electric energy production activity from renewable energy sources, cogeneration and waste
"Royal Decree 436/2004":	Royal Decree 436/2004, dated 12 March 2004, establishing the methodology for the updating and systematisation of the legal and economic regime for electric power production under the special regime.
"Royal Decree 661/2007":	Royal Decree 661/2007, of 25 May 2007, regulating the activity of electricity production under the special regime.
"RD-Law 14/2010":	Royal Decree Law 14/2010, of 23 December, establishing urgent measures for the correction of the tariff deficit in the electricity sector published in the Official State Gazette of 24 December 2010.
"Royal Decree 1565/2010":	Royal Decree Law 1565/2010, of 19 November 2010, which regulates and modifies certain aspects related to electric energy production under the special regime.
"RD-Law 20/2012":	Royal Decree Law 2/2013, the Kingdom of Spain approved Royal Decree Law 20/2012, of 13 July, on measures aimed at assuring budgetary stability and promoting competitiveness.

"RD-Law 6/2009":	Royal Decree Law 6/2009, of 30 April 2009, by virtue of which certain measures in the energy sector are adopted and the Social Tariff is approved.
"RD-Law 1/2012":	Royal Decree-Law 1/2012, 27 January 2012, which proceeds to the suspension of the remuneration pre-assignment procedures and the elimination of the economic incentives for new electric energy production plants based on cogeneration, renewable energy sources, and waste, published in the Official State Gazette of 28 January 2012 (Spanish).
"RD-Law 2/2013":	Royal Decree-Law 2/2013, of 1 February 2013, on urgent measures in the electricity sector and the financial sector.
"RD-Law 9/2013":	Royal Decree-Law 9/2013 of 12 July 2013, establishing urgent measures to ensure the financial stability of the electricity system.
"Second Accuracy expert report on the Claimant":	Second Economic Report on the Claimant and its Claim of 09 June 2016, issued by Accuracy.
"Second Sector Expert Report of Accuracy":	Second Sectorial Report on the incentives to the thermosolar sector in Spain of 09 June 2016, issued by Accuracy.
"NREAP":	Spain's National Renewable Energy Action Plan.
"SES":	Spanish Electrical System.
"SPV":	Special purpose vehicle.
"SR":	Special Regime.
"Contracting Party":	State or Regional Economic Integration organization that has consented to be bound by the Energy Charter Treaty and for which the latter is valid, in accordance with the definition of "Contracting Party" established in article 1(2) of the Energy Charter Treaty.
"TGU":	Tax Gross-Up
"TVPEE":	Tax on the value of the production of electrical energy. It was established and became effective as of 1 January 2013 by the Act 15/2012 and is governed in Articles 1 to 11 of the Act 15/2012.
"Respondent":	The Kingdom of Spain.
"OMEL":	The Operating Company in the Spanish Electricity Market.
"Vienna Convention":	Vienna Convention on the Law of Treaties, of 23 May 1969.

II. INTRODUCTION

1. The Kingdom of Spain submits its Rejoinder on the Merits and Reply on Jurisdiction in accordance with the schedule laid down by Procedural Order No. 1 of 29 September 2014 and with the amendment agreed to by the parties on 22 December 2015.

2. Masdar Solar & Wind Cooperatief U.A. (hereinafter the "**Claimant**" or **"Masdar**") maintains that the Kingdom of Spanish has breached the obligations undertaken under the Energy Charter Treaty (hereinafter "**ECT**"). It sates in this regard that Spain: (a) has approved measures that frustrated the Claimant´s legitimate expectations; (b) has breached the obligation to create a stable, transparent and foreseeable legal framework for the Claimant´s investments; (d) has adopted abusive and disproportionate measures (e) has breached an alleged commitment assumed by the Kingdom of Spain.

3. The Kingdom of Spain will request that the Tribunal reject the Claimant´s pretensions in their entirety on their merits and sentence them to pay for the costs of this arbitration. However, and as a prior matter, a series of Objections are submitted to the Honourable Tribunal for analysis that, in the judgement of this Party, show its lack of Jurisdiction, with all due respect, to hear this dispute. They are presented below.

4. Firstly, as **Jurisdictional Objection A**, with all due respect, the Kingdom of Spain reiterates the lack of jurisdiction of the Arbitral Tribunal to hear the dispute that is the subject of this arbitration, as this dispute is between two States: United Arab Emirates, specifically the Emirate of Abu Dhabi and the Kingdom of Spain. Pursuant to international law and according to the facts acknowledged by the Claimant itself, the conduct of the Claimant must be attributed for jurisdictional purposes to United Arab Emirates, a State which is not a Contracting Party to the ECT. Therefore, the jurisdictional requirement of Article 26 of the ECT that the dispute shall be between a Contracting Party and an investor of another Contracting Party, is not met. The jurisdictional requirement of Article 25 of the ICSID Convention that the dispute must arise between a Contracting State and the national of another Contracting State is not met either.

5. Secondly, as **Jurisdictional Objection B**, the Kingdom of Spain reiterates the lack of jurisdiction of the Arbitral Tribunal to hear this dispute given that the Claimant did not make an investment in an objective or ordinary sense in Spain, pursuant to the provisions of Articles 26 and 1(6) of the ECT and Article 25(1) of the ICSID Convention.

6. Thirdly, as **Jurisdictional Objection C,** the Kingdom of Spain reiterates the lack of jurisdiction of the Arbitral Tribunal to hear this dispute as there is not a protected investor under the ECT. Both the Netherlands, the country in which the Claimant is incorporated, and the Kingdom of Spain are member States of the European Union (hereinafter "**EU**"). The EU is a Contracting Party to the ECT and hence the Claimant is not from "*another Contracting Party*", as required by Article 26 of the ECT to be able to resort to arbitration. The arbitration dispute resolution mechanism stipulated in Article 26 of the ECT is not applicable to an intra-EU dispute like the present one.

7. Fourthly, as **Jurisdictional Objection D**, the Kingdom of Spain reiterates the lack of jurisdiction of the Arbitral Tribunal as the Claimant has been denied the application of Part III of the ECT given that the circumstances of Article 17 of the ECT concur.

8. Finally, as **Jurisdictional Objection E**, the Kingdom of Spain reiterates the lack of jurisdiction of the Arbitral Tribunal to hear the claim submitted against the Kingdom of Spain for an alleged breach of Article 10(1) of the ECT, through the introduction by Act 15/2012 of the Tax on the Value of the Production of Electrical Energy (hereinafter "**TVPEE**"). The Kingdom of Spain has not given its consent to submit this issue to arbitration given that, pursuant to Article 21 of the ECT, section (1) of Article 10 of the ECT does not generate obligations regarding the taxation measures of Contracting Parties. The provisions relating to the TVPEE of Act 15/2012 constitute a taxation measure for the purposes of the ECT according to Article 21(7) of the ECT, which provides that the term "taxation measure" includes any provisions relating to taxes of the domestic law of the Contracting Party. In addition, in the hypothetical event that the Arbitral Tribunal considered that the above is not sufficient to determine that a taxation measure for the purposes of the ECT exists, and that the additional analysis of the TVPEE proposed by the Claimant is necessary, which implies to a certain extent examining the economic effects of this tax, the TVPEE is, in any event, a *bona fide* taxation measure.

9. The aforementioned Jurisdictional Objections A, B, C and D are Objections of total nature, that is, they affect the entirety of the dispute raised by the Claimant. Thus, the upholding of said Objections would entail the exclusion of the entire dispute from the jurisdiction of the Arbitral Tribunal. These Objections are also formulated without prejudice to one another. Jurisdictional Objection E is an Objection of partial nature, that is, it only affects part of the dispute raised by the Claimant.[1]

10. If the Tribunal deemed it appropriate to hear the merits of the dispute brought by the Claimants, the Kingdom of Spain will develop arguments for rejecting their pretensions.

11. The Claimant claims that Article 44 (3) of Royal Decree 661/2007 is a standard regulatory stabilisation clause freezing each and every one of the rules contained in that Regulation concerning installations in operation. The Claimant asserts that at the time it made its investment it had the Expectation that the economic subsidy system for production from renewable sources could not be changed. However, the Kingdom of Spain will show that the Claimant fails to provide any proof to confirm that its investment relied on the well-founded belief that this alleged Stabilization Clause existed. Moreover, it fails to produce a single legal Due Diligence report that was issued on that essential legal matter. The facts showed precisely the opposite.

[1] The Kingdom of Spain renounces to Jurisdictional Objection F, contained in section III of the Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, on the breach of the obligation to submit the dispute over Royal Decree-Law 9/2013, Act 24/2013, Royal Decree 413/2014, Ministerial Order IET/1045/2014 and Ministerial Order IET/1882/2014 to the Kingdom of Spain and of the obligation to observe the three-month cooling off period prior to submitting the dispute to arbitration in accordance with Article 26 of the ECT.

12. Furthermore, this allegation, a key component in the Claimant's expectations, is based on two incorrect assumptions:

- The Claimant continues to argue in its Reply that the only significant regulation of the Regulatory Framework for RE producers was Royal Decree 661/2007, which was confirmed by RD 1614/2010.

- The Claimant maintains that these regulations contain commitments in "clear and precise terms" to make sure that the model of the RD 661/2007 remains unchanged during the whole operational life of the SR Plants. Inter alia: (1) the system of remuneration of Article 36 of RD 661/2007; (2) other non-remunerative measures such as: (a) the possibility of choosing between the regulated rate or the Pool plus premium; (b) the possibility of producing energy by burning gas; and (c) the updating of remuneration in accordance with the CPI.

13. The Claimant also maintains that Article 4 of RD 1614/2010 was a ratification of the commitment to stabilisation included in RD 661/2007. Finally, it argues that the 2010 Communications issued by the Director General for Energy Policy and Mines are a confirmation of the commitment of the Kingdom of Spain to make sure that the framework of RD 661/2007 remains unchanged during the whole operational life of the plants in which the Claimant has a holding.

14. The Claimant seeks to bring to the Tribunal a self-serving and biased view on electricity generation activity from renewable sources. In particular, it maintains that the CSP facilities may be an "*island*" outside the system in which they are integrated. This is the only way to understand the Claimant´s insistence that the Government could commit itself to maintain the model of RD 661/2007 in regard to a specific technology. The Claimant also maintains that the Government of Spain could have placed the cost load entirely on the consumers, without any limit whatsoever. All of this is not correct or reasonable.

15. The Claimant maintains an inexcusable silence or distorts facts, to suit its own ends, that are essential to ascertain the reality of the Spanish Regulatory Framework in which the Claimant invested.

16. The Claimant is unaware of the value of the different regulations governing the SES. It is also unaware that the principle of hierarchy structures and establishes the functioning of the various regulations by which the Spanish Regulatory Framework is configured.

17. The Claimant omits the integration of the renewable energy generation activity in the SES as a cost thereof and, therefore, subject to its sustainability. The Claimant attempts to present CSP technology to the Tribunal as an island outside of the SES and its development.

18. The Claimant does not bring to the attention of the Arbitral Tribunal the significance of the Case-law of the Supreme Court, as ultimate interpreter of Spanish law. Thereby, it attempts to conceal the fact that the extension and limits of the rights and expectations of RE investors had clearly been configured and reiterated by this Case-law prior to its investments in 2008 and 2009. This silence is inexcusable when several of the documents

that it submits and on which it bases its theories cite and contain this Case-law, such as in the NEC reports from 2007 and 2008.

19. To suit its own ends, the Respondent also distorts EU law, international law applicable to this dispute. It thereby attempts to disconnect the Spanish support system for renewable energies from the Community State Aid Regime.

20. The Claimant is also unaware of the commitments assumed by the Kingdom of Spain at international level to correct Macroeconomic imbalances: The Memorandum of Understanding of 12 July 2012. This Memorandum constitutes international law applicable to this proceeding. The commitments included in the Memorandum imposed the duty of adopting macroeconomic control measures upon the Kingdom of Spain in order to comprehensively deal with the tariff deficit. Furthermore, the Experts of the Claimant fail to propose alternative hypothetical measures that could be adopted by the Kingdom of Spain without taking into account these commitments.

21. The Claimant underestimates the core principle on which renewable energy remuneration was and is based: The Principle of Reasonable Return. Therefore, it seeks to do away with two essential aspects derived from that principle: equilibrium and dynamism. The claimant omitted before the Arbitral Tribunal any reference to a Communication issued by the Ministry vis-à-vis the Management Company of the claimant (ADFEC) in January 2010. The Ministry expressly confirmed this Principle in this Communication: that the only expectation of the Kingdom of Spain is to provide investors with a reasonable return that does not imperil the sustainability of the System.

22. Furthermore, it makes no mention of the methodology that has historically been used by Spanish legislation to determine reasonable return through the definition of installation types and common standards. This methodology is recorded in PFER 2000-2010 and in PER 2005-2010. However, the Claimant maintains a resounding silence on this regulatory instrument. This silence is even more resounding if we take into account that Pöyry expressly remarked its importance.

23. The Kingdom of Spain has applied the legal principle of "Reasonable Return" since 1997 by means of various regulations, in relation to different concurrent economic and technical circumstances. The scope of this principle has been reiterated in more than one hundred judgements of the Spanish Supreme Court. This Case Law is prior to the time when the Claimants' investment was made. It could not have been unknown to a diligent investor.

24. Furthermore, the Claimant fails to mention to the Arbitral Tribunal that each and every regulatory measure adopted by the Kingdom of Spain since 1997 has been in keeping with a single *leit motiv*: to guarantee the economic sustainability of the system and prevent situations of over-remuneration. Proof thereof comes in the form of RD 661/2007. As the Claimant was aware, by means of the Due Diligence of Pöyry, RD 661/2007 was implemented with the aim to guarantee the economic sustainability of the SES which was threatened by the link of the subsidies to the Average Reference Electricity Tariff and to rectify the situation of over-remuneration caused by RD 436/2004 in wind technology. Under no circumstances was the purpose of this RD 661/2007 to increase remuneration to attract investors.

25. These omissions and distortions lead to the creation of an imaginary regulatory framework that is completely out of touch with reality. The Framework outlined by the Claimant is at odds with how the following entities understand the System: (1) the Supreme Court, (2) the most representative Associations of the RE Sector, (3) RE investors in Spain (4) the particular Partner of the Claimant Sener, (5) the Credit and Insurance Institutions that entered into the contracts according to which the investment was structured and (6) Pöyry, the regulatory consultant of the Claimant at the time of its investment, and other consultants such as KPMG and Deloitte.

26. The measures challenged in this Arbitration were adopted taking into account the different preliminary analyses of the regulator, as well as technical knowledge and technological development. They were adopted in a context of international economic crisis that produced severe effects on both the demand for electricity and capital market yields. The aforementioned international economic crisis substantially altered the economic parameters of the basis for aid to energy production from renewable sources.

27. In addition the analysis cited revealed the existence of remunerations which, either due to deficiency or to excess, did not maintain the principle of *Reasonable Return* laid down for the remunerations of the so-called special regime. The changes in the Spanish Legal System have been addressed, precisely, at underpinning and making sustainable this principle of reasonable return in the long term.

28. The contested measures have always maintained the pillars of the Spanish remuneration model in place since 1997. Specifically:

    a. They have maintained the concept of efficiency pursued by the SES since 1997, which involves supplying electricity to the Spanish consumer at the lowest possible cost.

    b. They have maintained the subsidies for renewables as a cost of the SES and therefore related to its economic sustainability.

    c. They have maintained and improved the priority of access and dispatch for RE.

    d. They have maintained the basic structure of the Spanish remuneration model which involves allowing RE plants to attain reasonable return by the combination of two elements: the market price (pool) and a subsidy.

    e. They have maintained the characteristic attributes of the principle of reasonablereturn : its equilibrium and dynamism.

    f. They have re-established the equilibrium by eliminating situations which produced unjustifiable remunerations such as the indexation of all the components of the subsidy according to the CPI or the imbalances caused by the pool plus premium option.

    g. They have maintained the dynamic nature of reasonable return. Therefore, the reasonability of the return continues to be assessed in accordance with the price of money on the capital market (the price of the Spanish ten-year bond). Dynamism

which allows the value of the investment to be protected over time while giving it greater stability as a result.

h. They have maintained and improved the methodology that has historically been used by the SES to determine the reasonable return which involves defining installation types and common standards.

i. They continue to guarantee a reasonable return for RE plants. The return provided by the Spanish remuneration model is better than the discount rate (opportunity cost) of the sector and, specifically, better than the discount rate (opportunity cost) of the Claimant. Consequently, the return that continues to be provided by the Spanish system is reasonable.

29. Therefore, the changes carried out due to the contested measures have precisely sought (1) to apply the principle of reasonable return; (2) to resolve situations of imbalance of the SES which threatened its economic sustainability and (3) to strengthen the stability of the regulatory framework through the elevation of some aspects regulated previously by a RD, to a regulation with the force of law.

30. Once these Measures have begun to produce their effects, they have been recognised as reasonable, necessary and stabilising Macroeconomic control measures for the SES by: a) International Institutions; b) Rating Agencies; and c) both domestic and international investors.

31. In regards to the Legal Basis, the Claimant tries to use the ECT as an *Insurance Policy* against the risk that the Regulatory Framework might be amended by the Kingdom of Spain. In order to do so, the Claimant forces an interpretation of the Treaty that does not correspond to the meaning of the text, according to its context and purpose.

32. Far from what is maintained by the Claimant, the ECT's main objective is to grant foreign investors a non-discriminatory treatment the same as domestic investors and no worse than the minimum standards guaranteed by International Law. Furthermore, according to the object and purpose of the ECT, States may adopt justified and proportionate macroeconomic control measures, even if this action affects the returns or profitability of investors.

33. The ECT obliges the Tribunal to resolve the dispute in terms of the ECT itself and the standards and principles of International Law. However, Spanish law and its correct interpretation are fundamental as relevant facts to appreciate the birth, extension and limits of the rights invoked by the Claimants. Consequently, they are of great importance in order to: 1) configure the Legitimate Expectations of the Claimants; and 2) appreciate the existence of commitments assumed by the Spanish State with the Claimants or their investment.

34. The Kingdom of Spain has adopted the measures challenged in its regulatory power, in order to correct an imbalance in the SES and for the benefit of the general interest. As it has been explained above, the measures adopted have not violated the Claimant's Legitimate Expectations in any way.

35. In relation to the alleged violation of the duty to create stable conditions, the claimant claims that the Kingdom of Spain should maintain a stable, predictable and transparent Regulatory Framework. However, the contested measures have maintained the pillars of the Spanish remuneration model in place since 1997. Furthermore, the Precedents applied by the ECT have allowed justified, reasonable and proportionate macroeconomic control measures to be adopted.

36. In regards to this standard, the Claimants rely on Awards that do not apply the ECT in order to lay claim to a *predictability* of the ECT signatory States' regulatory framework. This foreseeable character is not found in the text of the ECT; nor is it demanded by the Precedents that have applied it. At all events, the reasons that have justified these measures are the same as those which have protected the regulatory changes since RD-Law 7/2006: Economic sustainability of the system and over-remuneration. These reasons were foreseeable for a diligent investor who would have had a thorough knowledge of the Spanish regulatory framework. Indeed, Pöyry informed it of the reasons that might have justified the regulatory changes in the Due Diligence carried out in 2009.

37. In relation to the obligation to create transparent conditions, contained in ECT Article 10(1), the Claimant states that it was in "darkness" for 11 months. The Kingdom of Spain will show that this is not true. It will be shown that the plants of the Claimant participated in the process by formulating pleadings. The Association *Protermosolar* and hundreds of stakeholders also participated actively. Their pleadings were taken into account in the final definition of the installation types and common standards.

38. In addition, the measures adopted in 2013 and 2014 are coherent with the continuous announcements made by the Government on the structural reform of the SES. These announcements were made more than a year before the adoption of the measures. These measures were adopted maintaining the essential principles of the Spanish regulatory model and according to the interpretation that the Supreme Court had been realizing since 2005.

39. With regard to the alleged adoption of abusive or disproportionate measures by the Kingdom of Spain, the measures challenged are in conformity with the different Tests applied in arbitration jurisprudence to evaluate whether this standard has or has not been infringed. The application of these Tests to the measures challenged reveals that these: (1) are not discriminatory; (2) respect the FET standard laid down in the ECT; and (3) fulfil the minimum FET standard in International Law by respecting the economic equilibrium of the investment.

40. The Respondent will demonstrate that the Spanish remuneration model guarantees that the Claimant will recover its investment in the construction of the Plant and its operating costs and that it also provides a reasonable return. It should be highlighted that such return improves both the cost of opportunity (discount rate) of the CSP Sector as a whole and the cost of opportunity of the Claimant itself.

41. Moreover, the return provided by the Spanish remuneration model is compliant with the profitability and the system model that the main Association of the RE Sector (APPA)

proposed in May 2009 to the Kingdom of Spain. This proposal from 2009 highlights the reasonableness of the remuneration model adopted by the Kingdom of Spain.

42. The Claimants also allege that the Kingdom of Spain has infringed the umbrella clause included in the last point of Article 10(1) of the ECT. It believes that the Kingdom of Spain assumed the commitment, with regard to its investment, to petrify the provisions of RD 661/2007. That commitment would be contained in: 1) Article 44.3 of RD 661/2007, 2) Article 4 of RD 1614/2010, 3) in the Communications issued in 2010 to the plants in which the Claimant has a holding.

43. However, and outside the scope of the previous paragraphs, the Kingdom of Spain has not concluded any specific agreements or commitments with the claimant or its investment. There is no contract, concession or license that generates obligations between the Spanish State and the Claimant or its investment. Therefore, the application of the umbrella clause should not be encouraged according to arbitral doctrine that has applied the ECT.

44. In any event, the only commitment that the Kingdom of Spain assumed was to guarantee the Plant a Reasonable Return in conformity with the capital market within the framework of a sustainable electricity system. That commitment has not gone unfulfilled by the Kingdom of Spain.

45. Finally, in relation to the damages claimed, the Claimant has no right to the reparation requested. This section is submitted secondarily, in the event that, in the first place, the Tribunal were to accept jurisdiction over this dispute and, in addition, in the second place, if the Tribunal were to find that there was non-compliance on the part of the Kingdom of Spain with any precept of the ECT.

46. In this chapter, in view of the Counter-Memorial on Jurisdiction presented by the Claimant, we must also ratify each and every one of the points expounded in this regard in the Counter-Memorial. As we shall see, the Claimant has not refuted the arguments of the Kingdom of Spain in which it has been demonstrated that they have no right to the reparation requested.

47. Moreover, this section is supplemented by the Accuracy rejoinder expert report on the Claimant and its claim of 09 June 2016, which develops certain aspects thereof.

48. It is necessary to note that, in their report, the Accuracy Experts analyse and fully demolish the alternative quantification proposed by Brattle supposedly based on a hypothetical static and nominal petrified return. These alternative calculations proposed by Brattle lack any legal or economic basis whatsoever and "mistakenly interpret Reasonable Return". Reasonable return is an essentially dynamic concept by its very nature. To seek to anchor it to a fixed figure *ad eternum*, without reference to any market, would not be economically reasonable either for the investors or for the State.

49. The alleged damages estimated in the Brattle reports are not subject to compensation, as they are completely and absolutely speculative. In this sense, this representation, the same as the Supreme Court of the Kingdom of Spain in comparable circumstances, understands that the alleged damages have not even been minimally proved. The long time horizon,

together with the fact that nothing guarantees that the remuneration shall remain petrified in the current form (always ensuring Reasonable return), makes the calculation of damage done speculative.

50. With regard to the inadmissibility of the DCF method, both the Kingdom of Spain as the Claimant itself have made reference to scientific doctrine and to arbitral precedents which, under certain circumstances, consider the DCF inappropriate as a valuation method, as they are excessively speculative. Therefore, both parties agree that the DCF is not a method that is appropriate in all cases.

51. It is the Arbitral Tribunal who will have to decide, where applicable, if predictions that must be done over a time horizon of several decades are reliable or speculative. In addition, it will also have to determine in the same way if the calculations made by Brattle's experts, who have a track record of less than five years, and make projections for 37 years, are reliable or speculative.

52. In the Counter-Memorial, the Kingdom of Spain "*fully reserved the right to formulate later objections to the calculation of the compensation requested*" and made an open list of examples of possible additional objections. Remarkably, in this Memorial of Rejoinder, secondarily and for the case that the Arbitral Tribunal may understand it to be appropriate to resort to speculative methods for the calculation of the impact of the measures discussed, calculations based on Cash Flow Discounts (DCF) are submitted.

53. To simplify the comparisons, and since the object of the subsidiary calculations DCF is to demonstrate the volatility of the method in the present case and how wrong Brattle's calculation is, Accuracy draws from the Brattle outline as far as possible. The result obtained by Accuracy is that the disputed measures have had a positive financial impact on the value of the investment of the Claimant in an amount of EUR 12.5 million.

54. The discrepancies between the different DCF (that of Brattle and the one of Accuracy) derive from the different model of DCF and from the different parameters considered.

55. It should be noted that Accuracy has considered a useful life of plants of 25 years, which is the maximum according to the available information.[2] Also, Accuracy has taken into account (as opposed to Brattle) that the conditions of the but-for scenario would obviously entail a greater risk and greater uncertainty than the Current scenario. The revenue would be subject to greater risk in the But-for scenario. In fact, in the Current scenario, under the current regulations, we find a stable, more predictable framework with less risk. This is undoubtedly proved by the assessments of the market agents and the numerous transactions that have taken place since the adoption of the contested measures. These considerations, logically, will have their impact on the different discount rates to be taken into account and on the various marketability discounts to apply.

[2] Expert report from SERVERT Engineering.

56. In conclusion, we have demonstrated that, even when using the speculative DCF methods, the hypothetical financial impact on the value of the investment of the Claimant is positive, without any damage whatsoever.

57. Finally, with regard to the damages, the Tax Gross-Up (TGU, 25%) is dismantled *ad cautelam* on the compensation requested due to the hypothetical taxes to be paid in the Netherlands by the Claimant residing in that country.

58. In the first place the TGU is vetoed in Article 21 of the ECT, which literally establishes that there are no provisions whatsoever in the ECT that impose obligations with regard to taxation measures "of the Contracting Parties". In the second place, we will show the legal basis according to which Claimant residing in the Netherlands would never have to pay taxes for the amount granted in an Award found for, since it is classified as income exempted from taxation. That is to say, the factual situation necessary to argue a TGU would not even occur in this case. Finally, even in the hypothetical case that this was not exempted income *per se*, there would be other different types of elements to consider that would also make the TGU requested inadmissible, as it is excessively speculative, uncertain, and contingent: it has been so declared in previous arbitration cases.

59. This Rejoinder on the Merits and Counter-Memorial on Jurisdiction are accompanied by the following three expert reports and witness statements:

- Second Sector Report on the incentives to the thermosolar sector in Spain of 09 June 2016, issued by Accuracy.

- Second Economic Report on the Claimant and its Claim of 09 June 2016, issued by Accuracy.

- Expert report of SERVERT Engineering: "160608-GEMASOLAR_Lifetime_Analysis-signed"**,** of 08 June 2016, produced by the Engineer, Mr Jorge Servert

- Expert report of SERVERT Engineering: "160608-Valle_I y II_Lifetime_Analysis-signed" of 08 June 2016, produced by the engineer, Mr Jorge Servert

- Second Witness statement by Mr Carlos Montoya of 09 June 2016.

III. PRELIMINARY OBJECTIONS

A. Lack of jurisdiction *ratione personae* of the Arbitral Tribunal by virtue of Article 26 of the ECT and Article 25 of the ICSID Convention. The dispute is not between a Contracting State and a national of another Contracting State, but rather between two States: United Arab Emirates, specifically the Emirate of Abu Dhabi, and the Kingdom of Spain

(1) Introduction

60. In the Memorial on Jurisdiction[3], the Kingdom of Spain stated that, with all due respect, the Arbitral Tribunal does not have the jurisdiction to hear the dispute subject of this arbitration due to the fact that this dispute is between two States: United Arab Emirates, specifically the Emirate of Abu Dhabi, and the Kingdom of Spain.

61. As submitted in the Memorial on Jurisdiction, to whose detailed explanation we refer, the jurisdictional requirement set in Article 26 of the ECT that the dispute shall be between a Contracting Party and an investor of another Contracting Party, is not met. Moreover, the jurisdictional requirement set in Article 25 of the ICSID Convention that the dispute shall be between a Contracting State and the national of another Contracting State is not met either.

62. In the present case, pursuant to International Law and in view of the facts acknowledged by the Claimant itself, the conduct of the Claimant must be attributed for jurisdictional purposes to United Arab Emirates, a State which is not a Contracting Party to the ECT.

63. In its Counter-Memorial on Jurisdiction[4], the Claimant denies lacking standing to resort to arbitration under Articles 26 of the ECT and 25 of the ICSID Convention.

64. Without prejudice to what was already stated in the Memorial on Jurisdiction, to which we refer in order to avoid unnecessary repetition, as we will see below, the arguments of the Claimant must be rejected.

(2) The conduct of the Claimant must be attributed for jurisdictional purposes to United Arab Emirates, specifically Abu Dhabi, according to International Law

65. As we will examine in greater depth below, according to International Law, the conduct of the Claimant must be attributed for the purpose of determining the jurisdiction of the Arbitral Tribunal to the State of United Arab Emirates, specifically to the Emirate of Abu Dhabi.

(2.1) Attribution of conduct to the State under International Law

(a) Principles of international Law on "attribution": i) action with a governmental purpose and ii) action under the instructions, direction or control of a State

66. In International Law, there are two principles of customary Law on the attribution of conduct to the State that are relevant for the purposes of this arbitration:

- The principle that the actions of a legal person must be considered actions of a State when such legal person acts in exercise of governmental funtions, not commercial.

- The principle that the actions of a legal person must be considered actions of a State when such legal person acts under the instructions, direction or control of that State.

[3] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, section III.A, paragraphs 41 to 73.
[4] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, part III, section (9), paragraphs 694 to 766.

67. The existence and applicability of these two principles of customary International Law is proven by the fact that both have been codified in the Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission (hereinafter "**ILC Articles**"), in their Chapter on "attribution of conduct to a State".

68. Thus, Article 5 of the ILC Articles clearly provides that when a person acts in exercise of governmental functions its conduct is attributable to the State:

> *"Article 5 Conduct of persons or entities exercising elements of governmental authority.*
>
> *The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."*[5] *(emphasis added)*

69. Moreover, Article 8 of the ILC Articles provides that when a person acts under the instructions, direction or control of a State, that action must be attributed to that State:

> *"Article 8. Conduct directed or controlled by a State*
>
> *The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."*[6] *(emphasis added)*

70. As acknowledged by the Claimant itself, the principles included in the ILC Articles are principles of customary International Law. This is also indicated, among others, by the Arbitral Tribunal in the case of *Tulip v. Turkey:*

> *"The Tribunal agrees with the Parties and accepts that the ILC Articles constitute a codification of customary international law with respect to the issue of attribution of conduct to the State"*[7]

71. The existence and applicability of these principles is also proven by the fact that the Arbitral Tribunals have applied the aforesaid principles to determine whether a certain conduct must be attributed to a specific State. The awards cited by the Claimant in its Counter-Memorial on Jurisdiction themselves are an example of it.[8]

(b) The principles of International Law on "attribution" must be applied to determine the jurisdiction of the Arbitral Tribunal

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[5] Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission, Article 5. R-0146.

[6] Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission, Article 8. R-0146.

[7] Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey, ICSID Case No. ARB/11/28, Award of 10 March 2014, paragraph 281. RL-0064

[8] Counter-Memorial on Jurisdiction, paragraphs 750 and 752.

72. Contrary to what is alleged by the Claimant, the mentioned principles of International Law are fully applicable in the present case to determine whether the conduct of the Claimant must be attributed to the State of the United Arab Emirates, specifically the Emirate of Abu Dhabi, for jurisdictional purposes of Article 26 of the ECT and 25 of the ICSID Convention.

73. The application of these principles of International Law for the purposes of Article 26 of the ECT is compelled by Article 26(6) of the ECT, which provides that the Arbitral Tribunals that resolve disputes based on the ECT shall decide the issues in dispute (without excluding jurisdictional issues) in accordance not only with the ECT but also with the rest of International Law, including the principles of International Law. In this sense, Article 26(6) of the ECT states the following:

> *"A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."*[9] *(emphasis added)*

74. Therefore, it is the ECT itself, in its Article 26(6), which imposes on the Arbitral Tribunal the obligation to apply the principles of International Law to resolve the issues in dispute, including jurisdictional issues. It should also be noted that the cited Article 26(6) requires the application of the principles of International Law on equal footing with the ECT itself, without granting primacy to the ECT over those principles.

75. As for the application of these principles of customary International Law for the purposes of Article 25 of the ICSID Convention, it is significant what is affirmed in the ICSID Review on "*State-Owned Enterprises as Claimants in International Investment Arbitration*":

> *"With respect to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) -which does not extend to State-to-State disputes, even in a subrogation context- this article recommends that decision-makers look again to customary international law attribution principles"*[10]

76. Arbitral case-law itself has repeatedly acknowledged that the matter of "attribution" of conduct to the State is relevant for jurisdictional purposes. In this regard, the Arbitral Tribunal of the case of *Tulip v. Turkey* stated that:

> *"The issue of attribution relates both to the Tribunal's jurisdiction and to the merits of this dispute. Attribution is relevant [...] for the purposes of the BIT and Art 25 of the ICSID Convention."*[11]

77. The Arbitral Tribunal in the case of *Hamester v. Ghana* ruled along the same line, stating that:

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[9] ECT, Article 26(6). RL-0002

[10] ICSID Review, Foreign Investment Law Journal, Volume 31, number 1, winter 2016, page 24. R-0147.

[11] Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award of 10 March 2014, paragraph 276. RL-0064

"The question of "attribution" does not, itself, dictate whether there has been a violation of international law. Rather, it is only a means to ascertain whether the State is involved. As such, the question of attribution looks more like a jurisdictional question."[12]

78. Therefore, in the present case, there is no doubt that the principles of International Law on "attribution" of conduct to the State must be applied to determine whether the conduct of the Claimant must be attributed to United Arab Emirates, specifically the Emirate of Abu Dhabi, for the purposes of the jurisdiction of the Arbitral Tribunal.

79. Without prejudice to the above, in any case, in order to interpret both Article 26 of the ECT and Article 25 of the ICSID Convention, it should be remembered that Article 31 of the Vienna Convention provides, regarding the interpretation of International Treaties, that:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. […] There shall be taken into account, together with the context:[…]Any relevant rules of international law applicable in the relations between the parties."[13]

80. Undoubtedly, allowing a State, United Arab Emirates, that is NOT a Contracting Party to the ECT, to benefit from the arbitral mechanism included in Article 26 of the ECT would not be consistent with the object and purpose of the ECT which is, as recognised by the Claimant itself and as was expounded in the Memorial on Jurisdiction, to promote private investment among Contracting Parties. It would not be consistent either with the object and purpose of the ICSID Convention, which does not extent to State-State disputes. Furthermore, it would imply ignoring International Law which must be taken into consideration for the resolution of the issues in dispute that are at hand.

81. According to the above, as we already submitted in the Memorial on Jurisdiction and as we will develop below, the facts of the present case show that the actions of the Claimant must be attributed to United Arab Emirates, specifically the Emirate of Abu Dhabi.

(2.2) The Claimant acts with a governmental purpose, not a commercial one

82. As submitted in the Memorial on Jurisdiction, the facts of this case reveal without any doubt that the Claimant acts with a governmental, not a commercial, purpose. The renewable energy investment by the Claimant responds to the economic and socio-economic public policy of the Government of Abu Dhabi which had its starting point in the "Abu Dhabi Policy Agenda 2007/2008" and the "Abu Dhabi Economic Vision 2030".

[12] Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID case no. ARB/07/24, Award of 18 June 2010, paragraph 143. RL-0065
[13] Vienna Convention, RL-0066.

83. The "Abu Dhabi Policy Agenda 2007/2008"[14] is a document in which the Government of Abu Dhabi sets out the basic objectives which must govern the public policies of the Emirate. Thus, that document itself indicates that:

> *"Policy Agenda 2007-08 outlines the key goals and Government initiatives in development and underway across a range of authority and departmental portfolios in the Emirate of Abu Dhabi. […]These initiatives are a result of the vision and guidance of His Highness Sheikh Khalifa Bin Zayed Al Nahyan, President of the UAE and Ruler of Abu Dhabi, who has set a comprehensive vision for significant growth and diversification for the Emirate. […] This report should be regarded as a primary source of information on the Government's aspirations, programs and policy directions."*[15] *(emphasis added)*

84. In this document, the government of Abu Dhabi acknowledges that the initiative of investing in renewable energies through Masdar is an initiative of the Emirate which seeks, among other objectives, to diversify the energy sources of United Arab Emirates. This is expressly mentioned in the "Abu Dhabi Policy Agenda 2007/2008":

> *"Policy Drivers*
>
> *While the Environment Agency has been very effective in a number of areas, its current mandate provides new opportunities.[…]*
>
> *5. Position Abu Dhabi as a leader in green technologies*
>
> *Abu Dhabi has been blessed with enormous oil and gas resources, but also renewable energy resources such as wind and sun. The world's global energy needs will be hydrocarbon based far into the future, but more countries will seek to diversify their energy mix. With the recent launch of the **Masdar** alternative energy initiative, the **Emirate** is poised to respond to this need and **diversify the UAE's own energy and technology offerings**, becoming not only a world leader in oil but energy more broadly."*[16] *(emphasis added)*

85. Along the same line, the "Abu Dhabi Policy Agenda 2007/2008" goes on to indicate that:

> *"In April 2006, **the Government of Abu Dhabi established the Masdar Initiative**, a landmark alternative and sustainable energy program designed to underpin Abu Dhabi's long term position as a reliable global energy provider.*
>
> *Masdar is therefore a strategic initiative with four key objectives:*
>
> *1. Contribute to the economic diversification of Abu Dhabi.*
>
> *2. Maintain, and later expand, Abu Dhabi's position in evolving global energy markets.*
>
> *3. Position Abu Dhabi as a developer of technology, rather than an importer.*

[14] Abu Dhabi Policy Agenda 2007/2008. http://www.eaig.ae/wp-content/uploads/2013/02/Policy_Agenda_2007_-_2008.pdf. R-0148.
[15] Abu Dhabi Policy Agenda 2007/2008, Executive Summary, page 9. R-0148.
[16] Abu Dhabi Policy Agenda 2007/2008, pages 53 and 54. R-0148.

4. Make a meaningful contribution towards sustainable human development.

At its most simple level, Masdar enables Abu Dhabi to apply its hydrocarbon resources and expertise in global energy markets to the technologies of the future. The initiative seeks to establish Abu Dhabi as a world-class research and development hub for new energy technologies, while maintaining the Emirate's strong position in the global energy sector.

The Government of Abu Dhabi will continue to support the Masdar initiative and work with the private sector to expand the role of the Emirate as a provider of energy to the world."[17] *(Emphasis added)*

86. The statements of the Abu Dhabi government itself are absolutely clear: Masdar is an instrument of the Emirate´s Government to implement its public policies. Therefore, there is no doubt over the governmental character of the Claimant.

87. On the basis of the "Abu Dhabi Policy Agenda 2007/2008", the document entitled "Abu Dhabi Economic Vision 2030"[18] was produced, which constitutes a long-term roadmap and a common framework to align the public policies and initiatives included in the "Abu Dhabi Policy Agenda 2007/2008". This is indicated in the "Abu Dhabi Economic Vision 2030" itself:

"In 2006, His Highness Sheikh Mohamed bin Zayed Al Nahyan, Crown Prince of Abu Dhabi and Chairman of the Executive Council, mandated the General Secretariat of the Executive Council, the Abu Dhabi Council for Economic Development and the Department of Planning and Economy to develop a long-term economic vision for the Emirate. This mandate was given in order to deliver upon the vision of His Highness Sheikh Khalifa bin Zayed Al Nahyan, President of the UAE, Ruler of Abu Dhabi, for the ongoing economic success of Abu Dhabi.

The expectation was the creation of a long-term roadmap for economic progress for the Emirate through the establishment of a common framework aligning all policies and plans and fully engaging the private sector in their implementation.

The initiative builds upon the foundations set by the Abu Dhabi Policy Agenda 2007/2008 […]"[19]

88. In the "Abu Dhabi Economic Vision 2030", reference is again made to the policy of the Government of Abu Dhabi which seeks, among other objectives, the economic and energetic diversification of the Emirate. These objectives of the policies of the Emirate´s Government are also reflected in several pieces of news published by the Abu Dhabi Government itself.[20]

[17] Abu Dhabi Policy Agenda 2007/2008, page 55. R-0148.
[18] Abu Dhabi Economic Vision 2030. R-0149 https://www.ecouncil.ae/PublicationsEn/economic-vision-2030-full-versionEn.pdf.
[19] Abu Dhabi Economic Vision 2030, Summary of Mandate, page 1. R-0149.
[20] News published on the website of the Abu Dhabi Government: R-0150. https://www.abudhabi.ae/portal/public/en/abu_dhabi_emirate/government/news/news_detail?docName=ADEGP_DF_124048_EN&_adf.ctrl-state=31v8fpq1s_4&_afrLoop=10648919211012636#!

89. Further proof that Masdar acts in a governmental capacity is the letter of 25 November 2009 sent by Dr. Sultan Ahmed Al Jaber, CEO of Masdar, to the Spanish Minister of Industry. In such letter, Dr. Sultan Ahmed Al Jaber states that the investment of Masdar in Spain is of paramount importance to the Government of United Arab Emirates:

> *"The success of these first investments by Masdar in Spain is of paramount importance to our shareholder and subsequently* ***our Government****. I really hope to receive your support in this important matter."*[21] *(emphasis added)*

90. Furthermore, the Minutes of the meeting of the Investment Committee of Mubadala of 16 June 2009 reflect the identity between the objectives of Masdar and the objectives of the Emirate of Abu Dhabi:

> *"Masdar´s key objective is to position* ***Abu Dhabi*** *as a research and development hub for new technologies in sustainable energy […]. Critical success factors for*

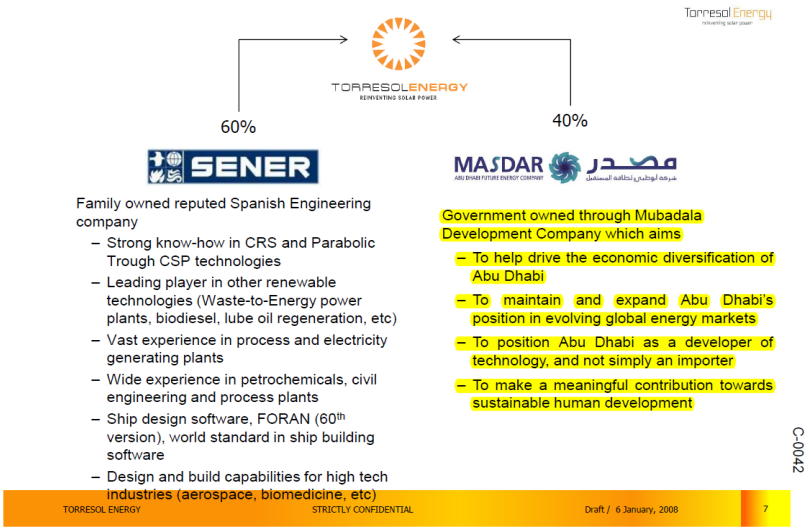
"Under the guidance of His Highness Sheikh Khalifa bin Zayed Al Nahyan, President of the UAE and Ruler of Abu Dhabi, and His Highness Sheikh Mohamed bin Zayed Al Nahyan, Crown Prince of Abu Dhabi and Deputy Supreme Commander of the UAE Armed Forces, the Government of Abu Dhabi announced today the publication of a long-term plan for the transformation of the Emirate's economy, including a reduced reliance on the oil sector as a source of economic activity over time and a greater focus on knowledge-based industries in the future. Entitled 'The Abu Dhabi Economic Vision 2030', the document provides a comprehensive plan for the diversification of the Emirate's economy and a significant increase in the non-oil sector's contribution to the Emirate's Gross Domestic Product (GDP) by the year 2030.
The 142 page document identifies two key priority areas for economic development in Abu Dhabi; building a sustainable economy, and, ensuring a balanced social and regional economic development approach that brings benefits to all. Ensuring all three of the Emirate's regions (Abu Dhabi, Al Ain and Al Gharbia) benefit socially and economically from the Emirate's development is a critical element of the Government's plan.
His Excellency Nasser Al Sowaidi, Chairman of the Department of Planning and Economy said: "The Abu Dhabi Economic Vision 2030 provides a clear road-map for the ongoing evolution of Abu Dhabi's economy. The plan seeks to harness the Emirate's assets and resources to ensure the local economy continues to grow sustainably while delivering significant benefits to the entire community."[…]
The document articulates a comprehensive vision for Abu Dhabi's economic development and explains the key policy initiatives that will be implemented by various entities of the Government in order to achieve it.[…]
The Abu Dhabi Economic Vision 2030 will establish a common framework for aligning all policies and plans that contribute to the ongoing development of the Emirate's economy. It seeks to create significant opportunities for the local and international private sector in the Emirate of Abu Dhabi, and new employment opportunities for UAE Nationals in the future, particularly in highly-skilled, knowledge-based, export-oriented sectors."

Website of the Abu Dhabi Urban Planning Council of the Abu Dhabi Government R-0151 http://www.upc.gov.ae/abu-dhabi-2030.aspx?lang=en-US:
"The Abu Dhabi Urban Planning Council (UPC) is the strategic planning agency for the Emirate of Abu Dhabi, which supports the realisation of Abu Dhabi Vision 2030 through the creation and continuing evolution of an Emirate-wide strategic framework plan.[…] They primarily focus on:
- Creating a sustainable Emirate that protects resources for current and future generations;
- Supporting and enabling economic diversification and growth;
- Raising the standard of living across the Emirate;
- Protecting, enhancing and promoting Arab and Emirate culture and traditions; and
- Embracing contemporary living and respecting the diverse cultures of those residing in Abu Dhabi."

[21] Exchange of letters between the CEO of Masdar and the Ministry of Industry of the Kingdom of Spain, dated 25 November 2009 and 14 January 2010. R-0158.

green-field projects like Masdar are: -Continued Government support, -Policy assistance -Concessions subsidies" [22]

91. Furthermore, in the PowerPoint presentation of 14 January 2008 to the Investment Committee of Mubadala on the opportunity of a joint venture between Masdar and Sener in Torresol, it is again acknowledged that the objectives of Masdar are objectives of the economic and socio-economic policy of the Abu Dhabi Government[23]:



92. Along the same lines, in the presentation by Masdar on 16 June 2009 to the Investment Committee of Mubadala, to ask for its approval of the investment of capital in Torresol, the following is indicated:

"Torresol is committed to transfer knowledge to Masdar, so we need to step up recruitment and seconding UAE nationals to the JV […]

Torresol JV Summary & Fit With Our Strategic Goals […] Technology know-how transfer to Abu Dhabi: Torresol brings an engineering partner with a proven track record in CSP technologies willing to share know-how with Masdar"[24] *(emphasis added)*

93. Further proof that the Claimant is acting with a governmental purpose is found in the news publication of Sener of Autumn 2011. In it, Sener, partner of the Claimant in Torresol, clearly states that Masdar is an initiative of the Abu Dhabi Government to implement its long-term economic policy:

"Masdar is a multi-disciplinary initiative of Abu Dhabi […]. Masdar is dedicated to the long-term vision of the Emirate for the future of energy […]. Spain, like Abu Dhabi, has been able to identify renewable energies as a fundamental pillar of its

[22] Minutes of Investment Committee Mubadala, 16 June 2009. R-0154
[23] Presentation to Mubadala Development Company (MDC) Investment Committee, 14 January 2008. Slide 7. C-0042
[24] Request Approval Equity Investment June 16, 2009 pages 8 and 11. R-0152.

long-term economic strategy […]. Dr. Sultan Al Jaber is the managing director and CEO of Masdar, a pioneering initiative for the promotion of an investment in renewable energies of the Abu Dhabi government." [25]

94. In short, there is no doubt that the Claimant is an instrument of the Abu Dhabi Government for the implementarion of the economic and socio-economic public policies of the Emirate. Therefore, there is no doubt that the Claimant acts with a governmental, and not a commercial, purpose. Consequently, as previously indicated, the actions of the Claimant must be attributed to United Arab Emirates, specifically the Emirate of Abu Dhabi.

(2.3) The Claimant acts under the control and direction of United Arab Emirates, specifically the Emirate of Abu Dhabi

95. Furthermore, the facts of this case show that the Claimant acts in any case under the full control and direction of United Arab Emirates, specifically of the Emirate of Abu Dhabi, and thus the actions of the Claimant must be attributed to such State. This was submitted in the Memorial on Jurisdiction, to which we refer to avoid repetition.[26]

96. It should be remembered that the Claimant (Masdar) is owned and controlled by Abu Dhabi Future Energy Company (ADFEC), as indicated in the Memorial on the Merits itself:

*"Masdar Solar is ultimately owned and **controlled** by Abu Dhabi Future Energy Company (ADFEC), a company founded in 2007 to help the economic diversification of Abu Dhabi."*[27] *(emphasis added)*

97. ADFEC is fully owned by Mubadala, which in turn is owned by the Government of Abu Dhabi, as is also acknowledged in the Memorial on the Merits:

"ADFEC is wholly owned by Mubadala Development Company (Mubadala), which is in turn owned by the Government of Abu Dhabi."[28]

98. It should also be remembered that ADFEC and Mubadala control the investments of the Claimant. The Claimant cannot make any investment without ADFEC and Mubadala instructing it to do so. As also recognised by the Memorial on the Merits itself, any proposed investment of the Claimant must be approved by ADFEC and Mubadala:

"Any proposed investment to be made by the Claimant had to be considered and approved by ADFEC and Mubadala before the Claimant could proceed to make the investment. This is because the equity for the Claimant's investments was ultimately provided by Mubadala and via ADFEC."[29] *(emphasis added)*

[25] News publication of Sener, Autumn 2011. R-0153.
[26] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, paragraphs 49 to 70.
[27] Memorial on the Merits, of 22 January 2015, paragraph 3.
[28] Memorial on the Merits, of 22 January 2015, paragraph 143.
[29] Memorial on the Merits, of 22 January 2015, paragraph 144.

99. This control over the Claimant´s investments exerted by ADFEC and Mubadala is determined by the fact that Mubadala contributes the capital for the investments of the Claimant and Abu Dhabi provides guarantees regarding the bank financing contracts related to those investments.[30]

100. It should also be remembered that the managers of ADFEC and the Claimant are the same.[31]

101. Without prejudice to what has already been expounded, other proofs show the Claimant´s control by the Government of Abu Dhabi. In this regard, in the Minutes of the meeting of the Investment Committee of Mubadala of 16 June 2009, it can be appreciated how the Committee, when examining the various alternatives for organising the governance of Masdar, considers the possibility that Masdar depends directly on the Government of Abu Dhabi, rather than indirectly through Mubadala.[32]

102. Furthermore, the renewable energy sector identifies at all times the Claimant with United Arab Emirates and in particular with Abu Dhabi. In this sense, in the Renewable Energies journal of March 2009, when referring to the alliance between Sener and the Claimant in Torresol, the Claimant is recognised as an investment fund of Abu Dhabi:

> *"the latest project of Sener has involved forming an alliance with Masdar, a sovereign wealth fund of Abu Dhabi"*[33] *(emphasis added)*

103. In the same regard, in the Renewable Energies journal of January 2010, the Claimant is again identified with the State of United Arab Emirates:

> *"The connection between "Puertollano-Abu Dhabi"*
>
> *The Institute for Concentration Photovoltaic Systems of Puertollano (Isfoc) and Masdar (United Arab Emirates) have today signed a "consulting services agreement to study and assess concentrator photovoltaic technology (CPV) under the environmental conditions of Abu Dhabi."*[34] *(emphasis added)*

104. It is also telling that in the correspondence exchanged between the Spanish Ministry of Industry and the CEO of Masdar, Dr. Sultan Ahmed Al Jaber, the post of Dr. Sultan

[30] The provision of guarantees by Abu Dhabi over the bank financing contracts related to the investments covered by this arbitration is outlined in various documents: R-0253, R-0255, R-0270, R-0290, R-0294, R-0295, R-0296 and R-0297.

[31] Memorial on the Merits , of 22 January 2015, paragraph 145:
"ADFEC's Director of Innovations and Investments, Mr Tassabehji, and the Chief Executive Officer of ADFEC, Dr Sultan, were the primary decision-makers in respect of the Claimant's investments in the CSP Plants. Both of Mr Tassabehji and Dr Sultan became founder directors of the Claimant from the date of its incorporation." (footnotes omitted)

[32] Minutes of Investment Committee Mubadala, 16 June 2009. Alternative number 4 for organising the governance of Masdar. R-0154.

[33] Renewable Energies journal March 2009, page 66. R- 0155.
Also see the article entitled "Masdar Visionary Tells the Untold Story" in which Mubadala is identified as a sovereign wealth fund of Abu Dhabi: "Mubadala board (Abu Dhabi Sovereign Fund)". R-0156.

[34] Renewable Energies journal January 2010, page 35. R-0157.

Ahmed Al Jaber refers to Abu Dhabi Future Energy Company (ADFEC), which is identified with Masdar:

"Dr. Sultan Ahmed Al Jaber

Chief Executive Officer

Abu Dhabi Future Energy Company (Masdar)

Masdar City"[35] *(emphasis added)*

105. In short, as has been examined, the Claimant acts in any case under the direction and control of United Arab Emirates. Therefore, the actions of the Claimant must be attributed to United Arab Emirates, in particular, to the Emirate of Abu Dhabi.

(3) Conclusion

106. In view of all of the above, it is concluded that the Claimant, Masdar, acts with a governmental purpose and under the direction and control of United Arab Emirates, specifically the Emirate of Abu Dhabi.

107. Therefore, according to International Law, the conduct of the Claimant must be attributed to United Arab Emirates, specifically to the Emirate of Abu Dhabi. In other words, the dispute object of this arbitration is between two States: United Arab Emirates - in particular, the Emirate of Abu Dhabi- and the Kingdom of Spain.

108. That implies a breach of the jurisdictional requirement established in Article 26 of the ECT that the dispute shall be between a Contracting Party and an investor of another Contracting Party. That also implies a breach of the jurisdictional requirement established in Article 25 of the ICSID Convention that the dispute shall be between a Contracting State and the national of another Contracting State.

109. Consequently, with all due respect, we reiterate our request that the Arbitral Tribunal declares that it does not have the jurisdiction to hear the dispute object of this arbitration.

B. <u>Lack of jurisdiction of the Arbitral Tribunal due to the fact that the Claimant did not make any investment in the Kingdom of Spain pursuant to Articles 26 and 1(6) of the ECT and Article 25(1) of the ICSID Convention.</u>

(1) Introduction

110. In the Memorial on Jurisdiction[36], the Kingdom of Spain submitted the lack of jurisdiction of the Arbitral Tribunal because the Claimant has not made any investment in an objective sense, which is a jurisdictional requirement under Articles 26 and 1(6) of the ECT and Article 25(1) of the ICSID Convention.

[35] Exchange of letters between the CEO of Masdar and the Ministry of Industry of the Kingdom of Spain, dated 25 November 2009 and 14 January 2010. R-0158.

[36] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, section III.B, paragraphs 74 to 128.

111. Specifically, the Kingdom of Spain submitted that the Claimant has not contributed funds or assumed risks in relation to the investment object of this arbitration because, as shown by the statements of the Claimant itself, the funds were contributed and the risks assumed by ADFEC and Mubadala, who are not claimants in this arbitration.

112. In the Counter-Memorial on Jurisdiction[37], the Claimant alleges that this jurisdictional objection of the Kingdom of Spain is baseless and that the arguments of the Respondent are irrelevant for the purposes of the *ratione materiae* jurisdiction of the Tribunal under the ECT and the ICSID Convention in this arbitration.

113. The arguments of the Claimant must be rejected on the grounds detailed below.

(2) The ECT requires the existence of an investment in an objective sense

114. In the Counter-Memorial on Jurisdiction, the Claimant does not accept that Article 1(6) of the ECT requires the existence of an objective or ordinary concept of investment to determine whether there is an investment for the purposes of this Treaty and, therefore, to determine whether the Arbitral Tribunal has jurisdiction.

115. However, the interpretation of Article 1(6) of the ECT according to the criteria established in the Vienna Convention leads to conclude that the investment protected by the ECT must be an investment in an objective or ordinary sense.

(2.1) The literal interpretation of Article 1(6) of the ECT requires the investment protected by the ECT to be an investment in an objective sense

116. Article 31 of the Vienna Convention establishes as a first interpretation criterion of an International Treaty the ordinary meaning of its words. Thus, it is necessary to seek the ordinary meaning of the terms of Article 1(6) of the ECT in all its sections.

117. The requirement of the existence of an investment in an objective sense by Article 1(6) of the ECT in view of its terms is determined by the use in this Article of the concept of "investment", in inverted commas, and investment, without inverted commas. In order to avoid unnecessary repetition, we refer to what has been stated in this regard in the Memorial on Jurisdiction[38].

118. Therefore, in order for an investment to exist for the purposes of the ECT, it is not enough for the investment to be included in the list of assets of Article 1(6), that those assets are owned or controlled by the investor and that those assets are associated with an Economic Activity in the Energy Sector. There must also be an investment in an objective sense.

119. It should be noted that this understanding of Article 1(6) of the ECT has been corroborated by doctrine. Crina Baltag´s indication in this regard can be cited:

[37] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, part III section 10, paragraphs 767 to 811.
[38] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, paragraphs 83 to 99.

"The interpretation of Article 1(6) of the ECT suggests that while the definition of 'Investment' is broad enough to encompass 'every kind of asset, owned or controlled directly or indirectly by an Investor', it is not boundless. Paragraph 3 of Article 1(6) restricts the notion of 'Investment' to 'investment associated with an Economic Activity in the Energy Sector'. Besides the required association between the Investment and the Economic Activity in the Energy Sector, the Investment must be an investment within the ordinary meaning of the term. Consequently, not 'every asset' is an investment under ECT, but only those assets that are investments. For example, sale of goods and other one-off transactions, although associated with an Economic Activity in the Energy Sector, may not be construed as Investments, as they do not satisfy the requirement to be investments within the ordinary meaning of the term." [39](emphasis added)

120. In the Counter-Memorial on Jurisdiction, the Claimant limits itself to asserting that it holds an investment for the purposes of the ECT because its investments match the categories of assets listed in Article 1(6) of the ECT and because the Claimant owns and controls those assets.[40] However, the Claimant does not analyse the terms of the whole of Article 1(6) of the ECT in any depth and does not offer any explanation as to why this Article uses the word investment differently with and without inverted commas.

(2.2) The object and purpose of the ECT require the investment protected by the ECT to be an investment in an objective sense

121. Article 31 of the Vienna Convention establishes as a second criterion of the interpretation of Treaties the object and purpose thereof. Hence, it is necessary to define what the object and purpose of the ECT are. For that we must consider its Article 2 which provides that:

"This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."

122. As for Article 1(1) of the ECT, it defines "Charter" for the purpose of the Treaty as follows:

"The European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter".

123. The Preamble of the ECT expressly indicates that one of the reasons why this Treaty was signed was the desire of the parties "to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalize investment and trade in energy."

[39] *The Energy Charter Treaty. The Notion of Investor*. Crina Baltag, Kluwer Law International BV, 2012, The Netherlands. Page 178. RL-0012

[40] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, paragraph 772.
"The Claimant's investments in this arbitration clearly fall within the scope of the definition of "investment" under the ECT, i.e. they fall within the categories of assets listed expressly in Article 1(6) of the ECT and the Claimant is the owner and has control over those assets."

124. The objective of the ECT of long-term cooperation in the energy field is intended to be achieved, among other means, by the institution of a multilateral system to protect investors and, as a requirement arising from the foregoing, by a binding mechanism to resolve disputes through arbitration which guarantees the protection of these investors. However, as indicated by the European Energy Charter, these mechanisms for the promotion and protection of the investment have an essential purpose to "promote the international flow of investments."

125. Long-term economic cooperation and the promotion of the flow of investments appear to be essential purposes of the ECT. From this perspective, if that is part of the purpose of the Treaty, it is more than acceptable to assert that the concept of "Investment", as included in Article 1(6) of the ECT, requires the existence of an economic contribution with an intended return, the existence of risk related to this contribution and duration.

(2.3) The context of the ECT requires the investment protected by the ECT to be an investment in an objective sense

126. Article 31 of the Vienna Convention establishes as a third criterion for the interpretation of Treaties their context, which includes the text of the Treaty itself. The assessment of various Articles of the ECT highlights that the concept of "Investment" of Article 1(6) of the ECT depends on the existence of a necessary contribution of funds, the assumption of a risk and the duration.

127. In this regard, Article 8 of the ECT asserts that "promote access to and transfer of energy" contributes not only to the "effective trade in Energy Materials and Products" but also to the "Investment". In other words, the Treaty links the concept of investment to a particular method of economic contribution: the transfer of technology.

128. Article 9 of the ECT refers to "*Access to capital*". From the perspective of the ECT, the importance of addressing this matter is due, as indicated in Article 9(1), to the repercussions that this matter has on two issues of vital importance for the ECT: "*encouraging the flow of capital to finance trade in Energy Materials and Products*" and, as regards the case by which we are concerned "*making of and assisting with regard to Investments in Economic Activity in the Energy Sector in the Areas of other Contracting Parties*".

129. As a result, Article 9 of the ECT justifies the existence of specific regulation of the access to capital in the ECT, by the direct connection of the capital with the making of investments. Within the scope of the ECT, without the existence of an economic contribution, whether in the form of capital or in any other form, there cannot be an investment.

130. In line with Article 9(1), Article 9(2) addresses access to particular public financing instruments such as: loans, grants, guarantees or insurance. This regulation is inserted in the ECT with two unique purposes: on the one hand, to promote trade and, on the other, to promote *"Investments in Economic Activity in the Energy Sector of other Contracting Parties"*. The ECT again makes an inevitable inter-connection between economic contribution and the concept of investment.

131. Finally, the whole investment protection structure outlined in Title III of the ECT is subject to the *"making of investments"*.

(2.4) The requirement of an objective concept of investment is corroborated by the preparatory works of the ECT

132. Finally, the preparatory works of the ECT show that the concept of protected "Investment" for the purpose of the ECT was constructed on the basis of an objective concept of investment which certainly included the contribution of funds with a view to obtaining a return, which involves risk and duration.

133. In the first drafts of Article 1 of the ECT the concept of "Investment" was defined from a static perspective. It was exclusively based on a list of "assets" of an investor. This is shown by reading the initial proposal of Article 1 and the drafting of Article 1 predicated on the various Basic Agreements (hereinafter "**BA**") which occurred from 31 October 1991 to BA 35 of 09 February 1993[41].

134. The concept of "Investment" defined statically, exclusively in terms of assets, was maintained until BA 37, of 9 February 1993[42]. This BA introduced for the first time what would subsequently become paragraph three of Article 1(6) of the final version of the ECT. By introducing this paragraph three, the ECT definitely incorporated a definition of "Investment" founded on an objective concept of investment based on the contribution of funds with a view to obtaining a return, which necessarily involves risk and duration.

135. The initiative of including a subjective concept of "Investment" which was founded on an objective concept of the term investment arose from the Canadian Delegation which was involved in the drafting of the ECT. This is appreciated by reading the observations made by this Delegation in each of the BA.

136. In BA 35, of 9 February 1993, regarding the draft version of Article 1(4) on the concept of "Investment", paragraph three is introduced which indicates:

> *"For the purposes of this Agreement, "Investment" refers to any investment associated with an economic activity in the Energy Sector".*

[41] Report of the Legal Sub-Group of the ECT of 10 October 1994 (R-0159); Initially proposed drafting of Article 1 of the ECT (R-0160), Basic Agreement (BA) 4, of 31 October 1991 (R-0161); Basic Agreement (BA) 5, of 09 February 1992 (R- 0162); Basic Agreement (BA) 6, of 20 January 1992, (R-0163); Basic Agreement (BA) 10, of 19 March 1992 (R-0164), Minutes of the Meeting of the Definitions Group of 30 March 1992 (R-0165); "Room document 1" drafted by the Definitions Group on 06 April 1992 (R-0166), Basic Agreement (BA) 12, of 9 April 1992 (R-0167), Basic Agreement (BA) 13, of 19 June 1992 (R-0168), Basic Agreement (BA) 14, of 24 June 1992 (R-0169); Basic Agreement (BA) 15, of 12 August 1992 (R-0170); Conference 35 of 16 September 1992 (R- 0171); Basic Agreement (BA) 22, of 21 October 1992 (R- 0172); Basic Agreement (BA) 26, of 25 November 1992 (R-0173); Basic Agreement (BA) 30 of 8 December 1992 (R-0174); Basic Agreement (BA) 31 of 21 December 1992 (R-0175); Basic Agreement (BA) 32 of 19 January 1993 (R-0176), "Room document" 12, of 1 February 1993 (R- 0177); Basic Agreement (BA) 35, of 9 February 1993 (R- 0178)

[42] Basic Agreement (BA) 37 of 01 March 1993. R-0179.

137. As a result of the new wording, the Canadian delegation changes its position regarding BA 37, of 1 March 1993. In this BA, the wording of Article 1(4), as included in BA 35, is maintained. However, this is the time when the Canadian Delegation sets out the reasons for changing its previous positions. This change in position mainly involved abandoning its request to include, in relation to the assets contained in letter b), its proposal that "and associated with an investment" was replaced by "and involving the commitment of capital or other resources in the Domain or another Contracting Party to economic activity in such Domain". And, in relation to the assets of letter c), its proposal for the following sentence to be included: "such activity includes the commitment of capital or other resources in the Domain of another Contracting Party". However, besides abandoning this position, what is relevant for the purposes at hand are the reasons used by Canada to justify the change of criterion. In this regard notes 1(5).5 and 1 (5).8 indicate that:

> *"CDN will reconsider its proposal in the light of the current draft of this definition (chapeu and third paragraph)."*

138. Once the Treaty indicated that "Investment" (with a capital I and in inverted commas) "refers to any investment [...]" it is more than obvious that the observations of Canada no longer made sense insofar as, according to the ordinary meaning of the word investment, the same implies, among other things, the need for an economic contribution. Therefore, by connecting the subjective concept of "Investment" established in the Treaty with a previous objective concept of investment, the observations become redundant and unnecessary.

139. On this point, we should not forget the explanation given by the Japanese Delegation in "Room Document 2" of 1 February 1993 in relation to the wording of Article 1(4) of the ECT. Thus note 1(6) indicates:

> *"J suggests substituting with: "whose principal business objective is", which should be considered together with F.N.1.9. J is of the opinion that WG II would try to define investment "per se" in terms of its business objective rather than to modify it by who possess it (owned o controlled) or where it is located (in the Domain of) [...]"*

140. Furthermore, in this regard, the note contained in Conference 60, of 1 June 1993[43], regarding the concept of "Investment" is enlightening. Thus once the observations issued by the participating States and listed from 1(6).1 to 1(6)6 had been assessed, the observation made by the "Chairman" of Working Group II to Canada and Norway is included, wherein these countries are asked to withdraw their observations.

141. In short, in view of the above, it must be concluded that the ECT requires the existence of an investment in an objective or ordinary sense for there to be an investment under the ECT and, therefore, for the Arbitral Tribunal to have jurisdiction to hear the case.

[43] Conference 60 of 01 June 1993. R-0180.

(3) Article 25 of the ICSID Convention requires the existence of an investment in an objective sense

142. As is known, Article 25(1) of the ICSID Convention requires the existence of an "investment" for the Centre to have jurisdiction in relation to a specific dispute, although the ICSID Convention does not define what must be understood by "investment" for these purposes.

143. Arbitral Tribunals have repeatedly indicated that in the absence of a definition of "investment" in the ICSID Convention, the objective or ordinary concept of investment, involving a contribution of funds and an assumption of risk, must be used. This was indicated by the Tribunal in the case of *Salini v. Morocco*[44] and by various other Tribunals such as those cited in the Memorial on Jurisdiction, to which we refer.[45]

144. According to the Claimant, "for the purposes of establishing the Tribunal's jurisdiction in this arbitration, the Tribunal does not need to consider any other possible definition of "investment" beyond what is stated in Article 1(6) of the ECT" because, according to the Claimant, "the Claimant's assets and interests which fall within the meaning of "investment" in Article 1(6) of the ECT also amount to an "investment" as that term is used in Article 25(1) of the ICSID Convention".[46] Thus, the Claimant alleges that the Salini test is irrelevant in determining whether or not a protected investment exists in this arbitration.[47]

145. The Kingdom of Spain in no way shares these assertions. The assessment of the existence of an investment for the purposes of the ECT must be accompanied by the assessment of the existence of an investment for the purposes of Article 25 of the ICSID Convention. In other words, a dual test must be conducted on the existence of an investment: i) a test on the existence of an investment for the purposes of the ECT, and ii) a test on the existence of an investment for the purposes of Article 25 of the ICSID Convention.

146. The need for this dual test to determine the existence of an investment for jurisdictional purposes has been recognised on many occasions by arbitral case-law, which shares the position of the Kingdom of Spain. In this regard, the Arbitral Tribunal of the ICSID case *Salini v. Morocco* indicated the following regarding its jurisdiction:

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[44] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, paragraph 52:
"ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre […].The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf commentary by E. Gaillard, cited above, p. 292). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition." RL-0068

[45] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, paragraphs 100-103.

[46] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, paragraphs 777 and 778.

[47] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, paragraph 783.

"jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Convention, in accordance with the case law."[48] *(emphasis added)*

147. The need for this dual test was also recognised by the Arbitral Tribunal of the ICSID case *CSOB v. Slovakia*:

> *"The Slovak Republic is correct in pointing out, however, that an agreement of the parties describing their transaction as an investment is not, as such, conclusive in resolving the question whether the dispute involves an investment under Article 25(1) of the Convention. The concept of an investment as spelled out in that provision is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre's jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment. A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT."*[49] *(emphasis added)*

148. In the same sense, the Arbitral Tribunal of the ICSID case *Joy Mining v. Egypt* indicated that:

> *"The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision."*[50]

149. Therefore, in the present case, it should also be analysed whether the investment of the Claimant complies with the concept of investment of Article 25(1) of the ICSID Convention, i.e. with an objective concept of investment which includes, as we have already seen, the contribution of funds and the assumption of the risks by the investor.

(4) The Claimant has not contributed funds or assumed risks and thus has not made an investment in an objective sense

150. As already submitted by the Kingdom of Spain in its Memorial on Jurisdiction[51], to which we refer in order to avoid unnecessary repetition, regarding the investment object of this arbitration, the contributions of funds and the assumption of risks are only attributable to Mubadala and ADFEC, who are not claimants in this arbitration.

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[48] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, paragraph 44: RL-0068.

[49] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision the Tribunal on the Objections of Jurisdiction of 24 May 1999, paragraph 68. RL-0007

[50] Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11,Jurisdiction Award, 6 August 2004, paragraph 50. RL-0079.

[51] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, paragraphs 104 to 118.

151. In relation to the contribution of capital for the Claimant´s investments by Mubadala, in its Counter-Memorial on Jurisdiction[52] the Claimant alleges that neither the ECT nor the ICSID Convention include a requirement of "origin of capital" used in the investment. To support its position, the Claimant cites two awards: Yukos v. Russia, which, by the way, was recently annulled, and Mr. Frank Charles Arif v. Moldova.

152. However, it should not be forgotten that arbitral case-law has also pointed out that there must be some economic link between the capital and the alleged investor for jurisdictional purposes. In this regard, the Arbitral Tribunal of the *Caratube v Kazakhstan* case indicated that:

> *"The Tribunal agrees with Claimant that, subject to express provisions to the contrary, the origin of capital used to make an investment is immaterial for jurisdiction purposes. However, there still needs to be **some economic link** between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor. […]Claimant insisted that the origin of capital used in investments is immaterial. This is correct, however, the capital must still be linked to the person purporting to have made an investment. In this case there is not even evidence of such a link."* [53] *(emphasis added)*

153. In the present case, that economic link between the invested capital and the Claimant has not been proven. On the contrary, the Claimant itself acknowledges in its Memorial on the Merits that the funds of its investment come from Mubadala, without there being any economic link between these funds and the Claimant:

> *"Any proposed investment to be made by the Claimant had to be considered and approved by ADFEC and Mubadala before the Claimant could proceed to make the investment. This is because the equity for the Claimant's investments was ultimately provided by Mubadala and via ADFEC."*[54] *(emphasis added)*

(5) Conclusion

154. In short, both Article 1(6) of the ECT and Article 25(1) of the ICSID Convention require the existence of an investment in an objective sense for the Arbitral Tribunal to have jurisdiction in this case. The existence of an investment in an objective sense requires the contribution of resources and the assumption of risks.

155. As mentioned above, in this case the Claimant has not contributed funds or assumed risks in relation to the investment object of this arbitration, as the funds were contributed and the risks assumed by ADFEC and Mubadala, who are not claimants in this arbitration.

156. Therefore, with all due respect, we reiterate our request that the Arbitral Tribunal declares that it does not have the jurisdiction to hear this case.

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[52] Reply on the Merits and Counter-Memorial on Jurisdiction, of 3 March 2016, part III, section 10, paragraphs 806 to 811.
[53] Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12, Award, 5 June 2012, paragraphs 355 and 456. RL-0021.
[54] Memorial on the Merits, of 22 January 2015, paragraph 144.

C. Lack of jurisdiction of the Arbitral Tribunal *ratione personae* due to the absence of an investor protected under the ECT. The Claimant is not from the area of another Contracting Party as the Netherlands, like the Kingdom of Spain, are Member States of the European Union. The ECT does not apply to disputes relating to Intra-EU disputes

(1) Introduction

157. In case the first allegation of lack of jurisdiction failed and only the Dutch company used to construct this arbitration procedure was to be taken into consideration, as the Kingdom of Spain explained in its Request for Bifurcation[55] and in the Memorial on Jurisdiction,[56] the Arbitral Tribunal, with all due respect, lacks jurisdiction to rule on the intra-EU dispute posed in this arbitration by companies from the Netherlands against the Kingdom of Spain.

158. The Netherlands and Spain are member States of the EU, and therefore the requirement is not met that is foreseen in Article 26(1) of the ECT which states that to access arbitration the dispute must be between a Contracting Party and investors from different Contracting Parties.

159. The Claimant, in their Counter-Memorial on Jurisdiction,[57] rejects the arguments of Spain in this regard. However, the reasons given do not invalidate the objection to the jurisdiction of the Arbitral Tribunal made by the Kingdom of Spain, as shown below. Without prejudice to the above explanations in our Memorial on Jurisdiction, to which reference is made in order to avoid unnecessary repetition.

(2) The Claimant avoids the principle of primacy of EU law in Intra EU relations

160. Insofar as we find ourselves in a Reply on Jurisdiction, we will proceed to reply to the arguments posed by the Claimants in their Counter-Memorial on Jurisdiction.

161. In this sense, the first thing that must be pointed out is that the Claimants show, from the beginning of their allegations and with all due respect, an ignorance of the essential principles of European Union Law and of the ECT itself. Fundamentally, they forget the essential principle on which the objection to the Arbitral Tribunal jurisdiction raised by the Kingdom of Spain pivots: the principle of primacy of EU law, although in the introduction of its Counter-Memorial Jurisdiction this principle is recognized as the first argument of the Kingdom of Spain.[58]

162. The CJEU established the principle of primacy in the judgment in *Costa v. ENEL* of 15 July 1964[59]. In it, the CJEU protected the rights of an investor in the common electricity market, opposed to the nationalisation practiced by Italy. According to the CJEU, *"unlike*

[55] Respondent's Request for Bifurcation, of 03 March 2015, section III.3, paragraphs 53 to 72.
[56] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, section III.C, paras. 129 to 187.
[57] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, part III, section 11, paragraphs 812 to 872.
[58] Ibid. paragraph 813.
[59] CJEU ruling of 15 July 1964, in Case 6/64, on *Flaiminio Costa v. ENEL*. R-.0181.

ordinary International Treaties, the EEC Treaty established an integrated legal system of the Member States since the entry into force of the Treaty and linking their own law courts. By creating an unlimited duration community, having its own Institutions, personality, legal capacity, capacity for international representation, and more particularly, real powers stemming from a limitation of competition or a transfer of powers from the States to the Community, they have limited their sovereign rights and have thus created a regulatory body applicable to their national regulations and themselves, which takes precedence over national rights."[60]

163. Preferential treatment means, thus, that EU Law is applied to intra-community relations in preference to or prevailing over any other law, displacing any other national or international provision. The preference given to community law does not admit comparisons with other laws. It does not demand that it be proven that other laws are more or less favourable. Simply put, EU Law is given preference over any other dealing with regulating internal EU relations.

164. The principle of primacy of EU law in Intra EU relations has an explicit recognition in the ECT, as stated in Article 25 that:

> *(1) The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as "EIA") to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any* ***preferential treatment*** *applicable between the parties to that EIA as a result of their being parties thereto.*
>
> *(2) For the purposes of paragraph (1), "EIA" means an agreement substantially liberalizing, inter alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame."*[61] *(Emphasis added)*

165. That Article 25 of the ECT refers to EU law is not questionable. In fact, the only Statement contained in the ECT in relation to this section is the one made by the European Communities and its Member States to say:

> *"(...) the application of Article 25 of the Energy Charter Treaty will allow only those derogations necessary to safeguard the preferential treatment resulting from the wider process of economic integration resulting from the Treaties establishing the European Communities".*[62] *(Emphasis added)*

166. The Claimant in relation to Article 25 of the ECT merely states that *"this provision does not state that EU Investors cannot bring claims against EU Member States under Article 26 of the ECT. What it does show, however, is that when the Contracting Parties intended to restrict Investors' rights, they did so by expressly stating how Investors' rights*

[60] Ibid. on the interpretation of Article 102 of the EEC Treaty.
[61] The Energy Charter Treaty, article 25. RL-0002
[62] Ibid.

under the ECT would interact with the EU".[63] But in any case, Article 25 expressly states that a *"preferential treatment"* is applied to the parties of the Agreement for Economic Integration, that is, the states of the EU, that is, a right that prevails in their relations with any other.

167. In addition to enshrine the principle of primacy of EU law, the CJEU ruling of 15 July 1964, issued in the case *Costa v. ENEL* ruled on issues of EU law that are also transcendent for the resolution of these proceedings, which undoubtedly affects Community law. In this regard, it should be remembered that what the Claimant is requesting from the Arbitral Tribunal is that it ensures that companies producing solar thermal energy in which it invested in Spain receive, throughout their respective useful life, a specific and unchanging amount of state aid, even if it could thereby distort competition in the Common Electricity Market. As we noted in our Jurisdiction Memorial[64], following the CJEU ruling on the matter of ELCOGAS, there is no doubt that *"the amounts financed by all end users of electricity established in the country and distributed to companies in the power sector by a public body under predetermined legal criteria"* constitute state aid.[65]

168. Well, the judgment by the CJEU in the *Costa v. ENEL* Case has already warned that the European Commission had to be informed promptly of any plans to grant or alter aid[66]. In this case, the aid received by companies producing renewable energy, although initially allowed by the EU, should be granted by the States taking into account the Guidelines on State aid for environmental protection and energy 2014-2020, approved by European Commission Communication 2014/C 200/01, as well as repealed by these (European Commission Communication 2008/C 82/01).[67] The purpose of these grants is *to* ensure that renewable energy producers are placed in a *level playing field.* Granting these producers aid which distorts competition on the market in their favour would therefore be contrary to EU law. Any statement that is made in relation to the right of the Claimant to receive that particular amount of aid will affect, as such, an essential pillar of the EU: the right of competition.

169. Renewable energy companies in Spain have invoked the EU Law and not the ECT to protect their interests in light of the regulatory measures adopted by the Government of Spain. The claims made the Spanish Wind Association (hereinafter the "SWA") should be highlighted in this regard, which were presented during the processing of RD 1614/2010, before the proposal to introduce a provision in the Regulation that would

[63] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, paragraph 830.
[64] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, paras 184 and 185.
[65] Order of the Court of Justice of the European Union laid down regarding the preliminary ruling C-275/13, ELCOGAS, on 22 October 2014. (English version). R-0030.
[66] CJEU ruling of 15 July 1964, in Case 6/64, on Flaiminio Costa v. ENEL, interpretation of Article 93 of the ECT. R-0181.
[67] Guidelines on State Aid for environmental protection and energy 2014-2020, approved by European Commission Communication 2014/C 200/01 (R-0064) and Guidelines on State Aid for environmental protection and energy approved by European Commission Communication 2008/C 82/01 (R-0063).

restrict the *"changes of ownership and the right transmission (Eighth additional provision)."*[68]

170. The SWA considered that proposal unacceptable for being contrary to Directive 2009/28/EC and because:

> *"(...) Restricts the free circulation of capital expressed in Article 63 (previously, Article 56) of the current Treaty on the Functioning of the European Union (TFEU). (...) The Court of Justice of the European Union has stated that movements of capital, 'direct' investments in particular, namely investments in the form of participation in a company through the ownership of shares which confers the possibility to participate effectively in its management and control, as well as 'portfolio' investments, namely investments in the form of acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the company (see Case Commission/Netherlands, cited above, paragraph 19 and the case laws cited therein)."*[69] *(Emphasis added).*

171. In short, under the principle of primacy, it is the right of the EU and not the ECT which must be applied to resolve this dispute. The Claimant, supposedly of Dutch origin, whose national treatment regarding state aid is not guaranteed by the ECT, it does have the full protection of EU law both at the time of the investment and its subsequent management. The fact is that the Claimants have carried out their entire investment under the norms of EU Law and protected by them, and they have only had recourse to the ECT and international arbitration because they are aware that the claim they have brought here would be rejected by the EU Court of justice.

172. This dispute also affects essential elements of EU law (state aid, free movement of capital and freedom of establishment), which affect the basic pillars of the EU, which prevents the Arbitral Tribunal ruling on it, this power is reserved to the EU's own judicial system and, ultimately, to the CJEU. It was thus stated by the latter in Opinion 1/91 invoked by both the Claimant and the Respondent in this proceeding.[70]

(3) Regarding the preliminary observations on the relevance of previous awards and other legal precedents

173. Although what was indicated above would suffice to justify the lack of jurisdiction of the Arbitral Tribunal to hear this dispute, the arguments raised by the Claimant in their Counter-memorial on jurisdiction will be referred to.

174. The Claimants insist on the fact that all the Arbitral Tribunals that have ruled on the so-called intra-community objection have rejected it. However, these awards do not resolve issues which fully coincide with the present case for the following reasons: a) they either refer to Bilateral Investment Treaties which have nothing to do with a multilateral and

[68] Submissions from the SWA concerning the proposal of RD 1614/2010 R-0182.
[69] Ibid.
[70] Opinion 1/91 on 14 December 1991 issued by the Court of Justice of the European Union regarding the "Agreement to Create a European Economic Area" (EEA) (original version in Spanish). R-0028

mixed treaty promoted and signed by the EU; b) or because when referring to the ECT, they regulate the maintenance of the obligations assumed by states that were not yet members of the EU when they signed the ECT, c) or because when referring to the ECT and the obligations assumed by Spain, they omit the analysis of the principle of primacy specifically invoked in this arbitration.

175. Hence, the *Eureko v. Slovakia* award, on which the Claimants base several of their arguments, expressly recognises the impossibility of extrapolating its conclusions to Treaties like the ECT and to intra-community disputes after the Treaty of Lisbon of 2007 went into effect:

> *"This award is thus necessarily confined to the specific circumstances of the present case; and the Tribunal does not here intend to decide any general principles for other cases, however ostensibly analogous to this case the might be. For example, this case arises from a BIT concluded in 1991 before the CSFR Association Agreement, the Association Agreement and the Accession Treaty; it does not arise from a multi-lateral treaty or a treaty to which the EU is a party or signatory; and, moreover, these arbitration proceedings were instituted in 2008 before the Lisbon Treaty came into force, amending the EU Treaty and the EC Treaty (now the TFEU)."*[71]

176. But also, there is a new item on this matter which require the Arbitral Tribunal 's attention. The Federal Supreme Court of Germany has raised Preliminary Ruling to the CJEU regarding compatibility with EU law of intra-EU arbitrations. There is no formal proof yet of the admissibility of the question.

177. In regards to the Jurisdiction Award of *Electrabel v. Hungary*, it should be emphasized that Hungry signed the ECT when it had not yet joined the EU. Therefore, Hungary, unlike Spain and the Netherlands, was able to contract obligations under Part III of the ECT.

178. At any rate, if we apply, in theory, to the current matter the arguments that both the awards referring to BITS and the *Electrabel* award have applied, we would come to the undoubted conclusion that EU Law is the one that must be applied.

179. The objective of the ECT is indicated in Article 2 thereof:

> *"This Treaty establishes a legal framework in order to promote long-term co-operation in the energy field, based on the complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."*[72]

180. Therefore, the objectives of the ECT should be integrated with the objectives of the European Energy Charter by imperative of Article 2 of the ECT. The European Energy Charter, states in Article 2 that:

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[71] *Eureko B.V. v. the Slovakian Republic*, Jurisdiction Award, of 26 October 2010, paragraph 218. RL-0067

[72] ECT, Article 2. RL-0002

"Resolved to promote a new model for energy co-operation in the long term in Europe and globally within the framework of a market economy and based on mutual assistance and the principle of non-discrimination." "persuaded that broader energy co-operation among signatories is essential for economic progress and more generally for social development and better quality of life." "Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic co-operation, they undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy."[73] *(Emphasis added)*

181. Furthermore, the objectives of the Treaties constituting the European Communities are established in Article 2 of each one of those Treaties. So, Article 2 of the Treaty of Paris of 1951 established that the objective of the European Coal and Steel Community (ECSC) was:

> *"to contribute, through the common market for coal and steel, to economic expansion, growth of employment and a rising standard of living."*[74] *(Emphasis added)*

182. And Article 2 of the Treaty of Rome of 1957 established the following in regards to the objective of the European Economic Community:

> *"The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."*[75] *(Emphasis added)*

183. The Treaties constituting the European Communities were signed 43 years (in the case of the Treating Constituting the European Coal and Steel Community, which is an energy agreement) and 37 years (in the case of the Treaties Constituting the European Economic Community and EURATOM) before the ECT (1994). These Treaties had the aim of creating, within their respective scopes, a common market based on the principles of non-discrimination and market-oriented price formation.

184. That is, the Treaties establishing that the European Communities not only shared but exceeded the objectives of the ECT, which does not guarantee non-discrimination in the so called *"making investment process"* nor on public aid to foreign investment[76]. Both in the former and in the latter, the aim, by means of the creation of that common market, is to improve the quality of life of the citizens of the States that are parties to those Treaties.

[73] European Energy Charter, Article 2. RL-0002
[74] ECSC Treaty, Paris 1951. R-0183.
[75] EEC Treaty, Rome 1957. R-0184.
[76] The Energy Charter Treaty, article 10 (2), (3), (4) and (8). RL-0002

185. The signatories to the European Energy Charter were perfectly aware that the European Communities were in a process of integration that was much more advanced than the ECT sought to promote. That is why they expressly stated that in order to achieve that objective "*they relied on the support of the European Communities by means of the creation of their internal market.*"[77]

186. Actually, the Case-law does not hesitate to recognise that the ECT was promoted by the European Communities themselves as a step toward including the former Soviet socialist republics into the EU. In this regard, Wälde states:

> *"The ECT is largely a product of EU external, political, economic and energy policy. It is meant to integrate the formerly Communist countries, provides an ante-chamber and preparation area for EU accession for many of them".*[78]

187. As seen before, the text itself of the ECT recognises that process of superior economic integration in Article 25 and in the Declaration that the European Communities and their Member States included in relation to that precept in the ECT. That economic integration process had been being perfected until reaching the current statute of the European Union and the signing of the Treaty of Lisbon in 2007.

188. In short, if we carry out an exercise of comparing the aim and purpose of the ECT with the aim and purpose of the EU Treaties, and even more so as of the Treaty of Lisbon, we will reach the conclusion that, by virtue of Articles 30 and 59 of the CVDT, the EU Treaties should prevail.

189. The Claimants say that the statement by the Kingdom of Spain that arbitration is not possible in intra-community disputes is absurd[79]. The Claimants, however, have not understood the Respondent's argument. What the Kingdom of Spain maintains is that the arguments employed in the awards that resolve disputes under BITs are not applicable. And, if they were applied, their arguments regarding the set of Articles 30 and 59 of the CVDT would lead to sustaining the prevalence of EU Law. In addition, in any case, all of these awards do not recognise the principle of the primacy of EU Law that this party is invoking.

190. Actually, the foregoing conclusion is a result of an exercise that this party proposes for merely dialectical purposes and to counter the Claimants' allegations. The Claimants are the ones invoking the awards concerning BITs the *Electrabel* case to support their thesis, and not Spain. It has been shown that the application of the reasoning in the aforementioned awards in this case would lead to sustain the prevalence of EU law over the ECT, something unquestionable, especially after the signing of the Treaty of Lisbon in 2007, which even expressly gathers competition in favour of the EU over foreign investment. In view that it is difficult to argue, as the Claimant claims for the ECT to

[77] European Energy Charter, 1991, RL-0002
[78] *"T W Wälde, "Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation" (1996)* 12 Transnational Dispute Management 4.: RL-0070
[79] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, paragraph 821.

prevail over EU law under the *lex porterior* principle enshrined in Article 59 of the CVDT.[80]

191. Finally, in regards to the awards of *PV Investors v. Spain* and *Charanne v. Spain*,[81] they fail to consider the principle of the primacy of EU law. That principle is precisely invoked by this party as an essential element of their objection requesting the Arbitral Tribunal an express ruling on its validity and application in this case.

192. In addition, the European Commission, which is the "Guardian of the Treaties and also promoted the signing of the ECT, has reiterated ever since the first intra-community disputes arose under BITs that arbitration is not applicable as a dispute resolution mechanism. This position has been expressed by the European Commission recently when criticising several States for not ending their respective BITs.[82]

193. The Claimants, invoking the *PV Investors* award consider that the European Commission is simply of the opinion of the EU as part of the ECT,[83] which does not necessarily represent the opinion of all the signatory states of the ECT. Not recognising that the European Commission has an essential role in the interpretation of the ECT, means to ignore its origins.

194. Finally, the Claimant invokes Article 16 of the ECT to argue that, in case of conflict between EU law and the ECT, the latter must prevail as being more favourable to the investor. However, regarding Article 16, this is not applicable to intra-community disputes because it is included in Part III of the ECT to which, as we have argued, neither Spain nor the Netherlands could obligate themselves.

195. In addition, when the Claimants invoke Article 16 of the ECT, they forget to provide arguments about how the ECT (including access to arbitration) is more favourable for investors or investments. The Claimants do not argue how the protection that investors receive through the EU judicial system could be less favourable for them or for their investments than the protection that they receive through arbitration. The Claimant's statement is based on an objective lack of confidence in the EU judicial system (of which the courts of their country of origin are a part), which is incompatible with EU Law.

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[80] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, paragraph 820.

[81] Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain (SCC V 062/2012), Final Award, 21 January 2016, and dissenting vote, para. RL-0071

[82] "*Commission asks Member States to terminate their intra-EU bilateral investment treaties*" European Commission-Press release, Brussels, 18 June 2015: "*the Commission has decided to request five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) to bring the intra-EU BITs between them to an end. The letters of formal notice, sent today, follow earlier exchanges with the Member States in question. This is not a new issue as the Commission has consistently and over a number of years pointed out to all Member States that intra-EU BITs are incompatible with EU law. However, since most Member States have taken no action, the Commission is now launching the first stage of infringement procedures against five Member States. At the same time, the Commission is requesting information from and initiating an administrative dialogue with the remaining 21 Member States who still have intra-EU BITs in place. It is worth noting that two Member States – Ireland and Italy – have already ended all their intra-EU BITs in 2012 and 2013 respectively."* R-0029

[83] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, paragraph 816.

(4) Regarding comments made by the Claimants on the ordinary sense of the ECT

196. The Claimants, in their Jurisdiction Counter-memorial alleges that the articles of the ECT raised by the Kingdom of Spain to support this objection to the jurisdiction of the Arbitral Tribunal in any way impede the arbitration mechanism for resolving Intra EU disputes. To do this, they are carrying out a literal and completely out of context interpretation of each of the provisions invoked by the Respondent (Articles 26, 1(2), 1(3), 1(10), 16, 36 (7) and 26(6) of the ECT) which under no circumstances can be admitted.

197. As a starting point, it would be appropriate to begin by recalling that, as stated by the *Poštová Banka, A.S. and Istrokapital SE v Hellenic Republic award* (ICSID Case No. ARB/13/8) of 9 April 2015, the interpretation of the Treaty must conform to the *"principle of effectiveness"*. In this sense, it notes that:

> *"Interpretation of a treaty in good faith, considering not only the text but also the context, requires that the interpreter provide some meaning to the examples and to the content of such examples as part of the context of the treaty. The interpretation in good faith, be it considered alone or in conjunction with the object and purpose of the treaty, embodies the principle of effectiveness (ut res magis valeat quem pereratt). Preference should be given to an interpretation that provides meaning to all the terms of the treaty as opposed to one that does not. As indicated by the Appellate Body of the WTO:*
>
> *"We have also recognized, on several occasions, the principle of effectiveness in the interpretation of treaties (ut res magis valeat quem pererat) which requires that a treaty interpreter: '…must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'. In light of the interpretative principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously'. An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole."*[84] *" (Emphasis added) (footnotes omitted).*

198. An effective interpretation of the ECT articles invoked by the Respondent, will provide evidence about how the ECT itself is aware of the EU law role and its primacy in Intra-EU relations, excluding arbitration as a mechanism for dispute resolution.

199. In the first place, Article 26 introduces a model of consent to restricted arbitration. It should be remembered that the ECT has 50 articles. However, the conflict resolution mechanisms that are introduced by Article 26 of the ECT only refer to disputes regarding alleged breach of obligations derived from Part III of the Treaty regarding investor and investment protection. It does not apply to other parts of the Treaty. If, as Spain maintains, the member States of the EU could not obligate themselves under Part III of the ECT, it is clear that, consequently, the dispute resolution mechanisms laid down in the cited precept does not apply to intra-community disputes.

[84] Poštová Banka, A.S. and Istrokapital SE v Hellenic Republic award (ICSID Case No. ARB/13/8) of 9 April 2015. RL-0072.

200. Neither Spain, or the Netherlands could obligate themselves under Part III of the ECT when they signed it because they no longer had the competence to do so. In fact, neither Spain nor the Netherlands could incur obligations regarding the treatment they would give to each other's investors and investments because that jurisdiction had been given by both countries to the European Communities, as we have seen when analysing the judgment of the CJEU case *Costa v. ENEL*. And the best example of this is that not a single BIT can be cited that was signed by EU members after their entry in the European Communities. They could not be bound under the ECT Treaty concerning investors and investments because it would have meant to consider that a Dutch investor in Spain is a "foreign investor". And in the EU, the only foreign investors are those that come from countries that are not Member States of the EU.

201. Besides, this reality is included in the ECT itself. Thus, the ECT defines the Contracting Party in Article 1(2) as *"a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force*". That is to say, the Contracting Parties have to have agreed to bind **themselves** and neither Spain, the Netherlands could bind themselves under Part III of the ECT.

202. Moreover, Article 1(3) of the ECT defines Regional Economic Integration Organisation (REIO) as an "*organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters*."

203. That is, the ECT expressly recognises that there are matters governed by the ECT that should be negotiated by the EU because its Member States do not have the competence for this. That competence had been given to the then-European Community, the sole REIO that has signed the ECT.

204. And this idea is reaffirmed in Article 36(7) of the ECT, where it regulates voting rights and stipulates that:

> *"A Regional Economic Integration Organisation shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Treaty; provided that such an Organisation shall not exercise its right to vote if its member states exercise theirs, and vice versa."*

205. That is to say, the EU and its Member States may not vote simultaneously. Each one will vote within the scope of their respective competences. This means that in some areas covered by the ECT the Contracting Party is the EU and in others its member states.

206. The decision of who is the Competent Contracting Party in each subject is not for the Arbitral Tribunal to decide but the CJEU, as shown in its Opinion 1/91.[85]

[85] Opinion 1/91 on 14 December 1991 issued by the Court of Justice of the European Union regarding the "Agreement to Create a European Economic Area" (EEA): "*when a dispute relating to the interpretation or application of one or more provisions of the agreement is brought before it, the EEA Court may be*

207. In the second place, Article 26 of the ECT does not stipulate arbitration as the only dispute resolution mechanism but rather also introduces other mechanisms. It provides for the possibility of having recourse to international conciliation or to the ordinary or administrative Tribunals of the Contracting Party involved in the dispute.

208. In the third place, and in relation to the foregoing, Article 26 of the ECT, when it cites these dispute resolution mechanisms, does not establish an order of preference. It does tell us which is better or worse. It does not say that arbitration is "more favourable for the investor or investment" than the other mechanisms it cites, which include the investor's guarantee of being able to have recourse to the domestic tribunals of the State hosting their investment.

209. Moreover, Article 26(6) of the ECT makes it obligatory to resolve disputes in line with the ECT and other principles and rules of International Law. The Claimants have never denied (they could not do so) that EU Law is international law. It is hardly debatable, then, that the tribunals must apply EU Law and the ECT under equal conditions. The issue is that the hypothetical conflict of international standards is resolved in Article 25 of the ECT when it recognises the principle of primacy of EU law in Intra-EU relations and prevents that, under the most favoured nation clause, said right, is to be extended to nationals of ECT signatory states that are not members of the EU. Thus, Article 25 also recognises that the process of economic integration of the EU is more advanced than the ECT and, ultimately, more favourable for the investor.

210. Ultimately, an effective interpretation of ECT leads to sustain the inapplicability of arbitration as a mechanism for Intra EU dispute resolution: a) because EU member states could not be linked to each other under Part III of the ECT and b) because the ECT itself recognises in Article 25 the principle of primacy of EU law.

(5) Regarding the Claimant's arguments that the subjective intent of the EU and its Member States concerning the provisions of EU law cannot alter the ordinary sense of Article 26 of the ECT

211. In this issue, it must be simply highlighted that Spain does not propose a subjective interpretation of the ECT but an "effective" interpretation of the ECT in the terms set out in the previous section above. It is the Claimant who strives to make a purely literal and out of context interpretation, since a harmonious and effective interpretation, taking into account all the criteria of Articles 31 and 32 of the CVDT must lead to the interpretation of ECT defending this part.

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called upon to interpret the expression 'Contracting Party', within the meaning of Article 2(c) of the agreement, in order to determine whether, for the purposes of the provision at issue, the expression 'Contracting Party' means the Community, the Community and the Member States, or simply the Member States. Consequently, the EEA Court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement.
[] It follows that the jurisdiction conferred on the EEA Court under Article 2(c), Article 96(1) (a) and Article 117(1) of the agreement is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty". R-0028

212. The Claimant considers that Spain understands Intra EU unenforceable arbitration disputes because *"the EU Internal Market contains investor protection provisions supposedly superior to those contained in the ECT"*[86] and adds that *"The provisions of the ECT do not contradict EU law nor are the Investor protections contained in the EU internal market superior to those under the ECT"*[87]. Again, the Claimants do not understand the meaning of our objection. This is not a matter of proving what rights are superior, if any (even though EU law objectively provides for a wider economic integration process and ensures that Union investors receive national treatment at all times which is not granted to investors by the ECT). The question is that EU Law is applied preferentially in intra-community relations by virtue of the principle of primacy.

213. The Claimants go further and affirm that "*once an investment is made, EU law provides only limited protection to investors"*[88]. The Claimants, with all due respect, are not ignorant of EU Law. They are ignorant of the ECT. As mentioned above, the ECT does not guarantee the principle of non-discrimination in "making investment process" (Article 10 (2), (3) and (4)); EU law guarantees the principle of non-discrimination to all intra-EU investors. The ECT does not guarantee the principle of non-discrimination in public investment aid (Articles 9 and 10 (8)), EU law guarantees non-discrimination of intra-EU investment throughout the investment's life, whatever may this be.

214. We will recall, with Wälde and Bamberger, what protection the ECT gives investors in comparison with EU Law:

> *"the ECT in effect imports –directly or at least or in addition by an indirect interpretative effect- the law of the EU- as it relates to investor treatment. […] Such an import –directly by Article 10 (1) –most favoured treaty treatment – or indirectly –by interpretative guidance and by specification of what the standards of "fair and equitable", "no unreasonable impairment" and "constant protection and security" mean, is arguably also mandated for the "unwritten rules and principles" developed by the CJEU for European law: legal certainty, protection of investment-backed legitimate expectation, proportionality and least-restrictiveness"*[89]
>
> *"To anyone with a competition or energy law background, it is clear that we are now very close to the competition rules under primary EU law (Art.82, 86), the EU energy directives, the guidelines on third-party access by the Madrid and Florence EU regulators forums and national implementing law. The discrimination obligation on States obliges them to enact and apply what in effect is the competition law of the EU. It is therefore natural –but not yet tested- that one would look for precedent not only, and perhaps even less, to the WTO national treatment practice, as rather in the*

[86] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, paragraph 816
[87] Ibid. para., title 11.4. b
[88] Ibid. paragraph 845.
[89]T. W. Wälde, "Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation" (1996) 12 Transnational Dispute Management 4. RL- 0070

practice of the ECJ and the EU Commission on third-party access and of abuse of a dominant position"[90]

215. Therefore, it may hardly be maintained, with even minimal rigour, that the rights that the ECT grants investors in Article 10 (1) are in addition to those that EU Law grants them.

216. Really, the only recourse that remains to the Claimants is to maintain, as they do in their Counter-Memorial on Jurisdiction, that the ECT allows the investor to have recourse to arbitration in the defence of their rights. As pointed out, they forget that Article 26 of the ECT also foresees national Courts as suitable procedural means (on an equal footing to arbitration) for resolving disputes concerning Part III of the ECT. Secondly, in considering a priori that, when compared to the EU judicial system, arbitration is better. And the Claimant does not substantiate such claim.

217. Perhaps the Claimant holds this idea because in Spain, both the Supreme Court as well as the Constitutional Court have, in multiple judgements, rejected claims similar to that which the Claimant is raising in this arbitration. However, it should be taken into consideration that the first Arbitral Tribunal, which has ruled on the expectations that a renewables producer could have under RD 661/2007, has also rejected the claimant's claim.

218. The Claimant advocates the inapplicability of Article 344 of the TFEU to this case.[91] Again, the Claimant does not understand the meaning of our objection. The issue submitted to this Tribunal affects the essential pillars of EU Law and Spain cannot be submitted to any other system than the EU judicial system in relation to this matter.

219. Surprisingly, the Claimant holds that Opinion 1/91 of the ECJ that Spain puts forward in support of its claims *"is also irrelevant"*[92]. We say that this surprises us because the Claimant itself puts forward this Opinion several paragraphs earlier.[93]

(6) With regard to "The ECT does not include a disconnection clause, nor is the interpretation of an implied disconnection clause reconcilable with the ordinary meaning of the ECT"

220. Finally, on this issue we shall simply clarify that the Respondent does not hold to the existence of an express or implied disconnection clause.

221. We simply recall the words of the Commission:

"The Commission questions the need for a clause intended to regulate the relationship between regulations laid-down by a Community regime and an

[90] T. W. Wälde, "Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice" (2004) 1 Transnational Dispute Management 2. RL-0074.
[91] Ibid. Para 533 to 536.
[92] Reply on the Merits and Counter-Memorial on Jurisdiction, of 18 December 2015, paragraph 537.
[93] Reply on the Merits and Counter-Memorial on Jurisdiction, of 18 December 2015, paragraph 494 and footnote on page 867.

international agreement intended to extend that regime to non-member countries, which should not affect ipso facto the existing Community Law. In its view, given that the agreement envisaged covers areas for which a complete harmonisation has been carried out, the existence of a disconnection clause is entirely without relevance."[94]

(7) Conclusion

222. In view of the above, with all due respect, we reiterate our request that the Arbitral Tribunal declares a lack of jurisdiction to hear this intra-EU dispute raised by investors from the Netherlands against the Kingdom of Spain. The Netherlands and Spain were EU member States when the ECT went into effect. Hence, the Claimant fails to comply with the requirement foreseen in Article 26(1) of the ECT establishing that to access arbitration the dispute must be between a Contracting Party and investors from different Contracting Parties.

D. Lack of jurisdiction *rationae voluntatis* of the Arbitral Tribunal since the Claimant denied the application of Part III of the ECT in concurrence with the circumstances of Article 17 of the ECT

(1) Introduction

223. In its Memorial on Jurisdiction, the Kingdom of Spain made use of their power under Article 17 ECT to deny the Claimant the benefits of Part III ECT. Specifically, that statement stated that:

"Since the circumstances provided for in Article 17 of the ECT concurred on the Claimant, the Kingdom of Spain denied the benefits of the Treaty. This implies that Part III of the ECT does not apply to the Claimant"[95]

224. In its Counter-Memorial on Jurisdiction[96], the Claimant maintains that: (i) the right to denial of benefits has not been exercised in time by the Kingdom of Spain and, in the event that it has been exercised in time, it can only have a prospective effect; (ii) the Denial of Benefits Clause is not a question of jurisdiction; (iii) in any event, the Claimant does have a substantial economic activity in the Netherlands.

225. As discussed below, these arguments made by the Claimant must be rejected. Following the order of our Memorial on Jurisdiction, we will address the following issues:

- The Denial of Benefits Clause is a matter of jurisdiction as it relates to the consent given by the ECT Contracting Parties to go to arbitration.

[94] Opinion 1/03 of the European Court of Justice (Full Court) of 7 February 2006 on "Community competence to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters", paragraphs 83 and 84. R- 0185.
[95] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, para. 253.
[96] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, part III, section (12).

- The Claimant does not have a substantial economic activity in the Netherlands. That is, we will discuss how the objective budgets determining the application of Article 17 of the ECT stated in our Memorial on Jurisdiction concur in the Claimant.

- Spain has successfully activated the Denial of Benefits Clause provided for in Article 17 of the ECT.

(2) The Denial of Benefits Clause is a matter of jurisdiction. Article 17 of the ECT as a limit of consent granted by the Contracting Parties of the ECT to submit the controversies to the International Arbitral Tribunal

226. The denial of benefits clause and its effects is an issue that affects the jurisdiction of Arbitral Tribunals. This is founded on the literal wording of Article 26 of the ECT itself. It must not be forgotten that the literal wording is set as the first criterion of interpretation of all Treaties in accordance with Article 31 of the Vienna Convention.

227. The ECT Contracting Parties, determining the matters on which its consent to arbitration is granted, established two important limitations in Article 26 of the ECT:

- That the dispute must be one *"which concern an Alleged breach of an obligation of the former [Contracting Party] under Part III"* of the ECT.

- That this allegedly incomplete obligation should be "under Part III" of the ECT.

228. Thus, the Contracting Parties restricted their consent to arbitration, granting it only for those disputes concerning *"an Alleged breach of an obligation of the former [Contracting Party] under Part III"* of it. Any other subject remains excluded from the arbitral clause of Article 26 (1) of ECT.

229. Furthermore, Article 26(1) of the ECT provides that the allegedly breached obligation must be an obligation "under Part III" of the ECT.

230. Through Article 26 of the ECT's requirement that the obligations must arise from Part III, it is demanding that Party III is applied in its entirety. It is not enough that the obligation brings its origin as stated in Articles 10, 11, 12, 13, 14 and 15 of the ECT. It is also necessary that this obligation keeps on subsisting after applying Part III in its entirety. Specifically, after application of Article 17 of the ECT.

231. The wording of Article 17 of the ECT is fully consistent with the limitations on consent laid down in Article 26 of the ECT. The heading of Article 17 ECT states: "*Non-Application of Part III in Certain Circumstances*". As a consequence, when the "*circumstances*" included in said Article concur, Part III of the ECT will not be applied, so no obligation may be derived this Part of the Treaty.

232. If Part III of the ECT is not applied as a consequence of the concurrence of the circumstances set out in Article 17 of the ECT, it becomes evident that an "*an obligation of the former [Contracting Party] under Part III*" cannot exist. Consequently, if *"an obligation of the former [Contracting Party] under Part III" does not exist,* the

Contracting Parties have not consented to arbitration under Article 26(1) of the ECT and the Arbitral Tribunal shall have no jurisdiction "*ratione voluntatis* ".

(3) Circumstances that led to the activation of the Denial of Benefits Clause. The Claimant does not develop a substantial business in the Netherlands

233. As is known, the circumstances required by Article 17(1) of the ECT to deny the benefits of Part III of the ECT is that we are dealing with: i) a legal entity, (ii) when citizens or nationals of a third country own or control such entity and (iii) when they do not carry out substantial business activities in the territory of the Contracting Party in which it is established.

234. In its Counter-Memorial on Jurisdiction, the Claimant argues that, despite being a holding company, it carries out a substantial economic activity.

235. As for the *"substantial business activity" concept,* we can highlight the thoughts of Graham Coop and Clarisse Ribeiro:

> *"The term "substantial business activities" is not defined in the ECT. However, the plain meaning of the words seems clear. A "business" is a person, partnership or corporation engaged in commerce, manufacturing or a service in a bid to make a profit, and "business activities" are the activities of such persons, partnership or corporation in furtherance of the business. In other words, if a company is carrying out business activities in the territory in which it is organized, one would expect that, at a minimum, it will be engaged in buying, selling, and contracting in that territory beyond the normal activities or functions required merely by the fact of its corporate existence (such as corporate registration and administration, including holding requisite board or shareholders' meetings and the payment of associated taxes and corporate registration fees). One would also expect such a company: (1) to have employees in the territory of the Contracting Party in which it is organized carrying out assignments in furtherance of the business; (2) to have resident managers involved in a hands-on manner in the actual decision –making of the business; (3) to be party to substantial transactions in the Area of the contracting Party associated with furtherance of the business; (4) to pay taxes to the treasury of that Contracting Party in relation to profits earned from these transactions; and (5) to engage in procurement locally of inputs for the business.*
>
> *The world "substantial" indicates that merely "some" or "transitory" business activities would not suffice. This threshold is intended to exclude companies that have some minor activities or presence in an ECT Contracting Party, but whose business activities predominantly occur elsewhere."*[97]

236. On the relationship between the holding companies and the concept of *"substantial economic activity",* it is interesting to refer to *Pac Rim v. El Salvador case*, which considered whether a holding company carried out substantial economic activity:

> *"It will be recalled that the first condition in CAFTA Article 10.20.2 addresses "substantial business activities in the territory" of the USA. In the Tribunal's view,*

[97] *"Investment protection and the Energy Charter Treaty"*, Graham Coop and Clarisse Ribeiro, Ed. Har /Cdr, 30 December 2008. Page 20. RL-0075

the Claimant cannot here attribute geographical activities to the Claimant "in the territory" of the USA when those same activities (including their location) are not materially different from its earlier insubstantial activities as a company in the Cayman islands."[98]

237. The Arbitral Tribunal reaches this conclusion after incorporating an extract of the Claimant's witness to their analysis in which they was asked about various issues, including: (i) whether the company had employees; (ii) if it had an office; (iii) if it had any significant activity other than holding shares; and (iv) if it had any physical existence apart from the strictly documentary.

238. They replied the above questions in the negative, the Arbitral Tribunal found that the Claimant was a "shell company with no geographical location for its nominal, passive, limited and insubstantial activities".[99]

(3.1) The Claimant does not perform a business activity and even less a "substantial" one

239. The Claimant makes a substantial effort to shed its character as a simple holding company and providing *"substantiality"* to their activity.

240. So, first, the Claimant alleges that they hold interests in several renewable energy projects through its subsidiaries[100]. However, the fact of holding interests through subsidiaries in other projects does not imply that the Claimant performs a substantial business activity. The only thing it shows is that the Claimant holds shares in other companies, which is a purely formal activity.

241. The Claimant also argues that the management of its interests is done through a Board of Directors that acts independently and actively, having meetings in their offices in the Netherlands and takes decisions[101].

242. Well, two of the four Members of the Board of Directors are Dutch and Vistra employees, a trustee service company, no solid evidence of their active participation in the discussions of the Board of Directors has been demonstrated, much less their independence. In addition, Mr. Al Ramahi acknowledges that the presence of the two directors of Dutch nationality is required for tax purposes, which demonstrates the artificiality of their appointment[102]. In order to demonstrate active participation in a board's decision making, it is necessary to examine more than one record from the Board of Directors, which may respond to a specific action and not a pattern of behaviour within a company. As Mr. Al Ramahi, his relationship with ADFEC was already addressed in

[98] *Pac Rim Cayman LLC. v. The Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections*. Paragraph 4.74. RL - 0010
[99] *Pac Rim Cayman LLC. v. The Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections*. Paragraph 4.75. RL - 0010
[100] Counter-Memorial, p. 914 (a).
[101] Ibid. p. 914 (b).
[102] Statement by Mr. Al Ramahi, p. 37.

the Memorial, being notorious and obvious[103]. Also noteworthy is the position of Mr. Hannigan, who is part of the Board of Directors of at least 8 Masdar companies[104].

243. Furthermore, in its attempt to give the appearance of substantiality to their activity, the Claimant refers to their intervention in the acquisition of companies, signing of contracts and lending[105].

244. Surprisingly, this management activity is credited solely through the Claimant's Financial Statements,[106] the minutes reflecting the study, deliberation and decision-making that would allow to verify that there are *"resident managers involved in a hands-on manner in the current decision - making of the business"* are very few. Thus, the Claimant only shows an monetary flow channelling activity proper of a *"shell company"*.

245. In addition, the Claimant refers to an alleged autonomy in financial management of investments[107]. The Kingdom of Spain does not understand to what extent the ability to decide if some funds are held in society or are returned to their shareholder reflect that we are facing a substantial economic activity. More or less flexibility in the repayment of a ADFEC loan will always be the latter's decision, which is who pays the money and who defines precisely what terms should be used. Therefore, they are not evidence of the Claimant's greater autonomy. Moreover, this alleged financial autonomy is hardly compatible with such statements as set out on page 5 of the 2013 Financial Statements:

> *"Although the Company currently has an equity deficit and negative working capital balances, management of the Company believes that the assumption of a going concern is appropriate as Abu Dhabi Future Energy Company PJSC, the parent Company, has provided the Company with a commitment for the 12 months following the signing of the 2012 financial statements in order that the Company can meet its liabilities and continue its activities without significant curtailment of operations."*[108]

246. The Claimant also refers to the use of professional services as proof of the existence of a *"substantial economic activity"*[109]. Apart from the surprisingly little quantitative significance of expenditure on these services in relation to the volume of the assets allegedly managed[110], it should be added that the use of independent professional services, such as auditors, tax consultants, notaries and lawyers is fully compatible with the absence of a substantial economic activity. The reason is that the use of such services will not be inevitably linked to the performance of an economic activity, but to the existence of a corporate structure (including a *"shell company")* and managing their needs.

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[103] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015. Paragraph 229.
[104] Screenshot of http://masdar.ae/en/masdar/detail/our-executive-team R-0186.
[105] Ibid. p. 914 (c).
[106] Statement by Mr. Al Ramahi, p. 31.
[107] Counter-Memorial, p. 914 (d).
[108] C-173, Masdar Solar & Wind Cooperatief U.A., page 5 Financial Statements.
[109] Counter-Memorial, p. 914 (e).
[110] C-173, Masdar Solar & Wind Cooperatief U.A., page 14 Financial Statements, among others.

247. Likewise, the Claimant allegedly also assumes its own financial and corporate risk, including giving guarantees to third parties[111]. Surprisingly, the Claimant intends to prove the existence of a substantial business activity and the assumption of corporate and financial risks by submitting a document dated February 2015, in which one of its subsidiaries provides a maximum guarantee of 17,500 pounds for a project, considering that the value of the investment artificially channelled through the Claimant amounts - as the latter explained - to 119 million Euros. Therefore, we are not facing a significant flow, representative of a substantial business activity on the Claimant's side, the documentation is dated even after the initiation of this arbitration.

248. The financial statements submitted by the Claimant do not shed more light on the issue. Although the Claimant claims to have itemised Financial Statements[112], the fact is that the Accounts they provided in the Dutch Commercial Register and in this arbitration are simplified accounts. It is not only relevant the low activity and operations emerging from these accounts, but the fact that they can benefit from the simplified presentation regime of financial statements, reserved for small businesses, and this despite the volume of investment channelled through the Claimant.

249. We cannot forget the fact that the Claimant has still not fulfilled their obligation to provide Financial Statements for 2014, without providing sufficient justification for this[113]. At this point we must remember that in accordance with International Accounting Standards[114], binding rules in the area of the European Union, the content of the financial statements is a fundamental information requirement to third parties.

250. Finally, the Claimant has not given any further explanation about other circumstances which also show the absence of substantial business activity, as is the fact that they do not have employees or that their head office is located in a nest of companies located in a building at Schiphol airport, where they are also domiciled a total of 673 companies.[115]

251. In conclusion, the Claimant is a holding company that is limited to the mere holding of shares and financial assets in other companies and does not perform an economic activity in the Netherlands or anywhere else, much less a "substantial business activity."

(4) Spain has successfully activated the Denial of Benefits Clause provided for in Article 17 of the ECT.

(4.1) Time in which the factual circumstances under Article 17 (1) ECT should concur to the effects of applying the Denial of Benefits Clause

[111] Counter-Memorial, p. 914 (f); statement by Mr. Al Ramahi, p. 39, C-188, Minutes of the Board of Directors of Masdar Solar, February 2015.
[112] Counter-Memorial, p. 917.
[113] Statement by Mr. Al Ramahi, p. 28.
[114] Regulation (EC) No 1126/2008 of the Commission from 3 November 2008 on certain International Accounting Standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and the Council, Annex I R-0187.
[115] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015. Paragraphs 243 - 246.

252. The objective circumstances justifying the exercise of the right provided for in Article 17 ECT must be concur at the time the Request for Arbitration is submitted. It is at this time when an investor intends to make use of their rights and, therefore, he may be refused them.

253. On this question the Arbitral Tribunal ruled on the matter of *Ulysseas, Inc. v. Ecuador, Interim Award, 28 September 2010*[116]. In this award it was noted that the circumstances justifying the application of the denial of benefits clause must be present at the time the notice of arbitration is submitted:

> *"As provided by Procedural Order No. 2 of 10 February 2010 (point 10), the date on which the conditions for a valid and effective denial of advantages are to be met in the instant case is the date of the Notice of Arbitration, i.e. 8 May 2009, this being the date on which Claimant has claimed the BIT's advantages that Respondent intends to deny".*

254. Similarly, the Arbitral Tribunal ruled *on the matter Rurelec v. Bolivia* where it noted:

> *"As a matter of fact, it would be odd for a State to examine whether the requirements of Article XII had been fulfilled in relation to an investor with whom it had no dispute whatsoever. In that case, the notification of the denial of benefits would—per se—be seen as an unfriendly and groundless act, contrary to the promotion of foreign investments. On the other side, the fulfilment of the aforementioned requirements is not static and can change from one day to the next, which means that it is only when a dispute arises that the respondent State will be able to assess whether such requirements are met and decide whether it will deny the benefits of the treaty in respect of that particular dispute."*[117]

255. In the present case, the first *Trigger letter* was received by the Kingdom of Spain on 19 February 2013. Said *Trigger letter* led to the *Request for Arbitration* which was filed on December 9, 2013.

256. Consequently, the dispute arose during 2013. It is therefore necessary to establish whether by that date the Claimant had the objective circumstances allowing to activate the Denial of Benefits Clause.

257. At this point we must note that at the time the first *Trigger letter* and the *Request for Arbitration were submitted,* the only information available to the Kingdom of Spain on the economic activity of the Claimant was the information in the Dutch records, this was also incomplete at that time as the Financial Statements of the Claimant for 2013 had not yet been submitted. During 2014, no information on the financial and economic dependence of the Claimant regarding Abu Dhabi or their control exercised over it had yet been submitted. It was not until the submission of the Memorial on the Merits on 22 January 2015, that a more accurate knowledge of the subjective and objective elements affecting this Preliminary Objection was acquired.

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[116] *Ulysseas, Inc. v. Ecuador, Interim Award, UNCITRAL Case*, Interim Award, 28 September 2010. Paragraph 174. RL-0028.

[117] *Guaracachi America Inc. & Rurelec, Plc. v. Bolivia, PCA Case No. 2011-17*. Award on 31 January 2014. Paragraph 379. RL-0011.

258. This has forced the Kingdom of Spain not to exercise their right to denial of benefits until the presentation of the Counter-Memorial, as otherwise provided for by ICSID rules and the arbitration doctrine, as discussed later.

(4.2) Activating the Denial of Benefits Clause in the Counter-Memorial to the Claim

259. The Kingdom of Spain use the power provided by Article 17 of the ECT in its Counter-Memorial. Specifically, that statement stated that:

> *"When these circumstances concur, the benefits of ECT must be denied to Masdar Solar as provided by Article 17 of the ECT. Denial that, to all intents, is realised in this Counter-Memorial"*[118]

260. This arbitration must be processed in accordance with the ICSID Arbitration Rules. These rules are clear about the time of submission for different jurisdictional objections. Specifically, Rule 19 of the ICSID Arbitration Rules states:

> *"Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time."* [119]

261. As explained in the Counter-Memorial to the Claim:

> *"The Kingdom of Spain could only verify the concurrence of the circumstances set out in Article 17 of ECT after careful consideration of the Statement of Claim"*[120]

262. Therefore, the Kingdom of Spain simply complied with these applicable procedural rules.

263. The Arbitral Tribunal of case *Ulysseas, Inc* regarding this same issue said that the Denial of benefits Clause can be articulated with the response to the claim:

> *"The first question concerns whether there is a time-limit for the exercise by the State of the right to deny the BIT's advantages. In the Tribunal's view, since such advantages include BIT arbitration, a valid exercise of the right would have the effect of depriving the Tribunal of jurisdiction under the BIT. According to the UNCITRAL Rules, a jurisdictional objection must be raised not later than in the statement of defence (Article 21(3)). By exercising the right to deny Claimant the BIT's advantages in the Answer, Respondent has complied with the time limit prescribed by the UNCITRAL Rules. Nothing in Article I(2) of the BIT excludes that*

[118] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, para. 253.
[119] ICSID Arbitration Rules, Rule 41 (1).
[120] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, para. 194.

the right to deny the BIT's advantages be exercised by the State at the time when such advantages are sought by the investor through a request for arbitration".[121]

264. In the same vein the Arbitral Tribunal the case *of Empresa Eléctrica del Ecuador, Inc* said:

> *"What Ecuador did was to invoke a clause in the Treaty, by which both the United States and Ecuador reserved "the right to deny to any company the advantages" of the Treaty "if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations" (Article I (2) of the BIT). Since EMELEC is a "company of the other Party," Ecuador has the power to deny it the advantages of the BIT if the company has no substantial business activities in the United States. The Tribunal considers that Ecuador announced the denial of benefits to EMELEC at the proper stage of the proceedings, i.e. upon raising its objections on jurisdiction. If the Tribunal should agree to hear the merits of the present case, only then would it be appropriate to examine the substantive requirements for the denial of benefits, i.e. the determination of whether EMELEC has substantial business activities in the territory of the United States." (Emphasis added)*[122]

265. The Arbitral Tribunal of the Case *Guaracachi & Rurelec v. Bolivia* also had an opportunity to rule on this issue. This award states:

> *"On the contrary, the Tribunal agrees that the denial can and usually will be used whenever an investor decides to invoke one of the benefits of the BIT. It will be on that occasion that the respondent State will analyse whether the objective conditions for the denial are met and, if so, decide on whether to exercise its right to deny the benefits contained in the BIT, up to the submission of its statement of defence."*[123]

266. In this sense, we must not forget the conclusions reached in the case

> *"Under ICSID Arbitration Rule 41, any objection by a respondent that the dispute is not within the jurisdiction of the Centre, or, for other reasons, is not within the competence of the tribunal "shall be made as early as possible" and "no later than the expiration of the time limit fixed for the filing of the counter-memorial". […] In the Tribunal´s view, the Respondent has respected the time-limit imposed by ICSID Arbitration Rule 41."*[124]

267. It is also appropriate to mention the thoughts of Graham Coop and Clarisse Ribeiro:

> *"A plain Reading of Article 17(1) indicates that a Contracting Party to the ECT can exercise its Article 17(1) right to deny at any time and, most obviously, it ought to be*

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[121] *Ulysseas, Inc. v. Ecuador, Interim Award, UNCITRAL Case, Interim Award, 28 September 2010*. Paragraph 172. RL-0028.

[122] *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador, ICSID Case No. ARB/05/9*, Award, 2 June 2009. Paragraph 71. RL-0093.

[123] Guaracachi America Inc. & Rurelec, Plc. v. Bolivia, PCA Case No. 2011-17. Award on 31 January 2014. Paragraph 378. RL-0011

[124] *Pac Rim Cayman LLC. v. The Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections*. Paragraph 4.85. RL -0010.

entitled to exercise that right at the time the investor actually brings a claim to enforce the protections (or "advantages") of Part III of the treaty. Before that moment, a State will almost certainly have had no cause, nor any opportunity […] even to consider the status of any particular investor, nor their underlying ownership or control structure, or the extent of their business activities in the territory in which they are incorporated"[125].

268. The same authors go further and, in relation to the prior obligation analysis in the *Plama* case, they state:

> *"By insisting that the host State must notify the investor prior to its investment that it will exercise the right to deny advantages, the Tribunal in Plama appears to have placed a considerable burden on the host State. The effect of the decision means that the Tribunal has taken "something that the investor can know quite readily, i.e. ownership, control, citizenship, and nationality, and placed the burden of knowledge on the regulator, which can make such determinations only with some difficulty. "Some difficulty" may be an understatement."*[126]

269. Consequently, the possibility of activating the Denial of Benefits Clause in the Response to the Claim is supported by the rules governing this arbitration (ICSID Arbitration Rules) and endorsed by the arbitral doctrine.

270. Moreover, the activation of the Denial of Benefits Clause requires it done giving reasons. At this point, as stated above, the Kingdom of Spain did not have the information to determine the application of Article 17 of the ECT until this arbitration was well advanced. It must be noted that the presentation of the Memorial on the Merits took place on 22 January 2015.

(4.3) Effects of the activation of the Denial of Benefits Clause

271. As already stated, the ECT establishes a direct connection between Article 17 and Article 26 of the ECT. From this connection it is clear that the ECT Contracting Parties have only consented to arbitration regarding *"an Alleged breach of an obligation of the former [Contracting Party] under Part III".*

272. If as a result of the application of Part III of the ECT, where Article 17 is found, the application of Part III does not take place, no regulated obligation can be derived from said Part III. Therefore, if no obligation can be derived from Part III, the Arbitral Tribunals shall have no jurisdiction to hear the case due lack of consent from the Contracting Parties.

273. The terms in which Articles 17 and 26 of the ECT have been drafted are attributed to an Arbitral Tribunal to review whether the circumstances that enable the application of Article 17 concur in a particular case. However, if the Arbitral Tribunal were to conclude that the circumstances of Article 17 ECT concur, they should determine its lack of jurisdiction to hear the case "rationis voluntatis".

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[125] *"Investment protection and the Energy Charter Treaty"*, Graham Coop and Clarisse Ribeiro, Ed. Har /Cdr, 30 December 2008. Page 35. RL-0075

[126] Ibid. Page 41.

274. The Tribunal shall apply the will of the Contracting Parties to the Treaty without being able to introduce additional requirements to that will. In this regard, Graham Coop and Clarisse Ribeiro state:

> *"The express limits imposed on the State's discretion ought not to go beyond the requirements enunciated in Article 17 (1)"*[127]

275. If the application of Article 17 was projected only to the future, as requested by the Claimant, it would be introducing an additional limitation not provided for in the wording of Article 17 ECT.

276. If the ECT signatory Parties had wished that this effect should occur, they had multiple opportunities to have implemented it, among others: (i) avoid referring to "Part III" in Article 26; (ii) expressly list Articles 10, 11, 12, 13 and 14 of the ECT in Article 26; extract Articles 16 and 17 from Part III; or even expressly state in Article 17, 26, or both, the corresponding limitation on the projection of the purposes of Article 17. But none of this was done.

277. In this regard, the Tribunal on the matter *Ulysseas, Inc* pointed out that:

> *"A further question is whether the denial of advantages should apply only prospectively, as argued by Claimant, or may also have retrospective effects, as contended by Respondent. The Tribunal sees no valid reasons to exclude retrospective effects. In reply to Claimant's argument that this would cause uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made its the investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State"*[128]

278. Along the same lines that the Tribunal pointed out on the *Guaracachi* case when stating that:

> *"The same must be said in relation to the supposedly retroactive application of the clause. The Tribunal cannot agree with the Claimants when they argue that the Respondent is precluded from applying the denial of benefits clause retroactively. The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is "activated" when the benefits are being claimed".*[129]

279. In view of the foregoing, activating the Denial of Benefits Clause cannot have a simple prospective effect as the Claimant points out.

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[127] *"Investment protection and the Energy Charter Treaty"*, Graham Coop and Clarisse Ribeiro, Ed. Har /Cdr, 30 December 2008. Page 35. RL-0075

[128] *Ulysseas, Inc. v. Ecuador, Interim Award, UNCITRAL Case, Interim Award, 28 September 2010*, paragraph 173. RL-0028.

[129] *Guaracachi America Inc. & Rurelec, Plc. v. Bolivia, PCA Case No. 2011-17*, Award on 31 January 2014, paragraph 376. RL-0011.

280. In short, in view of the foregoing, it must be concluded that the Kingdom of Spain has successfully activated the Denial of Benefits Clause provided for in Article 17 of the ECT in this case.

(5) Conclusion

281. In view of the above, the Arbitral Tribunal is requested once more to declare its lack of jurisdiction to consider this dispute under the activation of the denial of benefits clause by the Kingdom of Spain under Article 17 of the ECT.

E. Lack of jurisdiction of the Arbitral Tribunal to hear an alleged breach by the Kingdom of Spain of obligations derived from Article 10(1) of the ECT through the introduction of the TVPEE by Act 15/2012: absence of consent from the Kingdom of Spain to submit this issue to arbitration given that, pursuant to Article 21 of the ECT, section (1) of Article 10 of the ECT does not generate obligations regarding taxation measures of the Contracting Parties

(1) Introduction

282. In its Memorial on the Merits[130], the Claimant submitted that the Kingdom of Spain has allegedly breached section (1) of Article 10 of the ECT by introducing the Tax on the value of the production of electrical energy (TVPEE) through Act 15/2012, of 27 December 2012, on tax measures for energy sustainability (Act 15/2012).

283. In the Memorial on Jurisdiction[131], the Kingdom of Spain submitted that, with all due respect, the Arbitral Tribunal lacks jurisdiction to hear this dispute. This is because section (1) of Article 10 of the ECT does not apply to taxation measures of the Contracting Parties in accordance with Article 21 of the ECT. Therefore, the Kingdom of Spain has not provided its consent to submitting that dispute to arbitration.

284. In particular, the main arguments in this regard submitted by the Kingdom of Spain in the said Memorial, to whose detailed explanation we refer, were, in summary, the following:

- In accordance with Article 26 of the ECT, the Kingdom of Spain has only provided its consent to submit to arbitration disputes related to alleged breaches of obligations derived from Part III of the ECT.[132]

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[130] Memorial on the Merits, of 22 January 2015, paragraphs 22(a)(ii), 216 to 218 and 504(a).

[131] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, section III.E, paragraphs 256 to 363.

[132] ECT, Article 26:

"Article 26. Settlement of disputes between an investor and a Contracting Party.

1. Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

2. If such disputes cannot be settled in accordance with the provisions of section 1 within three months from the date on which either party to the dispute requested an amicable settlement, the investor concerned may choose to submit a dispute for settlement:

[…] or

- In accordance with Article 21 of the ECT, section (1) of Article 10 of the ECT, invoked by the Claimant, although located in Part III of the ECT, does not generate obligations regarding taxation measures of the Contracting Parties.

  In this regard, pursuant to Article 21 of the ECT, on taxation, taxation measures are excluded from the scope of application the ECT (*"taxation carve-out")* with certain exceptions (*"claw-backs")* stipulated in such Article 21. Among those exceptions section (1) of Article 10 of the ECT is not found. The only sections of Article 10 that do apply, if the case, to taxation measures of the Contracting Parties are sections (2) and (7), which are not invoked by the Claimant.[133]

- The provisions relating to the TVPEE of Act 15/2012 are a taxation measure for the purposes of the ECT. Pursuant to Article 21(7) of the ECT, for the purposes of the said Article 21, the term "taxation measure" includes any provision relating to taxes of the domestic law of the Contracting Party. In the present case we stand before provisions relating to a tax -the TVPEE- of the domestic law of the Kingdom of Spain -Act 15/2012-.

285. In its Counter-Memorial on Jurisdiction[134], the Claimant tries to avoid the *taxation carve-out* stated by Article 21 of the ECT with respect to section (1) of Article 10 of the ECT, by attempting to argue that allegedly the TVPEE is not a taxation measure for the purposes of the ECT. To do so, the Claimant seeks to sustain that the TVPEE is allegedly not a *bona fide* taxation measure.

286. In view of all of the above, the fundamental issue is, therefore, to determine whether the provisions relating to the TVPEE of Act 15/2012 are a taxation measure for the purposes of the ECT, because if they are, they are excluded from the scope of application of section (1) of Article 10 of the ECT invoked by the Claimant.

287. As the Kingdom of Spain has already stated in its Memorial on Jurisdiction and as we will develop further below, the provisions relating to the TVPEE of Act 15/2012 are, in any case, a taxation measure for the purposes of the ECT.

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c) In accordance with the following sections of this Article. [referred to international conciliation or arbitration] *[...]. "* (emphasis added) RL-0002

[133] ECT, Article 21:

"Article 21. Taxation.

1. *Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.*

2. Article 7(3) shall apply to Taxation Measures other than those on income or on capital, except that such provision shall not apply to: […]

3. Article 10 (2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:[…]

4. Article 29(2) to (6) shall apply to Taxation Measures other than those on income or on capital.

5. a) Article 13 shall apply to taxes. […]" (emphasis added) RL-0002.

[134] Reply on the Merits and Counter-Memorial on Jurisdiction, of 3 March 2016, section III(13), paragraphs 930 to 1004.

(2) The provisions relating to the TVPEE of Act 15/2012 are a taxation measure for the purposes of Article 21 of the ECT

(2.1) Pursuant to Article 21(7) of the ECT, for the purposes of Article 21 of the ECT the term taxation measure includes any provision relating to taxes of the domestic law of the Contracting Party

288. As the Kingdom of Spain has already stated in its Memorial on Jurisdiction, Article 21 of the ECT itself, on taxation, refers to what should be understood as a "taxation measure" for the purposes of said article. Thus, section (7)(a)(i) of Article 21 of the ECT provides that the term "taxation measure" includes any provisions relating to taxes of domestic law of the Contracting Party:

> *"7. For the purposes of this Article:*
>
> *a) The term "taxation measure" includes:*
>
> *i) **Any provision relating to taxes of the domestic law of the Contracting Party** or of a political subdivision thereof or a local authority therein; and;*
>
> *ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound."*[135] *(emphasis added)*

289. As also stated by the Kingdom of Spain in its Memorial on Jurisdiction, there is no doubt that the provisions relating to the TVPEE of Act 15/2012 are provisions relating to a tax of the domestic law of a Contracting Party given that: i) Act 15/2012 is part of the domestic law of the Kingdom of Spain, and ii) the provisions relating to the TVPEE contained in Act 15/2012 are provisions relating to a tax, both if we use the concept of tax under Spanish Law as well as if we use the concept of tax under International Law.

290. In order to avoid unnecessary repetition, we refer to what has been stated in this regard in the Memorial on Jurisdiction[136]. However, we consider it appropriate to recall some relevant facts in this regard below.

(2.2) Act 15/2012 is part of the domestic law of the Kingdom of Spain

291. Act 15/2012 is a domestic law of the Kingdom of Spain. Act 15/2012 was passed by the Parliament of the Kingdom of Spain (comprised of the Congress of Deputies and the Senate) in accordance with the corresponding ordinary legislative procedure, regulated under Spanish Law[137]. Act 15/2012 was passed in exercise of the legislative authority and

[135] Article 21 (7)(a) of the ECT. RL-0002

[136] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 16 September 2015, paragraphs 289-356.

[137] The procedure of processing and approval of Act 15/2012 by the Spanish Congress of Deputies and the Senate is public and can be consulted in detail on the website of the Congress of Deputies and of the Senate. R-0037

primary power to impose taxes through law that the Spanish Constitution grants the Spanish State[138].

(2.3) The provisions relating to the TVPEE contained in Act 15/2012 are provisions relating to taxes

292. The provisions of Act 15/2012 relating to the TVPEE are provisions relating to taxes, given that the TVPEE is a tax both under the Domestic Law of the Kingdom of Spain as well as under International Law.

(a) The TVPEE is a tax under the Domestic Law of the Kingdom of Spain

293. From the perspective of the Domestic Law of the Kingdom of Spain, there is no doubt that the TVPEE is a tax.

294. Firstly, it must be remembered that the Spanish Constitutional Court itself has ratified the taxation nature of the TVPEE and its conformity with the Spanish Constitution in its Judgement of 6 November 2014[139]. Through this Judgement, the Spanish Constitutional Court, the supreme interpreter of the Spanish Constitution, dismissed the unconstitutionality appeal filed by the Andalusian Regional Government against the provisions of Act 15/2012 concerning the taxable event, the taxpayers and the tax rate of the TVPEE. Thus, the Spanish Constitutional Court has ratified that the aforementioned regulation is not discriminatory for renewable producers and that it is perfectly valid and in accordance with the Spanish Constitution.

295. Secondly, it must be remembered that the Spanish High Court has declared in various Judgements[140] that Order HAP/703/2013[141], which governs the tax form (Form 583) to be used for the self-assessment and payment to the Public Treasury of the TVPEE, is perfectly lawful.

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[138] Spanish Constitution, Article 66:
"*1. The Parliament represents the Spanish people and shall consist of the Congress of Deputies and the Senate.*
2. The Parliament exercises the legislative power of the State, […].". R-0038
Spanish Constitution, Article 133:
"1. The primary power to establish taxes corresponds exclusively to the State by means of law.". R-0038

[139] Judgement 183/2014, from 6 November 2014 issued by the Constitutional Court Plenary in unconstitutionality appeal number 1780-2013 promoted by the Cabinet of the Andalusian Regional Government with regard to articles 4, 5 and 8 of Act 15/2012 (and other regulations). R-0051

[140] The High Court has dismissed various contentious-administrative appeals brought against Ministerial Order HAP/703/2013, of 29 April 2013, and has declared that this Order corresponds to the Law. In this regard, the following Judgements of the High Court may be cited: i) Judgement of the High Court, of 2 June 2014, dismissing contentious-administrative appeal 297/2013 (R-0042), ii) Judgement of the High Court, of 2 June 2014, dismissing contentious-administrative appeal 298/2013 (R-0043), and iii) Judgement of the High Court, of 30 June 2014, dismissing contentious-administrative appeal 296/2013 (R-0044).

[141] Order HAP/703/2013, of 29 April, which approves Form 583 "Tax on the Value of the Production of Electrical Energy. Self-assessment and Installment Payments", and establishing the form and procedure for its submission. R-0041

296. Thirdly, it should also be remembered that the Institute of Accounting and Auditing (ICAC), an autonomous body of the Spanish State Administration that answers queries on the application of auditing and financial reporting standards, established in consultation of June 2013 that:

> *"The Tax on the value of the production of electrical energy is a tax of direct character and real nature [...] having to be recorded as an expense in the profit and loss account; the Other Taxes 631 account may be used for such purpose."*[142]

297. Finally, we must also remember that the Spanish General Directorate of Taxes, whose duties include interpreting taxation legislation, has stated that for the TVPEE taxpayers who are also taxpayers of the Corporations Tax, the TVPEE is a tax that is considered a deductible expense in the Corporations Tax[143].

298. Thus, there is no doubt that the TVPEE is a tax under Spanish Law.

299. The relevance of all the pronouncements of the Courts, bodies and organisms mentioned above is indisputable. As stated by the *ad hoc* Committee in the decision on the application for the annulment of the award in the case *Hussein Nuaman Soufraki v. United Arab Emirates:*

> *"It is the view of the Committee that the Tribunal had to strive to apply the law as interpreted by the State's highest court, and in harmony with its interpretative (that is, its executive and administrative) authorities."*[144]

(b) The TVPEE is a tax under International Law

300. In addition, there is no doubt that the TVPEE is a tax also from the perspective of International Law.

301. Firstly, we must remember that the TVPEE is a tax according to the concept of tax under International Law used by arbitration case-law.

302. As already analyzed in the Memorial on Jurisdiction, Arbitral Tribunals have stated in numerous awards[145] that the concept of tax has the following defining characteristics:

- That the tax is established by Law,

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[142] Consultation 1, no. BOICAC 94/June 2013. R-0046

[143] General Directorate of Taxation's reply, of 23 December 2014, to the binding Tax Consultation V3371-14. R-0049

[144] Decision of 5 June 2007 of the Ad Hoc Committee on the application for the annulment of the award in the case *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 para. 97. RL-0076

[145] *EnCana Corporation v. Republic of Ecuador,* LCIA Case No. UN 3481, Award of 3 February 2006, para 142. RL-0032

Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award 18 August 2008, para 174. RL-0033

Burlington Resources Inv. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, of 2 June 2010, paras 164 and 165. RL-0034

- That such Law imposes an obligation on a class of people, and

- That such obligation involves paying money to the State for public purposes.

303. All these defining characteristics are met in relation to the TVPEE:

- The TVPEE was established by Law: Act 15/2012 passed by the Spanish Congress of Deputies and the Senate.

- Act 15/2012 imposes an obligation on a class of people: all those who carry out the activities of production and incorporation of electric power into the Spanish electricity system, and

- Such obligation involves paying money to the State for public purposes: as already seen, the TVPEE is a source of public revenue for the Spanish State that is included in the General Budgets of the Spanish State every year and that, together with the rest of State revenue, contributes to form the State resources with which public expenditure is financed.[146] In addition, in accordance with the Fifth Additional Provision of Act 17/2012, an amount equivalent to the estimated annual revenue arising from the taxes included in Act 15/2012, among them the TVPEE, will be allocated to finance the costs of the electricity system concerning the promotion of renewable energies.[147]

304. Therefore, there is no doubt that the TVPEE is a tax according to the concept of tax under International Law repeatedly used by arbitration case-law.

305. In addition, we must also remember that the European Commission, specifically its Taxation and Customs Union General Directorate (TAXUD), has ratified the tax nature of the TVPEE and its conformity with EU Law, closing the pilot procedure of request for information to the Kingdom of Spain that had been initiated, not ex officio, but at the request of some individuals, with respect to this tax.[148]

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[146] Extracts of the General Budgets of the Spanish State for 2013 -the first year the TVPEE was in force-, 2014, 2015 and 2016. R-0053, R-0054, R-0052 and R-0188.

[147] Law 17/2012 of 27 December, on the General Budget of the State for 2013, Fifth Additional Provision:

"Fifth. Contributions to the Financing of the Electricity Sector

1. In the Laws of General State Budgets of each year an amount equivalent to the sum of the following will be used to finance the costs of the Electricity Sector relating to the promotion of renewable energies, provided for in the Electricity Sector Law:

a) The estimate of the annual collection derived from taxes included in the Act on tax measures for energy sustainability [Act 15/2012].

b) 90% of the estimated income from auctioning greenhouse gas emission rights, with a maximum of EUR 450 million.

2. 10% of the estimated income from auctioning greenhouse gas emission rights, with a maximum of EUR 50 million, is earmarked to the policy of combating climate change." (emphasis added) R-0118

[148] Case file of the procedure EU Pilot 5526/13/TAXU relating to the TVPEE, which records the closure thereof by the European Commission in the absence of evidence that there is an infringement of EU Law by the TVPEE (we inform you that the aforementioned document is confidential and that the European Commission has only given its consent for it to be used in this arbitration. The identity of officials has been redacted -"deleted"- for reasons of data protection). R-0189.

306. Thus, there is also no doubt that the TVPEE is a tax under International Law.

307. In summary, in view of the above, it is concluded that the TVPEE is a tax both from the perspective of Spanish Domestic Law as well as from the perspective of International Law and that it has been establcished by a Domestic Law of the Kingdom of Spain: Act 15/2012. In other words, both from the point of view of Domestic Law as well as that of International Law, the provisions relating to the TVPEE of Act 15/2012 are provisions relating to taxes of the Domestic Law of the Kingdom of Spain.

308. Consequently, under the cited Article 21 (7)(a)(i) of the ECT, we are standing before a taxation measure for the purposes of Article 21 of the ECT.

(3) In the hypothetical case that the Arbitral Tribunal considered that in order to determine that we stand before a taxation measure for the purposes of the ECT the additional anaylisis of the TVPEE raised by the Claimant is necessary, it must be concluded that the TVPEE is, in any case, a *bona fide* taxation measure

309. As we have analysed, the provisions relating to the TVPEE of Act 15/2012 are a taxation measure for the purposes of the ECT in accordance with Article 21(7)(a)(i) of the ECT.

310. However, the Claimant considers that, in order to determine that we stand before a taxation measure for the purposes of the ECT, the above is not enough and that it is necessary to carry out additional analysis of the TVPEE, which involves to a certain extent examining the economic effect of this tax.

311. Well, in order to determine that we stand before a taxation measure for the purposes of the ECT that additional analysis of the TVPEE that the Claimant seeks is not appropriate.

312. First, the Claimant relies on the *Yukos v. Russian Federation* award to analyse the good faith of this taxation measure. Such award has been recently annulled. In any case, the good faith analysis of taxation measures conducted in the *Yukos v. Russian Federation* case, on which the Claimants rely, is not applicable to the present case. The Arbitral Tribunal of the *Yukos v. Russian Federation* case made it clear that in such case *"extraordinary circumstances"* concurred, which do not concur in the present case. In this regard, said Arbitral Tribunal considered as extraordinary circumstances that the taxation measures pursue a purpose that is entirely unrelated to the purpose of obtaining revenue for the State, such as the destruction of a company or the elimination of a political opponent:

> *"Secondly, the Tribunal finds that, in any event, the carve-out of Article 21(1) can apply only to bona fide taxation actions, i.e., actions that are motivated by the purpose of raising general revenue for the State. By contrast, actions that are taken only under the guise of taxation, but in reality aim to achieve an* ***entirely unrelated purpose*** *(such as the* ***destruction of a company or the elimination of a political***

opponent) *cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1). As a consequence, the Tribunal finds that it does indeed have "direct" jurisdiction over claims under Article 13 (as well as Article 10)* ***in the extraordinary circumstances of this case****."*[149] *(emphasis added)*

313. In addition, the good faith analysis of the TVPEE intended by the Claimant involves examining the economic effects of this tax. In this regard, we should remember what the Arbitral Tribunal in the *EnCana v. Ecuador* case stated:

> *"The question whether something is a tax measure is primarily a question of its* ***legal operation, not its economic effect****.[…] The economic impacts or effects of tax measures may be unclear and debatable; nonetheless a measure is a taxation measure if it is part of the regime for the imposition of a tax."*[150] *(emphasis added)*

314. As we have examined, there is no doubt that in the present case we stand before a taxation measure in view of its legal operation. Thus, in order to determine that we stand before a taxation measure for the purposes of the ECT it is not appropriate to examine the economic effect of the TVPEE, as the Claimant is seeking.

315. In any case, even in the hypothetical event that the Arbitral Tribunal considered that, in order to determine that we stand before a taxation measure for the purposes of the ECT, an analysis of the TVPEE as that intended by the Claimant must be conducted, it must be concluded that the TVPEE is, in any case, a *bona fide* taxation measure.

316. According to the Claimant[151], the TVPEE is allegedly not a *bona fide* taxation measure for the following reasons: i) the TVPEE is addressed to all power generators, both conventional and renewable, without any distinction between both technologies; ii) the TVPEE is allegedly discriminatory against renewable producers by comparison to conventional producers, due to the former not being able to pass on at least part of the cost of the tax to consumers; and iii) the TVPEE allegedly constitutes a disguised tariff cut for renewable energy facilities.

317. As we shall see below, these arguments by the Claimant are utterly without merit.

(3.1) The TVPEE applies to all energy producers, both renewable and conventional

318. The TVPEE is, as has already been stated, a tax of general application. That is, it applies to all energy production facilities, both renewable and conventional.

319. In addition, Act 15/2012 grants exactly the same treatment to all TVPEE taxpayers, whether they are renewable or conventional producers.

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[149] *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award of 18 July 2014, paragraph 1407. RL-0077.

[150] *EnCana Corporation v. Republic of Ecuador,* LCIA Case No. UN 3481, Award of 3 February 2006, paragraph 142. RL-0032

[151] Memorial on the Merits, of 22 January 2015, paragraphs 216 to 218 and Reply on the Merits and Counter-Memorial on Jurisdiction, of 3 March 2016, paragraphs 930 to 1004.

320. One of the arguments used by the Claimant to try to sustain that the TVPEE is allegedly not a bona fide taxation measure is that this tax does not include distinctions between renewable energy producers and conventional producers.[152] In other words, it appears that the Claimant is attacking the measure's good faith because no different treatment has been granted in the TVPEE for renewable producers through, for instance, exemptions, reductions or deductions in the tax.

321. The fact that the TVPEE applies to all producers, both renewable as well as conventional, and the fact that Act 15/2012 grants the same treatment to all such producers cannot be construed in any way as a reason for considering that the TVPEE is not a *bona fide* taxation measure.

(a) The general application of the TVPEE is a legitimate option of the legislating State, as has been recognised by the Spanish Constitutional Court, and is linked to the environmental nature of the TVPEE

322. We must remember that the Spanish Constitution grants the State the originary power to establish taxes:

> *"The primary power to establish taxes corresponds exclusively to the State by means of law."*[153]

323. When establishing taxes, the State must respect a number of principles also enshrined in the Spanish Constitution. One of these principles is the principle of generality, according to which everyone must contribute to sustaining public expenditure:

> *"Everyone shall contribute to sustain public expenditure according to their economic capacity [...]"*[154]

324. This principle of generality does not mean that exemptions, reductions, deductions or other tax benefits cannot be established in the configuration of a tax. However, the decision on whether or not to establish such tax benefits is a choice made by the Spanish legislator, always in accordance with applicable law.

325. It cannot be argued in any way that the TVPEE is not a *bona fide* taxation measure because of the fact that Act 15/2012 granted the same treatment to all those obliged to pay the tax, without including tax benefits for renewable producers.

326. The Spanish Constitutional Court, the supreme interpreter of the Spanish Constitution, ruled in this sense in its Judgement of 6 November 2014 that dismissed the unconstitutionality appeal brought by the Andalusia Government against various provisions of Act 15/2012.

327. In this Judgement of 6 November 2014, the Spanish Constitutional Court stated that the Spanish Constitution does not grant a right to unequal regulatory treatment and that the

[152] Memorial on the Merits, of 22 January 2015, paragraph 217(i).
[153] Spanish Constitution of 1978, Article 133(1). R-0038
[154] Spanish Constitution of 1978, Article 31(1). R-0038

generalised application of the TVPEE responds to a choice of the legislator, which has a wide margin for establishing and configuring the tax:

> *"[...] we shall begin by judging Arts. 4, 5 and 8 of Act 15/2012, which respectively regulate the taxable event, the taxpayers and the tax rate of the tax on the value of the production of electric energy, a tax of direct character and real nature that taxes the activities of production and incorporation of electric power into the electricity system, measured at power station busbars, through any type of generation facilities.*
>
> *The Counsel for the Regional Government of Andalusia has no objection to the establishment by the State of this tax figure. What is questioned is that the tax does not establish differences between the different electric power producers, specifically, between those that use renewable energy sources and those that do not [...]*
>
> *[...] what is questioned is that the new tax regime worsens the situation of renewable energy producers, due to not discriminating on the basis of the sources used for the production of electric power.*
>
> *As we shall see, such complaint, under the terms in which it is made, cannot be accepted. Firstly, because it refers to a complaint of unconstitutionality due to non differentiation, when it is the view of this Court that Art. 14 SC [[155]] is limited to prohibiting discriminatory or unfounded distinctions, but it does not enshrine a right to unequal treatment, nor does it cover the lack of distinction between unequal cases, there being no subjective right to unequal regulatory treatment (STC 38/2014, of 11 March, FJ 6 with quote from STC 198/2012, of 6 November FJ 13). Secondly, the contested provisions do not exceed the freedom of configuration granted to the legislator, to which nothing prevents the use of taxes as an instrument of economic policy on a particular sector (STC 7/2010, of 27 April, FJ 5), that is, with non-tax or management purposes [STC 53/2014, of 10 April, FJ 6 c)]. The generalised application of the tax in question corresponds to a choice made by the legislator, which, while respecting constitutional principles, has a wide margin for establishing and configuring the tax. This margin cannot be constrained by a demand for differentiation that is not constitutionally required, even if it seems convenient or appropriate to the appellant [...]"*[156]

328. In addition, the fact that Act 15/2012 establishes the TVPEE on all electric power production facilities, whatever the technology used, is linked to the environmental character of the tax.

329. All facilities for electric power generation, whatever the technology used in the power production, entail two kinds of environmental effects: on the one hand, the very existence of the facilities involves environmental effects and, on the other hand, the electrical energy transport and distribution networks that allow evacuating and distributing the electric energy produced in the facilities also entail environmental effects. It is thus consistent that the TVPEE is applied to all production facilities.

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[155] Article 14 of the Spanish Constitution of 1978: *"Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance."* R-0038

[156] Judgment 183/2014, from 6 November 2014 issued by the Constitutional Court Plenary which rejects unconstitutionality appeal number 1780-2013 promoted by the Cabinet of the Andalusian Regional Government with regard to articles 4, 5 and 8 of Act 15/2012 (and other regulations). R-0051

330. This is expressly stated in the Preamble to Act 15/2012 when referring to the TVPEE:

> *"This tax shall be levied on the economic capacity of the electric power producers whose facilities generate significant investments in electrical energy transport and distribution networks to be able to evacuate the energy the energy flowing to them, and that involve, by themselves or as a result of the existence and development of such networks, undoubted environmental effects, as well as the generation of highly relevant costs required for maintaining a guaranteed power supply. The tax shall be applied to the production of all generation facilities."*[157] *(emphasis added)*

331. In short, the fact that Act 15/2012 configures the TVPEE as a tax of general application, applicable to both conventional and renewable producers, granting the same treatment to all such taxpayers without including tax benefits for renewable producers, cannot in any way be construed as a reason to deny the *bona fide* nature of this taxation measure.

(3.2) The TVPEE does not discriminate against renewable producers regarding repercussion

332. The repercussion of a tax can be defined as the transfer of the amount of that tax by the taxpayer to another person.

333. In general, the repercussion of a tax can be of two types: legal repercussion and economic repercussion. The difference between them is as follows:

a) Legal repercussion is that which occurs because the law requires it. The legal repercussion is not inherent to direct taxes, i.e. taxes levying direct manifestations of economic capacity, such as obtaining income or holding capital. This is reflected in *Black*'s *Law Dictionary*: "***direct tax.*** *[...] A direct tax is presumed to be borne by the person upon whom it is assessed, and not "passed on" to some other person.*"[158]. In contrast, the legal repercussion is typical of indirect taxes, i.e. taxes levying indirect manifestations of economic capacity, as is consumption, for example, the Value Added Tax (VAT). This is also reflected in *Black*'s *Law Dictionary:* "***indirect tax.*** *[...] An indirect tax is often presumed to be partly or wholly passed on from the nominal taxpayer to another person.*"[159]

b) Economic repercussion depends on the choice made by the businessperson, who decides whether or not to pass on the tax via the price, depending on their cost policies and structure.

334. As we shall see, the TVPEE does not discriminate against renewable producers from either the perspective of legal repercussion or from the perspective of economic repercussion.

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[157] Act 15/2012, of 27 December, on tax measures for energy sustainability, published in the Official State Gazette of 28 December 2012, Preamble. R-0018

[158] *Black´s Law Dictionary*, Ninth Edition, Bryan Garner (Editor in Chief), page 1595. RL-0078.

[159] *Black's Law Dictionary*, Ninth Edition, Bryan Garner (Editor in Chief), page 1596. RL-0078.

(a) Act 15/2012 grants the same treatment to all taxpayers, including in terms of repercussion

335. Firstly, there is no discrimination against renewable producers from the perspective of legal repercussion.

336. This is because Act 15/2012 grants the same treatment to all TVPEE taxpayers, whether they are renewable or conventional producers. Such equal treatment is also granted in terms of repercussion.

337. The TVPEE is a direct tax, levying a direct manifestation of the economic capacity of those obliged to pay it, as is obtaining income.[160]

338. Given the direct tax nature of the TVPEE, and being typical of direct taxes the lack of legal repercussion of their amount as we have stated, Act 15/2012 does not establish the repercussion of the amount of the TVPEE by any of the TVPEE taxpayers -whether they are conventional producers or renewable producers- to other persons.

(b) The TVPEE is one of the costs that are remunerated to renewable producers through the specific remuneration they receive. Consequently, the economic impact of the TVPEE on those renewable producers is neutralised

339. Secondly, there is no discrimination against renewable producers from the perspective of economic repercussion either.

340. The TVPEE is one of the costs that are remunerated to renewable producers through the regulated regime applicable to them. Thus, the economic effect of the TVPEE on renewable producers is neutralised.

341. That is, the specific remuneration received by renewable producers allows them, in addition to obtaining a reasonable return, to recover certain costs which, unlike with the conventional technologies, they cannot recover on the market. Among those costs is precisely the TVPEE.

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[160] Articles 1 and 6 of Act 15/2012:

"Article 1 Nature

The tax on the value of the production of electric energy is a tax of direct character and real nature that taxes the performance of activities of production and incorporation into the electric system of electric energy, measured in power plant busbars, through each of the installations indicated in Article 4 of this Law." (emphasis added)

"Article 6 Tax base

1. The tax base consists of the total amount that the taxpayer is to receive for the production of electrical energy and its incorporation into the electricity system, measured in power plant busbars, at each installation, in the taxable period. [...]". R-0018

342. In this regard, the Explanatory Memorandum of Royal Decree-Act 9/2013 is clear in stating that the said remuneration received by renewable facilities allows them to cover the costs necessary to compete in the market on an equal footing with conventional producers, as well as to continue to obtain a reasonable return:

> *"This framework shall articulate a remuneration which will allow renewable facilities and those of cogeneration and waste to cover the costs necessary to compete in the market on an equal footing with the other technologies and to obtain reasonable return."*[161] [162]

343. Act 24/2013 also states in its Explanatory Memorandum that the specific remuneration for renewable producers allows them to recover certain costs which, unlike the conventional technologies, they cannot recover on the market, as well as to continue to obtain an adequate return:

> *"The remuneration regime for renewable, cogeneration and waste energies shall be based on the necessary market participation of these facilities, supplementing market income with specific regulated remuneration that allows these technologies to compete on an equal footing with the rest of technologies on the market. This specific complementary remuneration will be sufficient to reach the minimum level necessary to cover the costs which, unlike with the conventional technologies, they*

[161] Royal Decree-Law 9/2013, of 12 July, on measures to ensure budget stability and promote competitiveness, Explanatory Memorandum. R-0190.

[162] Royal Decree-Law 9/2013, of 12 July, on measures to ensure budget stability and promote competitiveness, in Article 1 (Two), performed the amendment of Article 30(4) of Act 54/1997, making said Article 30.4 read as follows:

"Additionally, and under the terms by Royal Decree of the Spanish Cabinet Meeting it is legally determined, regarding the remuneration for the sale of energy generated valued at market price, the facilities may receive specific remuneration composed of a stipulation per unit of installed capacity, covering, where appropriate, the investment costs for an installation type that cannot be recovered from the sale of energy and a stipulation for the operation covering, where appropriate, the difference between the operating costs and the revenue from participation in the market of such installation type. For the calculation of such specific remuneration, for a installation type, throughout its regulatory service life and referring to the activity carried out by an efficient and well-managed company, the following shall be considered:

a) Standard income from the sale of the energy generated valued at the production market price.

b) Standard operating costs.

c) The standard value of the initial investment.

For these purposes, under no circumstances shall any costs or investments that are determined by administrative acts or regulations that do not apply in the territory of Spain be taken into consideration. Similarly, only those costs and investments that correspond exclusively to the electric power production activity shall be taken into account.

As a result of the unique characteristics of the island and non-Spanish mainland electricity systems, specific installation types may be exceptionally defined for each one.

This remuneration regime shall not exceed the minimum level necessary to cover the costs that allow the facilities to compete on an equal footing with the other technologies on the market and that allow Reasonable profitability to be obtained by reference to the installation types applicable in each case. Notwithstanding the foregoing, exceptionally, the remuneration regime may also incorporate an incentive to investment and implementation within a certain period of time, when such installation would involve a significant reduction in costs in the island and non-Spanish mainland systems." R-0191.

cannot recover on the market and to allow them to obtain an adequate return with reference to the installation type applicable in each case."[163] *(emphasis added)*

344. As we have mentioned, the TVPEE is precisely among the operating costs of renewable producers that are taken into account in calculating the specific remuneration for such renewable producers. This is stated in Order IET/1045/2014:

> *"On the other hand, the operating costs, which are variable depending on the installation type's production, include but are not limited to the following: insurance costs, administrative expenses and other general expenses, market representation expenses, fees for accessing the transmission and distribution grids that must be paid by the producers of electric power, operation and maintenance (both preventive as well as corrective) costs, tax on the value of the production of electrical energy established by Act 15/2012, of 27 December, on tax measures for energy sustainability as well as the other taxes regulated by this Law. Where appropriate, auxiliary consumption (water, gas etc.) and fuel costs associated with the operation of the installation types have also been considered."*[164] *(emphasis added)*

345. Therefore, there is no discrimination against renewable producers whatsoever in terms of repercussion in connection with the TVPEE.

(3.3) The objective of the TVPEE is to collect income for the Spanish State for public purposes

346. As we have already detailed when analysing why the TVPEE meets the definition of tax under International Law that has been applied by Arbitral Tribunals, and as we shall recall below, the purpose of the TVPEE is to collect income for the Spanish State for public purposes.

(a) The TVPEE is an income of the Spanish State that is integrated into the General Budgets of the State

347. As we have discussed above, the revenue corresponding to the TVPEE is public Spanish State income that is included in the General Budgets of the State. This can be clearly seen in the Spanish General Budgets of the State for 2013, the first year the TVPEE was in force, 2014, 2015 and 2016, the most recent Budgets approved.[165] Thus, the TVPEE, together with the rest of the State income, contributes to form the State's resources with which public expenditures are financed.

348. Therefore, the Claimant´s assertion that "the 7% Levy was not a normal tax as part of the Government's ordinary process of revenue-raising"[166] is simply not true.

[163] Act 24/2013, of 26 December 2013, on the Electricity Sector. R-0192.
[164] Order IET/1045/2014, dated 16 June, approving those compensation parameters for standard energy facilities applicable to certain electric power production facilities from energy renewable energy sources, cogeneration and waste, Explanatory Memorandum III. R-0113.
[165] Extracts of the General Budgets of the Spanish State for 2013 -the first year of the TVPEE-, 2014, 2015 and 2016. R-0053, R-0054, R-0052 and R-0188.
[166] Reply on the Merits and Counter-Memorial on Jurisdiction, of 03 March 2016, paragraph 990.

(b) An amount equivalent to the estimated annual revenue arising from the taxes included in Act 15/2012, among them the TVPEE, is used to promote renewable energy

349. In addition, as we have also already stated, the Fifth Additional Provision of Act 17/2012[167] provides that an amount equivalent to the estimated annual revenue derived from the taxes included in Act 15/2012[168], among them the TVPEE, will be allocated to finance the costs of the electricity system concerning the promotion of renewable energies.

350. Therefore, the Spanish Minister for Industry, Energy and Tourism stated that the taxation measures adopted ultimately seek to "defend the general interest, which is to have an electricity system that is sustainable from the environmental, economical and financial points of view".[169] This was the objective of the taxation measures adopted in the words of the Minister, who has never at any time stated that the objective was to indirectly reduce premiums to renewable producers, as alleged by the Claimant in seeking to create confusion.

351. In short, as we have analysed, the TVPEE does not seek to perform a disguised tariff cut for renewable producers. The Claimant´s argument that the TVPEE was deliberately designed to perform such disguised cut lacks any foundation, taking into account also that, as explained, the economic impact of TVPEE on renewable producers as those subject to this arbitration has been neutralised. The purpose of the TVPEE is to raise revenue for the Spanish State for a public purpose.

(4) Conclusion

352. In view of all the above, the following can be concluded in summary:

i. The Kingdom of Spain introduced the TVPEE through Act 15/2012, passed by its Parliament (Congress of Deputies and Senate).

The provisions relating to the TVPEE of Act 15/2012 are a taxation measure for the purposes of the ECT. Article 21(7)(a)(i) of the ECT provides that the term taxation measure includes any provisions relating to taxes of the domestic law of the Contracting

[167] Fifth additional provision of Act 17/2012, of 27 December, on the General State Budget for 2013:
"Fifth. Contributions to the Financing of the Electricity Sector
1. In the Laws of General State Budgets of each year an amount equivalent to the sum of the following will be used to finance the costs of the Electricity Sector ***relating to the promotion of renewable energies*** *provided for in the Electricity Sector Law:*
a) The estimate of the annual collection derived from taxes included in the Act on tax measures for energy sustainability [Act 15/2012].
b) 90% of the estimated income from auctioning greenhouse gas emission rights, with a maximum of EUR 450 million.
2. 10% of the estimated income from auctioning greenhouse gas emission rights, with a maximum of EUR 50 million, is earmarked to the policy of combating climate change." (emphasis added). R-0118.

[168] It must be remembered that Act 15/2012 (R-0018) also lays-down other taxes such as the tax on the production of spent nuclear fuel and radioactive waste from nuclear power generation, the tax on the storage of spent nuclear fuel and radioactive waste in centralised facilities and the levy for use of inland waters for electric power production.

[169] C-0106.

Party. The provisions on the TVPEE of Act 15/2012 are both under Spanish domestic law and under International Law, provisions relating to a tax of the domestic law of the Kingdom of Spain.

Even in the hypothetical event that the Arbitral Tribunal considered that, in order to determine that this is a taxation measure for the purposes of the ECT, the above was not sufficient and that an additional analysis of the TVPEE had to be conducted as the one intended by the Claimant, which implies examining the economic effects of the TVPEE, the TVPEE is, in any case, a *bona fide* taxation measure.

ii. The Kingdom of Spain has only provided its consent to submit to investment arbitration disputes related to alleged breaches of obligations derived from Part III of the ECT (Article 26 of the ECT).

iii. The Claimant alleges a supposed breach by the Kingdom of Spain of obligations arising from section (1) of Article 10 of the ECT -an Article included in Part III of the ECT- by introducing the TVPEE through Act 15/2012.

iv. However, section (1) of Article 10 of the ECT does not generate obligations with respect to taxation measures for the Contracting Parties. The only sections of Article 10 that do apply, if the case, to taxation measures of the Contracting Parties are sections (2) and (7), which are not invoked by the Claimant (Article 21 of the ECT).

v. Thus, there is no obligation arising from section (1) of Article 10 of the ECT that could have been allegedly breached by the Kingdom of Spain by introducing the TVPEE through Act 15/2012.

vi. Therefore, the Kingdom of Spain has not provided its consent to submitting the dispute stated in section iii. above to arbitration and, therefore, said with all due respect, the Arbitral Tribunal has no jurisdiction to hear it.

353. Due to all of the above, the request of the Kingdom of Spain is reiterated to the honourable Arbitral Tribunal to declare its lack of jurisdiction to hear the dispute on the alleged breach by the Kingdom of Spain of obligations arising from section (1) of Article 10 of the ECT by introducing the TVPEE through Act 15/2012.

IV. MERITS OF THE MATTER: THE KINGDOM OF SPAIN HAS RESPECTED THE ENERGY CHARTER TREATY (ECT)

A. Statement of facts.

(1) General regulatory framework at the time of investment: Omissions and contradictions made by the Claimants

354. The Claimants hold that their investment was materialised in 2008 and 2009. This investment was based, according to the Claimants, on the promise to maintain and stabilise RD 661/2007 as a whole throughout the entire operational life of the RE Plants. The Claimant submits that this promise was made *"in clear and unambiguous terms"*[170]. Besides, they feel that those stabilisation promises were confirmed with Art. 4 of RD 1614/2010 and the Resolutions issued in December 2010.

355. According to the Claimants' thesis, said alleged stabilization promise would affect all provisions of Royal Decree 661/2007 and, in particular: (1) the option to choose between the two remunerations laid-down by RD 661/2007 (fixed tariff or pool price plus a premium), (2) the maintenance of these tariffs or premiums throughout the entire operational life of the RE Plants and (3) the option to produce 15% of the energy, burning gas throughout its entire operational life and (4) the updating of the remuneration according to the CPI.

356. Thus, the Claimant builds their Memorial on the Merits, seeking to convey to the Arbitral Tribunal the mistaken idea that the only regulations in the Spanish Regulatory Framework that any investment had to take into account were RD 661/2007 and RD 1614/2010. They try to support those ideas with press releases, advertising and Power Point presentation *cherry picking*, which are not evidence of ever knowing and valuing them. They also seek reports on NEC paragraphs, without requesting any Legal Due Diligence on other paragraphs of these reports or on other standards from 2006 and 2009 that clearly contradict the Claimant's alleged expectations.

357. The Claimant never requested a Legal Due Diligence on the Spanish regulatory framework and any amendments thereto. An investment in such a complex regulatory Framework required a diligent and thorough knowledge of the regulatory framework as a whole, not just the parts which are of interest for the Claimant and of brochures or *power point* presentations not known to them.

358. However, the Claimant has omitted before the Arbitral Tribunal, among these alleged statements, a much more relevant statement than the sentences pulled out from power point presentations. The Claimant knew of a declaration from the Kingdom of Spain stated by the Ministry in January 2010 by a letter addressed to Dr. Sultan Al Jaber[171]. In this letter, as will be shown, the Secretary of State confirmed the Government's intention

[170] Reply on the Merits, paragraphs. 20, 108, 296, 334, 411 and 512. Furthermore, this is reiterated in similar terms in paragraphs. 266, 269, 301, 302, 303, 319.o), 403, 405, 406, 491, 506 or 513

[171] Exchange of letters between the CEO of Masdar and the Ministry of Industry of the Kingdom of Spain, dated 25 November 2009 and 14 January 2010. R-0158

to provide investors with a reasonable profitability that would not put at risk the sustainability of the system. And they offered to answer any questions about it.

359. The Claimant omits this clearly relevant statement and shows the Arbitral Tribunal a regulatory framework that did not exist in 2008 and 2009. Thus their pleadings show the Arbitral Tribunal an artificial regulatory framework created to accommodate their alleged Expectations maintaining the regulations frozen, *"locking their rights"*[172] for 40 years. This is the theory contained in their Memorials. Specifically, they configure a regulatory framework in an ad hoc manner based on the idea that their production activity is an "island" within the Spanish Electricity System. Thus, the Claimant while analysing the Spanish regulatory framework they only give relevance to RD 661/2007 and RD 1614/2010.

360. The Claimant claims not to be aware of to the principle of economic sustainability of the SES, the principle of Reasonable profitability as a guarantee of subsidies received by investors and the consolidated Case-law of the Spanish Supreme Court. As has been credited in the counter-memorial and will be credited in this Memorial, these principles, which have interpreted the Case-law clearly, shaped the objective legitimate expectations of investors and were thus revealed by RE Sector Associations, encompassing these RE investors.

361. However, this reconstruction task leads to the inevitable collision of their arguments with the basic principles on which such regulatory framework is based. Moreover, such artificial construction leads to the Claimant having to hide the reasons that led to the adoption of the different regulatory measures adopted by the Kingdom of Spain. Some of them prior to their investment.

362. The very contrast between the view of the Claimant and the reality of the SES and its evolution (shown by the Kingdom of Spain), provides evidence that the Claimant seeks to omit from the Arbitral Tribunal highly relevant elements of the regulatory framework existing at the time of their investment.

363. Indeed, the Spanish Electricity System is a strategic economic sector, which involves (i) a wide degree of regulation, (ii) the presence of relevant public interests and (iii) the need for amendments that adapt the regulatory framework to the circumstances of the sector and the changes that may occur in the economic data. Therefore, paraphrasing the Supreme Court[173] and the Constitutional Court[174], it seems that the Claimants, despite operating in this strategic economic sector, are aiming to avoid the specific nature of the economic sector in which they invested.

[172] Reply on the Merits, paragraph 272: "*the relevant installations were pre-registered and then definitively registered with the RAIPRE, thus locking in their rights under RD 661/2007"*
[173] Counter-Memorial
[174] Constitutional Court ruling of 17 December 2015, issued in an appeal on the grounds of unconstitutionality no. 5347/2013. R-0193.

364. The biased statement made by the Claimants results in the omission and, on other occasions, misunderstanding of data essential to the resolution of this Arbitration. The following elements in particular should be highlighted:

a. The Claimant confuses the value of the different regulations governing the SES and the consequences of this diversity. They omit the key concept of the hierarchy of rules of the continental rules of law and its relevance in the Spanish regulatory framework.

b. They ignore the fact that production from RE is an integrated, not isolated, activity in the SES. This means ignoring that state aid or subsidies for SR are a cost of the SES and, therefore, subordinate to the principle of the economic sustainability of the same.

c. They omit from the Arbitral Tribunal the Case-law of the Supreme Court of the Kingdom of Spain as the legal interpretation established by the Spanish State to determine the content, extent and limits of the rights of SR producers. The Claimant uses Press releases and Press Conferences they never knew and omits the supreme interpreter of the Law in Spain. Any minimally diligent investor knew this Case-law.

d. The Claimant presents unfounded arguments to argue that the existing Case-law of the Supreme Court since 2005 does not apply to measures relating to this arbitration.

e. Claimant seeks to minimize the fact that the Spanish legislation regarding support for renewable technologies is subject to EU directives. The Claimant thereby obscure the important criteria laid down by Union law on issues related to this arbitration. The Claimant is trying to hide the undisputed fact that the State Aid system admitted by EU directives for the development of renewables is subject to the EU State Aid Regime[175]. That is, they are subject to the principle of proportionality. The Claimant also seeks to obscure the way EU regulations require the use of gas by thermosolar plants.

f. The Claimant distorts the principle of reasonable profitability. This principle exists since 1997 and is currently the cornerstone of the system of remuneration for the production of energy from RE. The Claimant does not wish to understand the established idea that reasonable profitability is the objective of the support system for renewables. This objective is achieved by combining two elements, market price and subsidy, whereby there has never been a freezing of the concrete form of articulating these two elements to achieve the aforementioned objective. They also try to blur the essential characteristics of the principle of reasonable profitability; their balance and dynamism.

g. They skip, despite warnings contained in its due diligences, that the subsidies established in RD 661/2007 are grounded in Act 54/1997 and in PER 2005-2010.

h. The Claimant seeks to hide from the Tribunal that subsidies to renewables, by their link to the principles of the SES' economic sustainability have been set and are

[175] Directive 2001/77/EC of the European Parliament and of the Council, of 27 September 2001, on the promotion of electricity produced from renewable energy sources in the internal electricity market. Article 4 (1) C-0018.

conditioned by the expected changes in demand and other base financial economic data. These forecasts were set out in the Renewable Energy Plans to adapt the roll out of renewables to the economic sustainability of the SES.

i. The Claimant also ignores that subsidies were established in 2007 based on the definition of different installation type and standards in PER 2005-210. Thus, the Claimant also omits that the methodology used by the Spanish regulator was always to determine the operation and investment *costs* of an *installation type*, in order to enable investors to recover the CAPEX, OPEX and obtain *reasonable profitability* according to the capital market.

365. These latter points will be described below. However, before developing them, it is necessary to answer two important questions. Firstly, it is necessary to clarify the position of the Kingdom of Spain regarding what the Claimant has defined as "key facts". Secondly, the Tribunal must be warned about the inaccuracies detected in the translations of the Claimant.

(1.1) Clarification of "key facts" identified by Claimant

366. The Claimant in paragraph 18 of their Reply on the Merits states that they made their investment based on what is stated in RD 661/2007. The aforementioned claim is based on a partial, biased and subjective interpretation of the Spanish regulatory framework. That claim ignores that along with RD 661/2007 there are a number of regulatory instruments that are essential to know the Spanish regulatory framework such as Act 54/1997, the Renewable Energy Plan and the Case-law of the Supreme Court. Regulatory instruments, which despite of being ignored by the Claimant, are the foundation of RD 661/2007. The Claimant's attempt to disconnect RD 661/2007 from the regulatory instruments it is based on and to which it must conform is a manifest error. The isolated analysis of RD 661/2007 leads the Claimant to make various mistakes which vitiate all their arguments and that will be made manifest throughout this Memorial. Moreover, with that statement, the Claimant seems to ignore their own due diligence and content of the contracts signed when they made their investment.

367. The Claimant argues in paragraphs 20 and 61 to 63 of their Reply on the Merits that RD 661/2007 represented an increase in remuneration with respect to RD 436/2004 in order to attract investors. As will be discussed in detail in Section IV.A.2.2. (A) of this Memorial the above statement is a manifest error. At this point we will simply note that RD 661/2007 was introduced in order to ensure the economic sustainability of the SES, which was threatened by linking subsidies to the Average Reference Electricity Tariff and in order to correct the situation of over-remuneration that RD 436/2004 was producing in wind technology.

368. The Claimant also argues in paragraph 20 of their Memorial that Article 44 (3) of Royal Decree 661/2007 is a stabilisation clause. The Kingdom of Spain rejects that statement. Moreover, as will be developed in Section IV.A.3.3 that statement ignores the wording of Article 44 (3), ignoring that RD 436/2004 included Article 40 (3) whose content is similar to 44, ignoring the relationship of all regulatory mandates to the law

requirements of the principle of hierarchy precepts and ignoring the Supreme Court's Case-law on the issue.

369. The Claimant argues in paragraphs 21 and 22 that Article 4 of RD 1614/2010 confirmed the said stabilisation clause. The Kingdom of Spain rejects that statement. Neither Article 44 (3) was a stabilization clause nor Article 4 of RD 1614/2010 involved a ratification of that fictitious stabilisation clause. This issue is addressed in Section IV.A.3.4. of this writing.

370. The Claimant refers to the clarity of the terms of the legislation and the amount of evidence submitted to claim that everybody had the same expectations that no retroactive changes would be implemented, that is, by being retroactively applied to their investments. The Claimant is trying to strengthen their unfounded position on the regime freeze in their favour, repeating insistently that the contested measures have been retroactive and, therefore, disproportionate or exorbitant. This statement is as repetitive as uncertain and is made with the sole purpose of presenting the Arbitral Tribunal with a distorted picture of the facts.

371. In order to clarify that the contested measures are not retroactive, the Respondent will conclusively prove that: (i) they are not retroactive according to international Law Precedents that have addressed the issue; (ii) they are not retroactive, as an already proven fact, in Spanish law, (iii) Important RE Sector Associations and Investors such as Iberdrola knew, before taking the measures, their future application on existing installations. (iv) the Claimant knew that the contested measures are not retroactive, since she was advised in Documents provided from 2007 and 2008, that future reforms could be introduced on existing installations.

372. The accreditation of these circumstances will show that the Claimant knew and could have foreseen that reforms could be introduced in the future that would affect existing installations. These circumstances also will show the stubborn will of the Claimant to distort reality before the Arbitral Tribunal.

373. On the other hand, the Claimant claims that their position in this arbitration is held by public statements by the Kingdom of Spain and Communications from 2010. They add that their position is supported by the various arbitral and judicial processes that exist with respect to the Kingdom of Spain.

374. The Claimant builds their alleged understanding based on statements of entities that lack competence to define energy policy in Spain or approve regulatory changes. However, it is surprising that the Claimant does not mention Act 54/1997, nor the 2005-2010 Renewable Energy Plan or the Case-law of the Supreme Court when showing the sources of their understanding of the regulatory framework.

375. It is also surprising that an investment in a highly regulated sector as is the production from renewable sources was made without the support of a legal due diligence on the matter. It is also surprising that the Claimant did not read the contracts they signed to execute their investment where they expressly contemplated regulatory risks.

376. It is even astonishing that the Claimant intends to support this claim based on arguments that openly contradict what was stated by the sole due diligence requested by the Claimant to make the investment. This contradiction is reflected, among others, on the following issues: (i) reasons for the introduction of RD 661/2007, (ii) linking subsidies from RD 661/2007 to PER 2005-2010, (iii) understanding of the pool plus premium option, (iv) linking subsidies for renewables to the economic sustainability of the SES, (v) reasonable profitability as an essential principle and objective of the Spanish regulatory framework (vi) strictly advisory functions of the NEC (vii) the relationship between the regulated rate option and pool plus premium.

377. The Kingdom of Spain does not deny that the measures in this arbitration are being challenged both nationally and internationally. However, we note that to date all Judgments handed down by Spanish courts (the Constitutional Court and Supreme Court) have endorsed the regulatory measures adopted by Spain which are subject to this same arbitration. In the same way it should be noted that the only International Arbitral Tribunal that has commented on the regulatory measures adopted by Spain to date has considered that they were in accordance with the Energy Charter Treaty. This data is omitted by the Claimant.

(1.2) The translations provided by the Claimant for relevant sections are not correct

378. The Claimant has made investment in Spain according to Spanish standards and has provided documentation written in Spanish. However, they have provided this arbitration procedure with English translations of standards or relevant documents that the Kingdom of Spain does not admit as valid. This could mean that the Arbitral Tribunal could mistakenly understand the reality or the facts. Those translations which by their great importance must be clarified are the following:

(a) Article 30.4 LSE 1997

379. The Claimant has provided a translation of Article 30.4 LSE 54/1997 that is not admitted by the Respondent:

> *"...in order that reasonable remunerative **tariffs** may be established related to the cost in assets on the capital market."*[176]

380. This translation is used at the Memorial on the Merits to explain the differences between the old art. 30(4) LSE 1997 and the new art. 30(4) RDL 2013:

> *"the 1997 Electricity Law provided for the Government to provide economic incentives (in the form of FITs) to Special Regime installations for their entire operational lifetime and all of their production. The New Regime completely did away with this."*[177]

381. It is an important mistake, since Article 30.4 LSE 1997 does not mention the right to obtain a *Tariff.* The translation carried out by NEC is attached, which is a translation the

[176] Document C-0016 produced by the Claimant, page 3.
[177] Claimant's Memorial, paragraph. 230.

Respondent supports. In this translation, the relevant part of Article 30.4 states the following:

> *"...as to achieve reasonable profitability rates with reference to the cost of money on capital markets".*[178]

382. A simple reading of Article 30.4 LSE 1997 in Spanish certifies that a *"tariff"* is not guaranteed as the Claimant translated. Article 30.4 LSE 1997 guarantees *"reasonable profitability rates with reference to the cost of money on capital markets"* or *"reasonable rates of return".*

(b) Solar Tres, Arcosol-50 and Termesol-50 plants waiver, with a request for a communication of the applicable fee.

383. The Plant Waiver Letters[179] request the communication of the Plants' *"remunerative conditions"*. The Claimant translates "retributivas" as "compensation":

a. "*...communication of the compensation conditions during the operating life...*"

b. *"Third. That it requests that the compensation conditions for the facility throughout its operating life be communicated*."

384. The translation supported by the Kingdom of Spain is:

a. "*communication of the **remunerative*** [or payment] *conditions during the operational life of the installation".*

b. *"Third. That it requests that it be notified about the remunerative* [or payment] *conditions of the installation during its operational life*."[180]

385. *"Compensation"* has a compensatory connotation in English that is not reflected in the statement in Spanish submitted to the MINETUR by the plants. They simply request information on "remunerative conditions".

(c) Resolutions of the Directorate General for Energy Policy and Mines of December 2010.

386. The Kingdom of Spain does not accept the translation of the Resolutions into English provided by the Claimants[181]. Neither the translation of its Title, nor Section II of the Introduction or its Second point are supported.

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[178] The translation of Article 30.4 c) of LSE 54/1997 carried out by NEC says: "*To work out the premiums, the voltage level on delivery of the power Lo the network, the effective contribution to environmental improvement, to primary energy saving and energy efficiency, the generation of economically justifiable useful heat and the investment costs incurred shall all be taken into account so as to achieve reasonable profitability rates with reference to the cost of money on capital markets*." R-0191.

[179] Documents C-0060, C-0061 and C-0062.

[180] C-0061_ESP, C-0062_ESP y C-0063_ESP. The translation of "Remunerative conditions" refers to "remunerative or payment conditions". *Retribución* is translated as *"payment"* according to Wordreference dictionary.

a) The Title of Resolutions in Spanish language is clear when stating its contents:

> *"**R**esolution of the DGPEM accepting the waiver formulated by [...] registered in the Remuneration Pre-assignment Register of the Ministry of Industry to being discharging electricity before a certain date within the already assigned Phase and acceptance of the classification of the installation made and Communication from the DGPEM relative to the remuneration conditions and annual electricity discharge capacity of the facility to start discharging electricity prior to a certain date within the already assigned Phase and the acceptance of the statement on the classification made of the facility and **C**ommunication of the DGPEM of the remuneration conditions and annual electricity discharge capacity of the facility."* (Emphasis added)

The English translation provided by the Claimants is not correct, because it separates sentences in the title incorrectly. The phrase concerning the "Resolution" is a different sentence from the "Communication":

> **Sentence 1:** *"**R**esolution of the DGPEM (Directorate General for Energy Policy and Mines) admitting the waiver presented by [...] registered in the Administrative register for pre-assignment of remuneration to start the discharge of electrical power by an allocated date under the already allocated Phase and admitting the classification of the installation performed and* [*y*]
>
> **Sentence 2**: ***C**ommunication of the DGPEM regarding remunerative conditions and the annual power discharge capacity of the installation."*

However, the English translation of the Claimant mixes the last paragraph of Sentence 1 (the "Resolution"), with the sentence regarding the "Communication"[182]. In fact, the translation is so wrong that the expression "are hereby accepted" seems to be also referring to the Communication. This is incorrect.

The attention of the Arbitral Tribunal is drawn to another fact. The translation of the Claimant adds a little dot after *"is accepted"*. In the Spanish version there is no dot after "*y se acepta*...". In the Spanish version does not appear the "*furthermore*" expression. This translation can also lead to confusion in the English version. The title in Spanish highlights the two sentences by distinguishing them with a capital

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[181] Resolutions of the Directorate General for Energy Policy and Mines regarding Gemasolar, 28 December 2010 (R-0196), Resolutions of the Directorate General for Energy Policy and Mines regarding Arcosol, 28 December 2010 (R-0197), and Resolutions of the Directorate General for Energy Policy and Mines regarding Termesol, 28 December 2010 (R-0198).

[182] Documents C-0065, C-0066 and C-0067: "*Resolution issued by the Directorate General for Energy Policy and Mines, by which the waiver presented by [...], of its right to start to discharge of electrical energy before certain date within the Phase in which it has already been allocated **is accepted. Furthermore, the Statement of classification of the installation made and Communication** of the Directorate General for Energy Policy and Mines on the remuneration conditions and the annual capacity of discharging electrical energy of the installation **are hereby accepted**".* (Emphasis added in the parts wrongly translated which are confusing)

letter: *"**R**esolution* [...] *and **C**ommunication* [...] ". The meaning is not the same, they are therefore two different actions.

Therefore, the translation accepted by the Kingdom of Spain of the statement sent by the General Directorate to the plants is:

"***R**esolution of the Directorate-General for Mining and Energy Policy accepting the waiver submitted by* [...] *entered on the administrative register for remuneration pre-assignment to start discharging electrical energy before a certain date within the Stage already assigned and accepting the statement of classification of the Installation carried out and **C**ommunication of the Directorate-General for Mining and Energy Policy of the remuneration conditions and the annual electrical energy discharge capacity of the installation*."[183] (Emphasis added)

b) In the Introduction, last paragraph of Section II, the Plants request to be *informed* about the remuneration conditions. The Claimant does not translate the request contained in the Communication of 28 December 2010:

*"Finally, the party concerned **asks to be informed** about the remuneration conditions during the working life of the installation."*[184]

c) The Second Point of the statement. Given the importance granted by the Claimants to these Resolutions, it is very important that this point is understood accurately. The Kingdom of Spain admits a version reflecting the accurate wording of the statement provided with its Counter-memorial:

*"Second – It communicates that**, currently,** by dint of the stipulations of section 1, transitory provision five of Royal Decree 16 enacted on April 30th 2009, the **remuneration*** [or payment] *applicable to the installation **is** made up of the tariffs, premiums, upper and lower limits and complements set out in Royal Decree 661 enacted on May 25th 2007..."*[185]

The Claimants have provided a translation[186] where the following sentence is changed: "*currently and by virtue...*". The article "and" does not exist in the original Spanish document. In fact, "currently" is highlighted with commas. In addition, the translation of

[183] Resolutions of the Directorate General for Energy Policy and Mines regarding Gemasolar, 28 December 2010 (R-0196), Resolutions of the Directorate General for Energy Policy and Mines regarding Arcosol, 28 December 2010 (R-0197), and Resolutions of the Directorate General for Energy Policy and Mines regarding Termesol, 28 December 2010 (R-0198).
[184] Ibid.
[185] Ibid.
[186] "*Second. Communicates **that currently,** in virtue of the provisions of Section 1 of the Fifth Temporary Provision of Royal Decree Law 6/2009, dated 30 April, the **compensation** applicable to the facility is made up of rates, premiums, upper and lower limits, and addenda established in Royal Decree 661/2007, dated 25 May*, [...]"Resolutions of the Directorate General for Energy Policy and Mines regarding Gemasolar, 28 December 2010 (R-0196), Resolutions of the Directorate General for Energy Policy and Mines regarding Arcosol, 28 December 2010 (R-0197), and Resolutions of the Directorate General for Energy Policy and Mines regarding Termesol, 28 December 2010 (R-0198).

the Claimant uses the term "retribution" when the translation of *"remuneración"* is "remuneration" or "payment", not retribution.

387. The Claimants conclude from this resolution the existence of confirmations, express guarantees or promises from the Kingdom of Spain on future freezing of the regime for the plants. We therefore reiterate the importance of a literal and accurate reading of what is actually expressed in this document, to be able to appreciate the absence of any promise with the communication of the regime in force at that time.

(1.3) The Claimants ignore the value of the different regulations governing the SES.

388. The Claimant, in presenting his version of the regulatory framework at the time of making their contended investment and its subsequent evolution, cites different regulatory components. They refer to different laws such as LSE 54/1997 and different regulations such as RD 661/2007 and RD 1614/2010. In reading the Claimant's Memorials, the idea would seem to be deduced that all the regulatory components cited have the same legal status and legal value.

389. Any diligent investor should know that their rights and duties are imposed by the different regulations in force in the Spanish Legal System. They should also know that these regulations are structured hierarchically among themselves[187], said structure having important legal effects.

390. Faced with that argument, the Claimant surprisingly asserts in their Reply on the Merits[188], that the only effect of the hierarchical structure of the regulations is that (i) a subsequent regulation can repeal a previous regulation and (ii) that the Law is more generic and the regulation is more specific. That argument has no connection with the argument of the Kingdom of Spain. This argument seeks to hide the important consequences that in Spain, the country where the investment was made, the fact exists that a matter is regulated in a Law or a Regulation. These consequences are derived from the principle of hierarchy of legal provisions.

391. This principle of hierarchy implies that the regulations cannot contradict the provisions of a higher Law. In Spanish Law, when a Regulation infringes on the provisions of a rule with the status of Law, it causes said Regulation to be null and void[189]. Moreover, the Courts have the obligation not to apply regulations contrary to the Law[190].

392. This principle of hierarchy of legal provisions applies without any exception to the regulations legally configuring the SES. When the Claimant made their investment, Act 54/1997, of 27 November[191] was in force, and a plurality of Regulations that developed the mandates under said Act all existed. Included in these Regulations were RD

[187] Reply on the Merits, paragraph 392.
[188] Reply on the Merits, paragraph. 252-256.
[189] Act 30/1992 of 26 November on the Legal Regime of Public Administrations and the Common Administrative Procedure. Article 62.2. R-0142.
[190] Organic Law 6/1985, of 1 July, on the Judiciary. Article 6. R-0199.
[191] Act 54/1997, of 27 November, on the Electricity Sector. R-0191.

661/2007[192] and RD 1614/2010[193], which developed the mandates of Act 54/1997 concerning electricity production activity under the special regime. These Regulations, under the principle of hierarchy of legal provisions cannot contradict or nullify the provisions of Act 54/1997.

393. That is, an investor, unless manifestly negligent, could never invest in Spain while ignoring the mandates within Act 54/1997, and based on an isolated interpretation of the provisions of RD 661/2007 and RD 1614/2010. Any minimally diligent investor should know that when the law imposes a mandate, no regulatory provision may contradict or invalidate what has been prescribed by law.

394. The Claimant intends to omit this principle of hierarchy and its application to the present case. Indeed, the correct understanding of this principle invalidates most of the theory of the Claimant both in their Memorial on the Merits and their Reply on the Merits.

395. Act 54/1997 pivots on the principle of economic sustainability of the SES[194]. Therefore, diligent investors knew or should have known that RD 661 could not freeze remunerations indefinitely, as this would infringe the principle of sustainability of the SES. Therefore a regulatory provision that would prevent the adoption of measures to ensure the economic sustainability of the SES would not be subject to LSE 54/1997. Principle which, by legal mandate, is subject to the economic regime of the Special Regime[195]. It should be recalled that subsidies paid to SR producers are a SES cost[196] that necessarily affects its sustainability.

396. Similarly, no investor can claim that the freezing of a regulatory provision maintaining a level of subsidies generating a profitability that is not reasonable, due to the subsidy being *far higher* regarding the capital market. Such an interpretation would be contrary to Act 54/1997, which sets a limit on the subsidised regime in question by stating that the binomial *market price + subsidy* aims to provide *reasonable profitability pursuant to the capital market*[197].

397. The Claimant's lack of knowledge on this principle leads them to commit factual errors of a structural nature that contaminate all the arguments in their Memorial on the Merits and their Reply on the Merits.

398. Regarding the linking of SR *subsidies* to the legal mandate on the economic *sustainability* of the SES, the Claimant maintains a deafening and voluntary silence. The Claimant thereby wants to omit the principal *"leitmotiv"* for all the regulatory changes carried out in the SES since 2007, an issue we will return to later.

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[192] Royal Decree 661/2007, of 25 May, regulating the activity of electricity production under the special regime. C-0038_ESP R-0150 Bis.
[193] Royal Decree 1614/2010 of 7 December, Article 2.C-0063_ESP. R-0151 Bis.
[194] Reply on the Merits. Paragraphs 413 and 414.
[195] Act 54/1997, of 27 November, on the Electricity Sector. Article 29. R-0191.
[196] Act 54/1997, of 27 November, on the Electricity Sector. Article 16 (6). R-0191.
[197] Act 54/1997, of 27 November, on the Electricity Sector. Article 30 (4). R-0191.

399. On the principle of reasonable profitability, the Claimants outline an interpretation that, with all due respect, can only be described as astonishing. This statement cannot be accepted under any circumstances: "*Article 30.4 thus simply provided the framework that would serve as the basis for the Government to set out the specific remuneration that would provide a reasonable profitability through regulation*"[198]. We shall return to this matter when we analyse the legal principle of Reasonable profitability

400. Act 54/1997 marks clear limits to the Regulations developed under it: (i) the obligation to set out Reasonable profitability with reference to the cost of money on the capital market and, (ii) that in any case the returns generated do not affect the economic sustainability of the SES.

401. Therefore, no regulatory provisions (i.e. Art. 44.3 RD 661/2007 or from Art. 4 of RD 1614/2010) can be or could be understood so as to be contrary to what is stipulated under Law. An investor could not expect that the aforementioned regulatory provisions could prevent the adoption of regulatory measures in SR necessary to maintain the economic sustainability of the SES and respect the investments' Reasonable profitability. Therefore, no comprehensive or diligent investor could have the expectation that, once a situation of over-remuneration infringing the mandate of Reasonable profitability is observed, this situation would not be corrected to enforce the legal mandate. In fact, it could be observed in the RE sector in 2007 and in 2010, regarding wind and PV energy.

402. The foregoing has been expressed, since 2005, by more than 100 judgements issued by the supreme interpreter of Spanish Law, the Supreme Court[199]. However, the Claimant argues that *"Spanish law does not support Spain's case"*[200]. However, the Claimant fails to mention that the position of the Kingdom of Spain is corroborated by the Case-law which in a consolidated manner the Supreme Court of the Kingdom of Spain has been establishing since 2005.

403. This ignorance of the Spanish legal system by the Claimant is logical, since they never requested a Legal Due Diligence on the Spanish regulatory framework. However, they claim that they were also unaware of the regulatory Framework concept which their own Partner has, Sener or RE Sector Associations, such as Protermosolar. This is not credible, as the Respondent will prove.

(1.4) The Claimants ignore the fact that production activity from renewable sources is an integrated, not isolated, activity in the SES.

404. By reading the various written pleadings made by the Claimant, it is inferred that, in his opinion, the activity concerning electric power production from renewable sources is an island within the SES. For the Claimant, such activity must (and can) be separate from the future of the SES as a whole, as well as its from its sustainability.

[198] Counter-Memorial on Jurisdiction, para. 191
[199] Counter-Memorial. Para.523 - 549.
[200] Counter-Memorial. Page 58

405. Such a configuration is a manifest error. The SES is first and foremost an interconnected legal, economic and technical system for the generation, transmission, distribution and sale of electricity[201]. It is, therefore, a system created to ensure that (1) a power supply will be maintained under conditions that are affordable for consumers and (2) to ensure that this supply will be sustainable in the long term. "*Sustainability*" specifically involves the technical, environmental and economic-financial viability of the SES[202].

406. In order to show the Arbitral Tribunal the Claimants' omission of this essential nature of the SES, the following issues highlighting this conscious omission shall be developed: (1) The link between the system's economic sustainability and the subsidies to SR was clearly covered under Act 54/1997; (2) This concept was implemented in PER 2005-2010 by legal mandate; (3) The Claimants were advised of that fact by the Pöyry Report.

(a) Act 54/1997 requires production activity from renewable sources to be part of the SES

407. In accordance with Act 54/1997, and as another part of the SES, electric power production from RE is included. This activity has a direct impact on the economic sustainability of the SES inasmuch as the subsidies comprising the SR producers' economic regime are a cost of the SES: *"cost of diversification and security of supply"*[203] that affects its economic sustainability.

408. As a result, Act 54/1997 Art. 29 stipulates that RE activity is subject to the principle of *economic sustainability* of the SES[204] and requires *planning* as we shall examine below.

(b) Renewable rollout planning is unequivocal proof of the integration of RE in the SES

409. The close link between premiums (cost of the SES) and the economic sustainability of the SES require the rollout of renewable technologies and their impact on the sustainability of the SES to be planned with due detail. It is necessary to reconcile (a) the cost to the SES that the rollout of renewable technologies will involve with (b) the capacity to absorb said cost by the evolution of the only revenue of the SES: Spanish consumers, through electricity demand.

410. Given the impact in terms of costs to the SES that the rollout of renewables involves, the Law stipulates necessary planning for such rollout. Thus, Act 54/1997, as amended by Act 17/2007, stipulates:

> *"The Government shall modify the Renewable Energy Promotion Plan to adapt it to the targets set in this regard by the European Union of 20% by 2020, maintaining*

[201] Counter-Memorial, paragraphs 408 - 409
[202] Counter-Memorial, paragraphs 413 - 414
[203] Act 54/1997, of 27 November, on the Electricity Sector. Article 16 (6). R-0191.
[204] Act 54/1997, of 27 November, on the Electricity Sector. Article 29. R-0191.

the commitment that this plan established of 12% for 2010. These targets will be taken into account when setting premiums for these kinds of facilities"[205]

411. Prior to Act 17/2007, Act 54/1997 stated that:

"For renewable energy sources to cover at least 12% of the total energy demand in Spain by 2010, a Renewable Energy Promotion Plan shall be established, the objectives of which shall be taken into account in setting premiums"[206]

412. The planning described is developed in *"Renewable energy plans"*. Specifically, as we shall examine, the determination of the premiums laid-down by Royal Decree 661/2007 is linked to the provisions of the Renewable Energy Plan 2005-2010[207]. In said Plan, like in the Renewable Energy Promotion Plan 2000-2010[208], the costs to the SES that the deployment of renewable energy involves are assessed in terms of the profitability that it is foreseen will be granted as *reasonable*[209].

413. More than just the costs are assessed in such planning. In addition, it analyses whether such costs are *sustainable* for the SES. Therefore, PER 2005-2010 are included within a specific energy scenario, which is the scenario of the Renewable Energy Plan 2005-2010[210]. In this scenario, the sustainability of the renewable rollout costs is analysed under the framework of a scenario of foreseeable electricity demand. The costs are at all times subordinate to the sustainability of the SES.

414. Consistent with and based on such planning and the requirement for the economic sustainability of the SES, RD 661/2007 set the corresponding subsidies. That is, as required by Act 54/1997, every investor should know that the system of subsidies implemented by RD 661/2007 was inextricably linked to basic economic assumptions (electricity demand, etc.) on which the Renewable Energy Plan was built.

415. Said link was not only reflected in Act 54/1997 as stated above. RD 661/2007, in its preamble it explicitly refers to the link between subsidies and PER as is being discussed.

416. For that reason it is not surprising that presentations conducted by Ms. Manuela García in 2008 [211]made reference to PER 2005-2010. In these presentations the author defined the regulating parts the renewable support system was built on. These regulating parts were: Act 54/1997, PER 2005-2010 and Royal Decree 661/2007. Specifically (highlighted in the image):

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[205] Law 17/2007, of 4 July, amending Act 54/1997, of 27 November, on the Electricity Sector, to adapt it to the provisions of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003, concerning common rules for the internal electricity market. It introduces Additional Provision 26 of Act 54/1997. R-0200.

[206] Act 54/1997, of 27 November, on the Electricity Sector. Sixteenth Transitional Provision. C-0016 _ESP.R-0191.

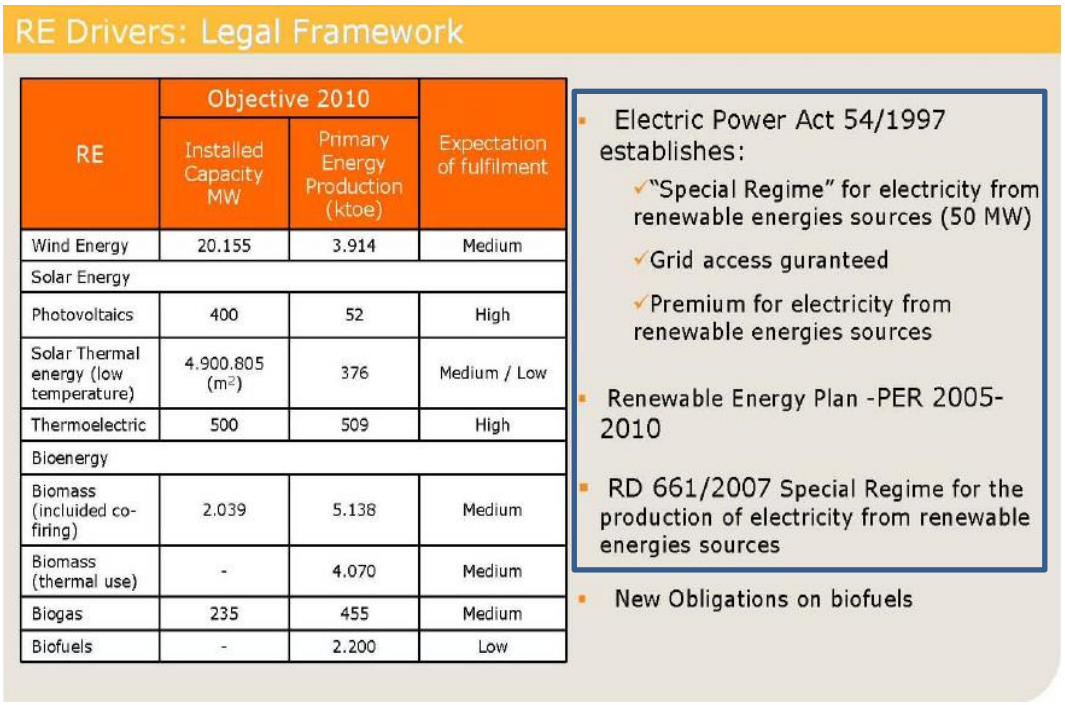
[207] Spain Renewable Energy Plan 2005-2010. Pages 270 to 313. R-0201.

[208] Renewable Energy Promotion Plan 2000-2010. R-0202

[209] Spain Renewable Energy Plan 2005-2010 Pages 276 to 279. R- 0201.

[210] Ibid. pages 323-327.

[211] Opportunities in Renewable Energy in Spain, Manuela García, Page 20/28. C- 0048



417. Exhibited above, no diligent investor could ignore the link between Act 54/1997, PER 2005-2000 and Royal Decree 661/2007. The warnings could not be clearer.

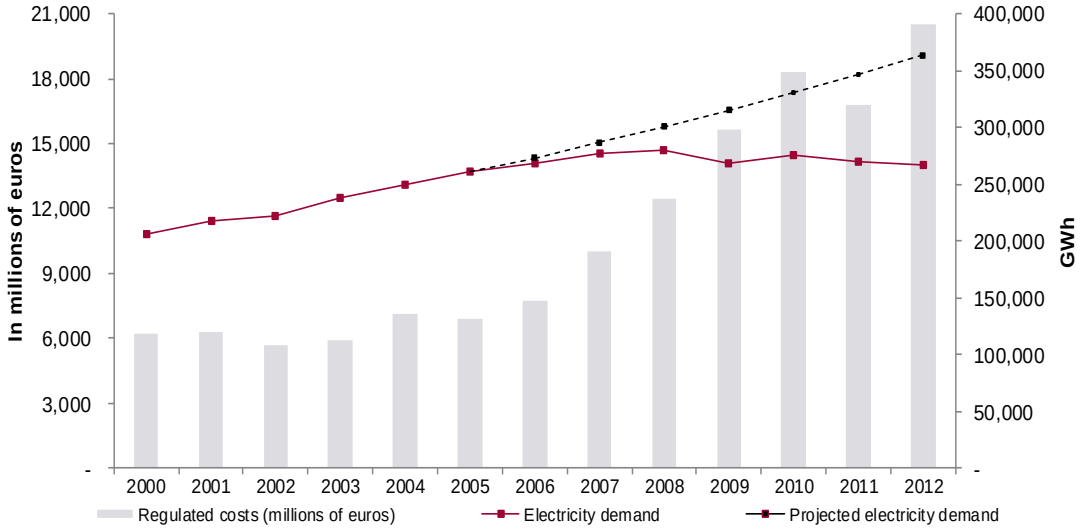
418. Consequently, a correct understanding of the SES necessarily should have led any investor to the conclusion that RD 661/2007 subsidies were unfailingly united to the base economic data on which PER 2005-2010 was built (changes in demand, etc.). Consequently, no investor could have the expectation that when facing major changes in economic data that formed the basis for fixing subsidies, these subsidies would not be modified.

419. Moreover, the expectation to maintain a specific subsidy can hardly be kept if, besides their maintenance, fixed on the basis of strongly altered economic data, could jeopardize the economic sustainability of the SES.

420. At this point we must remember that the international financial crisis that started in 2009 had an extraordinary impact on the economic data base on which RD 661/2007 premiums were projected. It is enough to simply observe the impact this crisis had from the main data taken into account in PER 2005-2010 to design RD 661/2007 subsidies, the evolution of electricity demand[212]:

[212] Accuracy, Second Report on incentives to the solar thermal sector in Spain. Paragraph 412.

Figure 4.2 – Evolution of the demand for electrical energy and regulated costs



Source: Annual Reports of the Electricity Sector - Red Eléctrica Española, and Manual of Energy - by Energía y Sociedad

421. The foregoing was corroborated by the ruling of the Supreme Court of the Kingdom of Spain in its Judgement of 12 April 2012 and in other multiple Judgements[213] that were confined to stating the factual data referred to when they ruled on:

> *"The agents or private operators [...] knew or should have known that the public regulatory framework [...] could not ignore subsequent relevant changes to the economic data base, to which the reaction from public authorities to attune it to the new circumstances is logical. "If the latter involve adjustments in many other productive sectors [...], it is not unreasonable that it is also extended to the renewable energy sector, which wants to continue receiving the regulated tariffs [...]. And all the more so when faced with situations of widespread economic crisis and, in the case of electricity, with the increased tariff deficit which, in some part, arises from the impact on the calculation of the access fees made by the remuneration of such by way of the regulated tariff, in terms of cost attributable to the electricity system"[214](Emphasis added)*

422. Based upon this section it is surprising to note the astonishing silence in the Claimant's Counter-Memorial on PER 2005-2010 and its value in the Spanish Regulatory Framework. Surprise which, if anything, is more glaring, if we consider two circumstances:

> **First**: The Claimant was who dedicated an entire Section to talk about it in their Memorial on the Merits [215]. Without a doubt, the omission to PER 2005 - 2010 in the Counter-Memorial responds to an attempt to hide an essential part of the Spanish Regulatory Framework at the time of the investment: PER 2005 - 2010.

[213] Judgement of the Spanish Supreme Court of 12 April 2012 R-0081.
[214] Judgement of the Spanish Supreme Court of 12 April 2012, appeal 40/2011. Point of Law Four. R-0080.
[215] Memorial on the Merits Paras. 100-109.

Second: The silence regarding PER 2005 - 2010 is deafening if, in addition, we consider that the "Due Diligence" entrusted to Pöyry expressly warned the Claimant that PER 2005-2010 was the key tool to understand the formula through which subsidies were established on the RD 661/2007. This "Due Diligence" says:

> *"The PER sets out the specific growth projections for each technology and breaks it down by autonomous region. Using the PER´s the Government then sets a tariff (published in the form of a Royal Decree) for each technology depending on the level of growth that is required*
>
> *The PER´s are the best indication of the future development of the different renewable technologies."*[216]

423. When attempting to remain silent in the Counter-Memorial about PER 2005-2010, the Claimant attempts to transfer the misconception that the subsidised production activity from RE is an island within the SES. An island that did not affect neither Act 54/1997 or PER 2005-2010. An island outside the basic principles on which the SES is built and, in particular, isolated from the principle of economic sustainability of the SES.

(c) Before their investment, the Claimant was expressly advised that possible future regulatory measures in RE were linked to the evolution of the SES

424. The Claimant was expressly advised of the link in the SES between RE development and the economic sustainability of the former. On this issue the Pöyry report entitled *"Current and Future Trends in the Spanish Solar System"* noted the close relationship between subsidies to renewables and the Economic sustainability of the SES. In this regard, he warned about the role that these subsidies, as a cost of the SES, have in generating the tariff deficit:

> *"The renewable feed-in tariff structure in Spain contributes to generate further tariff deficits so future development plans needs to take into account the system costs of promoting expensive renewable technologies"*[217]

425. In the same vein, Pöyry highlighted as one of the key factors on which the Spanish market that:

> *"The Spanish system is under stress when cost of generation increases (generation tariff deficit*"[218]

426. Pöyry analysis conducted in 2009 found that *"the Spanish renewable business will be in the long term Developing and pushing to meet the targets"*[219]. However, it established a clear caveat to this conclusion:

> *"The only issue against it is represented by the financial crisis"*[220]

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[216] "Current and Future Trends in the Spanish Solar System". Pöyry March 2009 Edition. Page 37 C-0049
[217] "Current and Future Trends in the Spanish Solar System". Pöyry March 2009 Edition. Pag. 131 C-0049.
[218] Ibid. Page 131.
[219] Ibid. Page 131.

427. In the analysis of the relationship between the subsidies for CSP technology and the tariff deficit, Pöyry pointed out a risk of a drop in the subsidies when he noted that:

> *"It is clear that the total contribution of Solar to the tariff deficit would be much higher than the contribution from wind. Consequently the risk of wind projects having further reductions of the subsidy is low while the solar business risk is higher. Seeing as Solar PV has just experienced a reduction of the regulate tariff, we believe that the risk is now concentrated in the CSP industry"*[221] *(Emphasis added)*

(1.5) The Claimants ignore the role of the case-law of the Supreme Court of the Kingdom of Spain as done in this arbitration.

428. The Claimant demonstrated with their arguments that they ignore the legal system in which they invested. Besides of not having a Legal Due Diligence on the Spanish Legal System and its articulation, this ignorance was further proven when they tried to diminish the importance of the Supreme Court Case Law in their Counter-Memorial. Such is their ignorance of the legal value of this Case-law that they attempted to equate the Case-law to the opinion of an author, Mr. Giménez Cervantes. Thus, they came to the conclusion that the Case-law prior to RD 661/2007 had no effect based on the opinion in that book shaped by this author in 2009[222].

429. This argument revealed the ignorance of the legal value of the Spanish Supreme Court Case-law as the highest legal interpreter of the Spanish legislation. In fact, the Respondent mentioned in the Counter- Memorial answering Mr. Giménez that his explanation had *"no legal criteria"*[223]. Therefore, the Claimant, by putting this author at the same level as the Supreme Court, as a rectifier element of Case-law, showed their ignorance of the Spanish legal system.

430. The Claimant invested in the renewable energy production sector within the SES. They invested within a specific regulatory framework in which their rights and duties did not come from a contract, concession, license or agreement. Their rights and obligations derived directly from the Regulatory Framework as a whole.

431. When it comes to defining the extent and limits of investors' rights in this field, the case-law of the Supreme Court of the Kingdom of Spain plays a fundamental role. The Supreme Court is the ultimate interpreter of the Spanish Legal System according to the Spanish Constitution. The doctrine repeatedly upheld in its Judgements complement the legal system[224].

432. Thus, when, in our statements, we refer to the case-law of the Supreme Court, we do not cite it as a precedent that must necessarily be followed by the Honourable Arbitral Tribunal when it comes to settling this arbitration. This is most assuredly not our purpose. When we refer to the Supreme Court case-law of the Kingdom of Spain, we do it as fact.

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[220] Ibid. Page 131
[221] Ibid. Page 133
[222] Counter-memorial, paragraphs, 232 and 233.
[223] Counter-Memorial, Footnote 203
[224] Counter-Memorial, paragraphs 396 and 397.

A fact to be taken into account by the Honourable Arbitral Tribunal when it comes to applying the ECT and other Regulations and Principles of International Law.

433. In the regulatory framework in which the Claimant decided to invest, the main source of expectations for the Claimants must come from the rational and comprehensive understanding of the rights and obligations arising from such regulatory framework. This understanding certainly must include the case-law of the Supreme Court. Ignoring such case-law means ignoring a key component of the regulatory framework in which they invested. It also means ignoring the content and limits of the rights under which the investment is materialised. In other words, no investor in Spain can expect to base any expectations on an interpretation of the regulatory framework that disagrees with the interpretation laid-down by the Supreme Court in a consolidated manner prior to the investment.

434. As we discussed in our Counter-Memorial,[225] said case-law, since 2005, hinges on the following key points:

- there is no right to an economic system not being changed;
- it is not fitting to challenge an amendment either on the basis of the principle of legal certainty or that of legitimate expectations;
- until such time as Article 30(4) of Act 54/1997 is amended, the only limit that must be respected by the Government in policy changes is to grant the facilities of RE a Reasonable profitability with reference to the cost of money in the capital market.
- the integration of the facilities of the RE within the SES results in companies having to assume some regulatory risk.

435. Consequently, the Judgements of the Supreme Court included in the Counter-Memorial are facts that the Honourable Tribunal cannot ignore when it comes to applying International Law.

436. Regarding this point, the ruling on the Award for Charanne and Construction Investments v. the Kingdom of Spain on the value of the case-law of the Supreme Court of the Kingdom of Spain should be highlighted:

> *"The conclusion drawn by the Tribunal, i.e. that in the absence of a specific commitment the Claimants could not reasonably expect that the applicable regulatory framework provided in RD 661/2007 andRD 1578/2008 would remain unchanged, is backed by case law from the highest courts in Spain. Prior to the investment, these courts had clearly established the principle that domestic law could modify the regulations in force "* [226]*(Emphasis added)*

[225] Counter-Memorial, Par. 523-529.
[226] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain (SCC v. 062/2012), Final Award, 21 January 2016, and individual opinion, paragraph 504. RL-0071.

"Although these decisions by the Spanish courts are not binding on this Arbitration Tribunal, they are factually relevant to verify that the investor was unable, at the time of the disputed investment, to have the reasonable expectation that in the absence of a specific commitment the regulation was not going to be modified during the lifespan of the plants"[227] *(Emphasis added)*

437. Faced with the position taken by the Kingdom of Spain the Claimant has sustained a very different position in two pleadings. In their Memorial on the Merits , the Supreme Court Case-law on the regulatory changes simply does not exist. However they admitted its existence in their Counter-memorial but claimed that the Case-law cannot be taken into account to set the legitimate expectations for the Claimants.

438. Before analysing the Claimant's arguments it should be noted that while making their investment they did not carry out a legal due diligence on the issue at hand. There is no legal due diligence that in a reasoned manner and while the Claimant was making their investment maintained that the Supreme Court Case-law would be inapplicable to investments made after the entry into force of Royal Decree 661/2007.

439. The Claimant argues that Supreme Court rulings prior to Royal Decree 661/2007 would not be applicable to future regulatory changes that could be applied to this Regulation. The analysis of the arguments on which the Claimant's thesis is built demands to answer a series of questions: (i) Royal Decree 661/2007 was not issued for the purpose of improving the profitability of different RE technologies; (ii) Article 44 (3) of RD 661/2007 was not new in the Spanish regulation (iii) The main players in the Sector do not share the Claimant's view

440. The other Judgements provided, although dated after the investment, are relevant as the Supreme Court confined itself to reiterating its line of case-law laid-down in the Judgements of 2005, 2006, 2007 and 2009.

(a) Royal Decree 661/2007 was not issued for the purpose of improving the profitability of renewable technologies.

441. The Claimant misleadingly claims that Royal Decree 661/2007 was issued for the purpose of improving the profitability of renewable technologies. Therefore they believe that the Supreme Court Case-law prior to RD 661/2007 does not apply. However, that argument is biased and does not correspond to reality.

442. As will be further discussed in Section IV.A.2.2 (a). of this statement, RD 661/2007 was issued in order to ensure the economic sustainability of the SES and to correct remuneration situations. Both of which followed from the fact that the RD 436/2004 linked subsidies to the ARET.

443. Moreover, RD 661/2007 did not result in an improvement in returns compared to those from RD 436/2004.

[227] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain (SCC v. 062/2012), Final Award, 21 January 2016, and individual opinion, paragraph 508, RL-0071.

(b) Article 44 (3) of Royal Decree 661/2007 has its precedent in Article 40 (3) of Royal Decree 436/2004

444. The Claimant states that the Supreme Court Case-law prior to 2007 could not be applied because RD 661/2007 introduced Article 44 (3). This issue will be discussed further in Section IV.A. 3.3 of this document. Nevertheless, we must point out that said Article 44 of RD 661/2007 did not represent a new development in the Spanish Regulatory Framework.

445. The content of Article 40 (3) of RD 436/2004[228] was similar to what was later collected in Article 44 (3) of RD 661/2007. We say similar, because according to the Claimant's thesis, Article 40 (3) of RD 436/2004 was much more restrictive than Article 44 (3) of RD 661/2007. Article 40 would prevent, according to the Claimant's thesis, any changes that would affect not only the regulated tariff but also premiums and supplements. These concepts which are not included in Article 44 (3) of RD 661/2007.

446. However, at this point we must emphasise that the two articles limit the scope of the restriction to revisions exclusively to *"reviews under this paragraph"*. That is, periodic and regular reviews. At no time do these articles prevent or restrict the possibility of conducting revisions which are motivated by justified motives other than the usual, such as revisions justified by the economic sustainability of the SES or those justified by avoiding over-remuneration situations.

447. As a result, Article 40 (3) of Royal Decree 436/2004 was not an obstacle to regulatory adjustments made by RDL 7/2006 and Royal Decree 661/2007. This is because the revisions implemented by these regulations were justified in cases not referred to in Article 40 (3). The aforementioned justification needed to ensure the economic sustainability of the SES and to avoid over-remuneration situations in some technologies such as wind energy technology.

(c) The Claimant's thesis is not shared by the main SES' Players

448. The Claimants' thesis is meaningless. Next we will explain how the Supreme Court Case-Law prior to Royal Decree 661/2007 was fully applicable after the entry into force of this Regulation. At least, it was thus understood by the Supreme Court of the Kingdom of Spain, the National Energy Commission, different RE Sector Associations and it was thus recognised by an International Arbitral Tribunal

(i) Supreme Court of the Kingdom of Spain.

449. Royal Decree 436/2004 was repealed by Royal Decree 661/2007. This caused the technologies affected by the repeal to go to the Supreme Court.

[228] Royal Decree 436/2004, dated March 12th, establishing the methodology for the updating and systematisation of the legal and economic regime for electric power production in the special regime. Article 40 (3). C-0024 ESP R-0148 Bis.

450. The Supreme Court ruled on those issues in its Rulings of 2009[229]. However, regardless of any other relevant pronouncements, what is relevant about the rulings of the Supreme Court is that it expressly stated that its case-law prior to Royal Decree 661/2007 was fully applicable to changes in the RE remuneration system produced after its entry into force d. Specifically, the Supreme Court stated:

> *"[...] [The Claimant] **does not pay enough attention to the case law** of this Chamber issued specifically in relation to the principles of legitimate expectations and **non-retroactivity** applied to successive incentives regimes for electricity generation. These are the considerations expressed in our **Judgment of 25 October 2006 and reiterated in that of 20 March 2007**, inter alia, on the legal status of the owners of facilities producing electricity under the special regime, for whom it is not possible to recognize pro futuro an "inalterable right" to the maintenance of the remuneration framework approved by the holder of regulatory power, provided that the requirements of the Electricity Sector Law are respected as regards the Reasonable profitability on investment."* [230] *(Emphasis added)*

451. It should be stressed that this pronouncement occurred although Article 40 of RD 436/2004 contained a similar article to Article 44 (3) of RD 661/2007. In the same vein, RD 436/2004 was an improvement in the returns of certain technologies and a decrease in the profitability of other technologies with respect to the previous legislation (RD 2318/1998). That is, such circumstances did not prevent the application of the previous Supreme Court Case-law to RD 661/2007.

452. The rest of the rulings provided with the Counter-Memorial, even if they are dated after the investment, they are equally relevant to counter the objection raised by the Claimants. Specifically, in the Rulings of the Supreme Court from 2012 it reproduces the case-law reflected in its Rulings prior to 2007.

453. Moreover, as will be analysed later, the Case-law prior to the year 2007 has been used by the Supreme Court and the Constitutional Court of the Kingdom of Spain to solve various appeals that have been raised against the new remuneration model introduced in 2013.

(ii) NEC

454. The NEC, as the advisory body in energy matters, had to analyse the regulatory reform consisting in replacing Royal Decree 436/2004 with Royal Decree 661/2007.

455. In this analysis, the NEC declared its disagreement with the amendments introduced in RD 661/2007 compared with Royal Decree 436/2004, considering that it violated the review system set forth in art. 40 of the latter regulation, noting that:

[229] Counter-Memorial paragraphs 536 to 542
[230] Judgement of the Supreme Court, of 9 December 2009, Sixth Point of Law. R-0077.

"However, in said draft Royal Decree, reviews are established that do not comply with the terms of the aforementioned article 40 of Royal Decree 436/2004, which generates regulatory uncertainty"[231]

456. However, upon examination of the legality of the draft RD 661/2007 and specifically, the effects of said proposal on facilities already in operation, the NEC admitted that the proposed measure was lawful and correct. Regarding this point, and disregarding other considerations, the NEC was aware of the fact that the judgment of legality of the measure could not be made without regard to case-law of the Supreme Court prior to RD 661/2007. The NEC knew that it was bound to Supreme Court case-law on the subject. As a result, the NEC considered that the measures introduced under RD 661/2007 were adequate and possible pursuant to Spanish law. Specifically it stated:

"In this regard, the recent Judgement of the Spanish Supreme Court of 25 October 2006, regarding the challenge to Royal Decree 2351/2004, of 23 December, is highly illustrative. In particular, said judgment analyses the regulatory change that the aforementioned Royal Decree has on the calculation of premiums that foster electricity production activity under the special regime. The Judgment of the High Court reaches the conclusion that said modification does not violate the principle of either legal certainty or of legitimate expectation"[232]

457. It is also interesting to note that the NEC highlighted the arguments of the Judgement of the Spanish Supreme Court that it considered essential for justifying its position. Specifically, said arguments highlighted by the NEC were the following:

- *"the owners of electrical energy production facilities under the special regime do not have an "unmodifiable right" to maintain unchanged the way in which the collection of premiums is governed".*
- *"It is not fitting to simply challenge the value of the "legal certainty" on the basis of a regulatory amendment as the grounds that allegedly invalidate said amendment. (...), but it is also true that legal certainty is not incompatible with the regulatory changes from the perspective of the validity of the latter, the sole factor on which we can lawfully rule."*
- *"The same consideration applies to the principle of legitimate expectations"*
- *Until it is replaced by another one, the aforementioned legal regulation (article 30 of Electricity Sector Act) enables the corresponding companies to pursue premiums that include, as a relevant factor, the achievement of "Reasonable profitability with reference to the cost of money on the capital market" or, to once again use the words of the preamble to Royal Decree 436/2004, "fair remuneration for their investments".*

458. As we can see, the NEC considered the case-law of the Spanish Supreme Court prior to 2007 fully applicable. In other words, the NEC felt that the aforementioned case-law was

[231] NEC Report 3/2007, of 14 February 2007, regarding the draft Royal Decree, regulating the activity of electricity production under the special regime. Page 25. R-0203.

[232] Ibid. Draft of the report on the Royal Decree proposal, regulating the activity of electricity production under the special regime, of 25 January 2007. Pages 21 and 22.

applicable to the repeal of RD 436/2004 by RD 661/2007, despite the fact that: (i) Royal Decree 436/2004 contained article 40 (3); (ii) Royal Decree 436/2004 had increased the profitability of certain facilities compared to the previous regulation.

459. In 2008, the NEC again verified the applicability of Supreme Court case-law prior to 2007, after said regulation went into force[233].

(iii) Associations representing the Sector.

460. In contrast to the pleadings held by the Claimant, the Associations representing RE were aware of the Spanish Supreme Court case-law prior to RD 661/2007. Furthermore, said Associations considered such case-law to be applicable to the changes that could have been made in said regulation.

Spanish Wind Association (AEE, by its Spanish acronym)

461. Proof of this are the pleadings by the AEE during the processing of RD 1614/2010. The Spanish Wind Association is a business association to which 95% of the renewable energy producers using wind technology belong[234]. This technology is the most important RE production subsector in Spain, so its relevance is clear. This Business Association declared, in pleadings submitted on 29 August 2010:

> *"It is true that the Supreme Court has declared, in relation to this type of retroactive amendments, that there is no "unalterable right" to keep the economic regime unchanged and that "the prescriptive content of Act 54/1997, of 27 November, on the Electricity Sector does not provide for the petrification or freezing of the remuneration regime of electrical power plant owners under a special regime or the inalterability of said regime", **thus recognising a relatively broad margin of the Administration's "ius variandi" in a regulated sector where general interests are involved.** However, without prejudice to the above, the case-law established **limits** to the Administration's "ius variandi" regarding the retroactive amendment of that remuneration framework, especially "that the requirements of the Electricity Sector Act are respected regarding the **Reasonable profitability** on the investments". Moreover, a breach of the principle of legal certainty for a retroactive rule "can only be settled case by case "(...)".[235] (Emphasis added and footnotes omitted).*

462. In the footnotes to such statement, this RE Association specifically cites Judgments of the Spanish Supreme Court of 25 October 2006, 3 December 2009 and 9 December 2009.

463. In short, the AEE revealed in its claims that they had complete knowledge of the Spanish legal system, quoting Supreme Court judgements of 25 October 2006, 3

[233] Report 30/2008 by the NEC, regarding the draft Royal Decree on remuneration for production of electricity using solar photovoltaic technology for facilities after the deadline for the maintenance of the remuneration fixed under Royal Decree 661/2007, of 25 May, for such technology. Pages 9 C-0143_ESP.

[234] Who we are. Spanish Wind Association, R-0210.

[235] AEE's pleadings to the NEC during the hearing process before the Electricity Advisory Council on the draft Royal Decree 1614/2010, which regulates and modifies certain aspects of the special regime. Page 6. R-0182.

December 2009 and 9 December 2009. These Judgments are considered fully applicable, even though they were prior to the entry into force of RD 661/2007.

Protermosolar

464. Similarly, the main association for solar thermal technology, PROTERMOSOLAR, on behalf of its members, presented written pleadings on 10 February 2012 making proposals regarding the regulatory measures that should be adopted in the Electricity Sector. In these proposals, it is evident that Protermosolar was clearly aware of the *principle of reasonable profitability* and it expressly requested that this be applied to other producers.

465. Indeed, in its proposal statement, while RD 661/2007 was in force, it asserts:

> *"it is suggested [to the NEC] to study the following actions: - Applying a cut for the excess profits that generation activities in nuclear and large hydro power plants have had since the introduction of the figure of the tariff deficit, **in accordance with the theory of the Supreme Court of "reasonable profit"**, which already justified certain measures on certain renewable energy in the past."*[236] *(Emphasis added)*

466. Therefore, it is proven that this principle of reasonable profitability was known by the Solar Thermal Sector while RD 661/2007 was in force. Its application by the Supreme Court was also known, as well as the fact that this principle justified the adoption of measures regarding certain renewable energies. In fact, PROTERMOSOLAR proposed that this principle of reasonable profitability continue to be applied.

(iv) Charanne Award

467. The Claimant seeks to introduce the idea that the different Judgments provided in this arbitration are irrelevant or decontextualized[237]. This same argument was put forward by the Claimants in the case of Charanne against the Kingdom of Spain. However, the Arbitral Tribunal, in response to the line of reasoning by the Claimants in that case, exactly the same as that used by them here, ruled that*:*

> *"The Tribunal does not agree with the Claimants that said decisions are irrelevant or out of context. Although they refer to different rules, those judgments clearly lay down the principle that domestic law can modify, in compliance with the LSE, an economic regime, such as the one provided in RD 661/2007 and RD 1578/2008, aimed at fostering renewable energy production. To the Tribunal's understanding, at the time of making the investment in 2009 the Claimants could have carried out an analysis of their investment's legal framework in Spanish law and understood that the regulations enacted in 2007 and 2008 could be modified. At least that is the degree of diligence that could be expected from a foreign investor in a heavily regulated sector like the energy industry. In such a sector, thorough prior analysis of*

[236] PROTERMOSOLAR pleadings to the Public Consultation of the NEC, R-0083.
[237] Reply on the Merits. Para. 208-241.

the legal framework applicable thereto is essential to make an investment"[238] (Emphasis added)

468. The relevance of this ruling is that the Judgements to which the award refers are the Judgement of the Supreme Court of 15 December 2005[239] and the Judgement of the Supreme Court of 25 October 2006[240], transcribed verbatim in paragraph 506 of the Award *Charanne and Construction Investments v. Spain*. Bearing in mind that the footnote on page 443 of this Award confirms the ruling contained in paragraph 506 referring to the Judgement of 9 October 2007[241] and the Judgement of 9 December 2009[242]. They are the same Judgements that the Kingdom of Spain produced in this arbitration.

(1.6) The legal mandate for "reasonable profitability" sets out any rights or expectations of investors in the Spanish Regulatory Framework

469. The Claimant denies that the remuneration regime for special regime facilities is based on the principle of reasonable profitability[243]. For the Claimant, it seems to be a simple programmatic principle without any legal value.

470. This statement lacks the slightest evidential rigour. Far from it, there is multiple evidence to demonstrate the contrary. This evidence demonstrates that the remuneration regime for special regime plants, since its introduction in Act 54/1997 to the current date with the new regulation, has been based on a fundamental principle: the principle of reasonable profitability.

471. In this regard, one need only examine the many Judgments handed down by the Supreme Court of the Kingdom of Spain provided in this arbitration. Each and every one settles the issues submitted to its ruling through the interpretation and application of the *"principle of reasonable profitability"*. Moreover, it is clear that the Claimants have not provided this arbitration with even one Judgement of the Supreme Court on issues related to SR and its remuneration that addresses the matter in a different light to that of reasonable profitability.

472. We shall examine the different evidence provided in this procedure that demonstrates: (a) That reasonable profitability is the cornerstone of the remuneration system for the production of energy from renewable sources; (b) That this principle is not a means but an end, that can be achieved in various ways; (c) That this principle demands a necessary balance between the benefits to be received by producers and the effort involved in the rollout of renewable technology; (d) That this balance requires that reasonable profitability is of a dynamic nature, (e)That reasonable profitability is set out in PER 2005-2010, and (f) That reasonable profitability had to and must take into account

[238] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain (SCC v. 062/2012), Final Award, 21 January 2016, and individual opinion, paragraph 507, RL-0071
[239] Judgement of the Supreme Court, of 15 December 2005. R-0073.
[240] Judgement of the Supreme Court, of 25 October 2006. R-0071.
[241] Judgement of the Supreme Court, of 09 October 2007. R-0075
[242] Judgement from the Third Chamber of the Supreme Court, of 9 December 2009. R-0077.
[243] Reply on the Merits, para. 181.

applicable EU regulations, in particular, those on illegal state aid due to over-remuneration and distortion of market rules.

(a) Reasonable profitability is the cornerstone of the remuneration system for the production of energy from renewable sources

473. The structure and limits of the remuneration regime for producers under the special regime are laid-down by Articles 16 (7) and 30 (3) and (4) of Act 54/1997[244]. Article 16 (7), the article omitted by the Claimants, stipulates:

> *"The remuneration for production in power plant busbars of power for producers under the special regime will be that corresponding to the production of electric power, [...] and, where appropriate, a premium that shall be determined by the Government, after consultation with the Autonomous Communities, in accordance with the provisions of Article 30.4."*[245]

474. It is deduced from this Article that producers under the special regime are entitled to receive the market price and a premium (i.e. a subsidy) for their *net* power production.

475. Consequently, it refers to the subsidy, Article 30 (4) stipulates that:

> *"The remuneration regime for electric power production facilities under the special regime shall be supplemented by receiving a premium, under the terms legally laid down, in the following cases"*[246]
>
> *"To decide the premiums the following will be taken into account: the level of delivery voltage of power to the network, the effective contribution to improving the environment, saving primary energy and energy efficiency, the production of economically justifiable useful heat and the investment costs incurred for the purpose of achieving reasonable profitability with reference to the cost of money on capital markets"*[247]

476. The Claimant holds the idea that the transcribed art. 30 (4) "*did not limit a RE producer´s entitlement to a reasonable return*"[248]. For the Claimant, a reasonable profitability is merely one criterion to consider in setting the premiums. This line of reasoning makes the mistake of confusing the criteria that must be considered in setting the premium and the ultimate aim of the premium once set.

477. The Claimant's position is erroneous. Diverse issues must be taken into consideration: (i) the criteria to be taken into account by the regulator when it comes to setting subsidies or premiums; (ii) reasonable profitability as an objective to be achieved by the market price and the subsidy; (iii) the Claimant holds a stance that goes against its own "Due Diligence"; (iv) the RE sector holds a stance that goes against the Claimant; (v) the doctrine positions are contrary to the Claimants' line of argument.

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[244] Act 54/1997, of 27 November, on the Electricity Sector. R-.0191.
[245] Ibid.
[246] Ibid.
[247] Ibid.
[248] Reply on the Merits, paragraph 190

(i) Legal criteria for setting subsidies

478. As regards the criteria that the Law imposes on the Regulator when it comes to determining premiums, it should be noted that the Law does not enable the Regulator to ensure the immutability of premiums once established. The Law says nothing about this.

479. In addition to the foregoing, the first sentence of article 30 (4) states that *"To decide the premiums the following will be taken into account*". In other words, the factors that must be taken into consideration when setting the premiums are indicated.

480. According to this law, these factors must include the following: "*the voltage level on delivery of the power to the network, the effective contribution to environmental improvement, to primary energy saving and energy efficiency, the generation of economically justifiable useful heat and the investment costs incurred*"

481. This first sentence refers only to the criteria that must be taken into consideration in setting the premium.

(ii) Reasonable profitability as the objective of the binomial market price and subsidy

482. Secondly, the last paragraph of Article 30.4 of Act 54/1997 establishes the objective of the subsidised system: "for the purpose of achieving reasonable profitability with reference to the cost of money on the capital market".

483. A literal interpretation of Article 30 (4), last paragraph, leaves no room for doubt. The first paragraph establishes the elements that must be taken into account for setting premiums (*"In order to determine the premiums, the following must be taken into account")*. The second sentence discusses the aim that is sought in the addition of the market price and the subsidy: *"for the purpose of achieving reasonable profitability with reference to the cost of money on the capital market"*.

484. The Claimant forgets that the term "purpose", according to the Dictionary of the Spanish Royal Academy, means: "reason for which something is done"[249]

485. The Claimant also forgets that art. 16 (7) and art. 30 (4) define the subsidies as a "*supplement*" to the market price that the Claimants must necessarily be paid. Therefore, it is absurd to think that the reasonable profitability is the goal to be achieved exclusively by this supplement, the subsidy.

486. With this line of reasoning, the Claimant forgets the reason for the existence of the entire support mechanism of the special regime. For diverse reasons, energy production activity under the special regime is not competitive compared to conventional techniques. The pool price is not enough to enable renewable technologies to compete with traditional energy. Given that the market price is insufficient to compete with conventional industries, said market price is supplemented with a subsidy. Thus, the pool

[249] Dictionary of the Spanish Royal Academy. Definition of the word "purpose". R-0204

price plus the subsidy allows renewable technologies to compete with conventional energy.

487. Therefore, art. 30 (4) imposes a clear pairing that seeks an aim which can be expressed in the following formula:

Market price + subsidy = Reasonable profitability in accordance with the cost of money on the capital market.

488. Next, the Claimant commits a second mistake in asserting that article 30 (4) "*did not define reasonable profitability*"[250]. However, the concept of *"reasonable profitability"* has meaning in itself:

- Firstly, this means that the special regime producers have the right to obtain *"profitability"*. That is, that the remuneration they receive allows them to recover both the amounts invested (CAPEX, a criterion that must be taken into account for setting premiums) as well as the operating costs for such assets (OPEX) and, moreover, obtain an industrial profit.

- Secondly, this means that the industrial profit guaranteed to the producers must be *"reasonable"*[251]. Thus, this profit cannot be disproportionate or "*irrational*"

- Thirdly, this means that the judgment of reasonableness must be made based on an element that is objective and variable: *"with reference to the cost of money on the capital market"*.

489. We believe that, when the Claimant states *"that Article 30 (4) did not define reasonable profitability*", it means that Article 30 (4) did not specify such expression in a specific figure. Indeed, at no time did it do so, despite the lobbying undertaken by the Sector to obtain a "*Law on Premiums*"[252] as we shall examine later on. However, it did specify that said profitability from a negative perspective: the profitability could never be unreasonable.

490. Therefore, the Act established two essential limits in SR remuneration. (1) That the market price plus a subsidy allow *reasonable profitability* to be obtained pursuant to the Capital Market. (2) That such subsidies, as a cost of the SES, must in all cases be contingent on the *economic sustainability* of the SES.

491. The specification of such reasonable profitability, as we shall subsequently examine, would be attributed by Law and strictly subject to the limits set by it and to two essential instruments: the Renewable Energy Plan and the Regulations implementing the law.

[250] Reply on the Merits, para. 191

[251] *"Reasonable"* according to the Dictionary of the Royal Academy of the Spanish Language means: *"adequate, according to reason, proportionate, not exaggerated"* Dictionary of the Spanish language electronic version (twenty-third edition October 2014); "reasonable". Spanish Royal Academy. http://dle.rae.es/?w=razonable#.VlSem4LfJQY.email R-0205.

[252] Powering the Green Economy. The feed in tariff handbook, page 87 R-0058.

Plans and Regulations are instruments that, as we have previously discussed thoroughly, must in all cases be subordinate to the Law.

492. In the Spanish Regulatory Framework, the reasonable profitability mandate is the essential element for configuring the rights and expectations of special regime producers. If it were otherwise, the multiple Judgements handed down by the Supreme Court of the Kingdom of Spain on the Special Regime would be unexplainable[253]. The "reasonable profitability" mandate is the basic element of the grounds for such Judgements.

(iii) The Claimant holds a stance that goes against its own "Due Diligence"

493. The Claimant forgets that Pöyry specifically stressed to them that:

> *"There are a number of uncertainties surrounding the development of the Spanish renewable industry. In our view the major obstacles arise from the existing tariff structure which is unable to account for the generation costs. [...]*
>
> *In addition, recent history tells us that even though renewable technologies are expensive, **the Government is willing to provide a reasonable profitability for investors by keeping the subsidies**, even in the event of tariff deficits being generated over time."*[254]

494. This phrase summarises the essence of the regulatory framework of support for renewables. Pöyry expressly establishes that the support mechanisms are contingent upon the economic sustainability of the SES. Pöyry expressly notes that the Government, when developing these support mechanisms, even though changes are made to them, as had already been done, shall meet the basic aim of said mechanisms: seeking reasonable profitability for investors. Pöyry states that the subsidies are the means for achieving reasonable profitability for investors (by keeping the subsidies). If the subsidies were to disappear, the only income that the plants would earn would be the sale of energy in the market.

495. In explaining this conclusion about Pöyry's Due Diligence, the Claimant has merely responded in their reply that: "*This is the sole reference to "reasonable profitability" in Pöyry report which runs to 147 pages"*[255]. They conclude that reading it as a whole is what enables one to reach the conclusion of the Kingdom of Spain's guarantee or commitment to keep RD 661/2007 unchanged in the expression "*keeping the subsidies*". This assertion makes no sense. Either the Claimant did not read the report or they did not understand it. Pöyry reiterates this uncertainty and the commitment to provide reasonable profitability in the executive summary:

> *"There are a number of uncertainties surrounding the development of the Spanish renewable industry. In our view the major obstacles arise from the existing tariff structure which is unable to account for the generation costs. [...]*

[253] Counter-Memorial. Paras. 338-415.
[254] "Current and Future Trends in the Spanish Solar System". Pöyry March 2009 Edition. Pag. 131 C-0049.
[255] Reply on the Merits, paragraph 158, repeated in paragraph 322.

The renewable feed-in tariff structure in Spain contributes to generate further tariff deficits so future development plans need to take into account the system costs of promoting expensive renewable technologies. [...]

*The Spanish Government has stated publicly in a number of occasions its full commitment to supporting the industry. In addition, recent history tells us that even though renewable technologies are expensive, the Government is **willing to provide a reasonable profitability** for investors by maintaining the subsidies, even in the event of tariff deficits being generated over time."*[256]

496. By no means can it be deduced by reading this executive summary or the report that Pöyry concludes that the tariffs or premiums in RD 661/2007 are to remain frozen or guaranteed for the useful life facilities that are built. Only the commitment to granting a Reasonable profitability through subsidies can be construed. This is also what happens after the adoption of the challenged measures, as they continue to be granted reasonable profitability.

(iv) The RE sector holds a stance that goes against the Claimant

497. Reasonable profitability is the main principle on which the entire system of subsidised support for renewables is based. The Claimant objects to this assertion. However, the Claimant's position is contrary to what the renewable sector has held in Spain through both associations representing renewable energy companies and through individual companies. Below we shall examine the different declarations by the Sector, which directly oppose the Claimant's line of reasoning.

PROTERMOSOLAR

498. The Claimant holds that the declarations by PROTERMOSOLAR are not relevant, as they have never been a member of said Association[257]. Furthermore, they declare that they did not participate in the drafting of the pleadings that said Association submitted with regard to the public disclosure proceeding conducted by the NEC in February 2012.

499. However, what the Claimant fails to mention to the Tribunal is that Torresol Energy is Vice-president of this Association, actively participating therein. In other words, the Claimant is indeed a member of the Association through its subsidiary, Torresol Energy. Moreover, Torresol Energy, as Vice-president[258] of this Association, was aware of the drafting of the following pleading:

*"it is suggested [to the NEC] to study the following actions: - Applying a cut for the excess profits that generation activities in nuclear and large hydro power plants have had since the introduction of the figure of the tariff deficit, **in accordance with***

[256] Executive summary, page 19, C-0049
[257] Counter-Memorial on Jurisdiction, paragraph 320.
[258] www.protermosolar.com quienes-somos organos-de-gobierno Torresol energy Vicepresidencia. R-0206.
Sener is also a Member of this Association: www.protermosolar.com socios SENER.pdf, R-0207.

***the theory of the Supreme Court of "reasonable profit"**, which already justified certain measures on certain renewable energy in the past."*[259] *(Emphasis added)*

500. Torresol Energy's active participation in the activities of the Association PROTERMOSOLAR has been stated in its own monthly reports. The Claimant's attempt to disassociate itself from an Association in which it is a member is ridiculous, when the documentation submitted by the Claimant themselves in this arbitration evidences this relationship and participation:

*"average values obtained by **our lobbying association (PROTERMOSOLAR)** for the whole sector [...] we decided to join PROTERMOSOLAR global allegations against the Order, [...]. **We took part actively on the preparation of PROTERMOSOLAR document**, that was filed on February 25th ,,*[260].

501. Along the same lines, in another monthly report they assert:

*"TEI took part in the allegation process opened by the State Council, through Gemasolar (as single plant), Valle complex (as part of a group of PT plants with storage), and **Torresol (as partner** of PROTERMOSOLAR), ,,*[261]

502. At any rate, the Honourable Tribunal's attention is drawn to the fact that, while RD 661/2007 was in force, the Claimant is unable to explain how the Solar Thermal Sector was fully aware of the existence of the principle of "*reasonable profitability*" and demanded it be applied to other sectors.

AEE [by its Spanish acronym]

503. It has already been mentioned that the Spanish Wind Association [AEE] is a business association to which 95% of the renewable energy producers using wind technology belong[262]. This technology is the most important RE production subsector in Spain in terms of MW installed.

504. RD 1565/2010 introduced important technical and economic measures on the Renewable Sector, affecting the wind sector, among others. During the process of drafting this regulation, the AEE submitted documents to the NEC in the process of passing RD 1565/2010[263], which highlight the relevance of the principle of Reasonable profitability

505. In those claims the AEE, after recalling the case law of the Supreme Court, states that:

"Any review of the Remuneration Regime established in Royal Decree 661/2007 must necessarily ensure Reasonable profitability on investment and also meet the

[259] PROTERMOSOLAR pleadings to the Public Consultation of the NEC, R-0083.
[260] Monthly report February 2014 BQR-0063\Torresol Monthly activity report 2014\ MAR_February_2014_rev_2.docx. R- 0208.
[261] Monthly report May 2014 BQR 63\Torresol Monthly activity report 2014\ MAR_MAY 2014_rev_3.docx. R- 0209.
[262] Who we are. Spanish Wind Association, R-0210.
[263] SWA claims to the NEC during the Spanish National Energy Commission hearing process on the Proposed Royal Decree which regulates and modifies certain aspects of the special regime. R-0194.

criteria themselves established in that Royal Decree (which have not been modified) and the higher principles of legal certainty and proportionality"[264].

506. These claims are very relevant, because they prove that the most important members in RE Technology are fully aware of the possibility that the remuneration regime of RD 661/2007 could be modified, with the only limit to ensure the perception of Reasonable profitability.

APPA – GREENPEACE - CUATRECASAS

507. The Association of Renewable Energy Producers (APPA) is the largest Spanish Association of Renewable Energy Producers and covers all types of technology[265]. Nearly five hundred companies that operate in the renewable energy sector are members. Greenpeace needs no introduction. Cuatrecasas is one of the leading law firms in Spain.

508. On 20 May 2009, these three entities proposed an alternative project for the regulation of the subsidised remuneration regime for renewable energy[266]. We will come back to this project later. In relation to the overall awareness in the RE Sector of the concept of "Reasonable profitability", what is relevant now is that in May 2009 these entities asserted that the basic principle of the Spanish regulatory framework is the principle of reasonable profitability.

509. These entities suggested to the Government that the reasonable profitability guaranteed to the RE, as the axis of its remuneration regime, should be determined by reference to 10-year Treasury bonds, plus a spread of 300 basis points:

"The Government shall set the amounts for regulated tariffs, premiums and supplements, in all cases assessing the operation and maintenance costs and the investment costs incurred by facility operators in order to reach ***Reasonable profitability*** *with reference to the cost of money on the capital market. As for the capital remuneration tariff, an annual percentage equal to the average of the previous year's remuneration average of Treasury obligations to 10 years will be taken, plus a spread of 300 basis points."*[267] *(Emphasis added)*

SENER

510. SENER is the company with which the Abu Dhabi Investment Authority partnered to make its investment in Spain. The Claimant themselves state that "*Sener was considered to be a very strong partner* ***who really knew the Spanish market and regulatory policy*** *and was well connected*"[268].

511. As we shall see, SENER was aware of the principle of reasonable profitability and argued that it was the right of the Government of Spain to set the remuneration for

[264] Ibid. paragraph 7.
[265] AREP - Association of Renewable Energy Producers, R-0211.
[266] AREP-Greenpeace Press Release concerning the Draft Bill for the Promotion of Renewable Energy, dated 20 May 2009. R-0212.
[267] Presentation of the Draft Law presented by AREP-Greenpeace in May 2009. Article 23.4 of R-0213.
[268] Claimant's Memorial, paragraph 159.(e)

renewable energy. In an article published in the Spanish press while RD 661/2007 was in force, the Chairman of SENER, Mr Jorge Sendagorta publicly argued that:

> *"there is another **key idea** that has to be taken into account, that of " **Reasonable profitability**", laid-down by the Electricity Act as the **basis** for the Government to set the remuneration for new energies. Reasonable profitability must, therefore, be a **limit** for any solution adopted, and it does not leave much room for manoeuvre."*[269]

512. SENER publicly argues that the principle of reasonable profitability is the basis for, and the right of, the Government to set remuneration. This clearly confirms what is held by the Kingdom of Spain in this section.

513. It is surprising that the Claimants, in their Reply, now attempt to distance themselves from this opinion. The Claimant states that this opinion was published in 2012, after the Abu Dhabi Investment Authority had partnered with Sener. This disassociation is surprising and completely contradicts what the Claimant themselves, Masdar, asserted in January 2015:

> *"Sener was identified as a suitable partner and Mr Tassabehji and his team **met with representatives of Sener** in the second half of 2007 to discuss a potential joint venture for investment in Spanish CSP projects.*
>
> *Following the introduction of RD661/2007, the efforts of Mr Tassabehji and his team gathered momentum. In particular, Mr Tassabehji:*
>
> *(a) became familiar with the new economic regime established by RD661/2007;*
>
> *(b) discussed the detail of the RD661/2007 economic regime with Sener [...]"*[270]

514. The Claimant's disassociation from the opinion published by Sener also completely contradicts what was stated by Mr. Tassabehji in his Witness Statement:

> *"I had **numerous discussions with Sener about the detail of the RD661/2007 special regime**. I enjoyed a good personal relationship with Mr Jorge Sendagotra, who was then Group Chairman of Sener, [...] **Sener** had been involved in two CSP projects with ACS-Cobra and, as a result, **was very familiar with the regulatory regime** for CSP projects in Spain.*[271] *(Emphasis added)*

515. The disassociation on the opinion of Mr Sendagorta is also surprising and completely contradicts what is asserted by Dr Sultan Al Jaber in his Witness Statement:

> *"Ziad and Shaju met a number of Spanish renewables players but reported that the most likely partner was Sener. Sener was a well-respected engineering company*

[269] Press article "Tariff deficit, retroactivity and Reasonable profitability" signed by Mr Jorge Sendagorta, Chairman of SENER, and published in:
- The financial newspaper "Expansión" on 19/7/2012: http://www.expansion.com/2012/07/19/opinion/tribunas/1342729151.html R-0084.
- The thermosolar sector's digital newspaper "Helio Noticias" on 22/7/2012: http://www.helionoticias.es/noticia.php?id_not=813 R-0085.

[270] Claimant's Memorial, paragraphs 147 and 148

[271] Witness Statement, Mr Tassbehji, paragraph 28

which was privately owned by the Sendagot1a family. [...] ***Sener also had a detailed working knowledge of the regulatory regime****."*

"Discussions with Sener about a potential joint venture took place in the second half of 2007 following the introduction by Spain of RD661/2007, which created a new economic regime for renewables."

"Following the signing of the Joint Venture Agreement my team was active in working with Sener on the project financing for the Gemasolar project."

"we had a very strong partner in Sener who ***really knew*** *the Spanish market and regulatory policy and was well connected."*[272] *(Emphasis added)*

516. The Claimant has not provided a single report issued or delivered by Mr Ziad Tassabehji to Dr Sultan, asserting that they could not be found[273]. One must conclude, then, that except for the presentations made in Abu Dhabi to Mubadala, Dr Sultan made these declarations because of what Mr Ziad mentioned to him about SENER.

517. The coordinated, joint work done by Sener and the Claimant in 2012 (months after the publication of the article by Mr Sendagorta) has also been declared by Mr Al Ramahi:

"At this stage, [September 2012] ***Masdar Solar and Sener****, the shareholders in Torresol Energy,* ***commenced efforts to lobby*** *the Spanish Government to seek to protect our investments against the threatened regulatory measures. [...] I have met on four occasions with the Spanish Minister of Industry, Energy and Tourism (HE Mr. Jose Manuel Sorta [sic.]).* ***Two of those meetings have been in Madrid where I have been joined by Enrique Sendagorta****, the Chairman of Torresol Energy."*[274]

518. From these statements made in January 2015, it is evident that the Claimant, Mr Ziad and Dr Sultan Al Jaber are convinced that SENER was highly familiar with the applicable regulatory framework. Likewise, in January 2015, they seem to be fully aware of and share the understanding of the regulatory framework that SENER also holds. In fact, the Claim ends by explaining the Gemasolar Project, which approved the Project, as:

*"****Sener*** *was considered to be a very strong partner who* ***really knew the Spanish market and regulatory policy*** *and was well connected. Sener was heavily invested in CSP projects and was taking a 60% equity stake in the proposed joint venture."*[275] (Emphasis added)

519. It is contradictory, therefore, that after providing SENER's publication on reasonable profitability in the Counter-Memorial, which evidences their full knowledge of the regulatory framework, the Claimant now attempts to disassociate itself from this knowledge by SENER of the regulatory framework, asserting that this is from 2012, after the MASDAR investment. This line of reasoning cannot be upheld.

[272] Witness Statement by Dr Sultan Al Jaber, paragraphs 11, 15, 18(e), 24
[273] Letter from Allen&Overy. Document request 3 and 4, of 7 January 2016, stating that the documents that the Arbitral Tribunal has agreed to deliver have not been found. R-0248.
[274] Witness Statement by Dr Sultan Al Ramahi, paragraphs 11 and 28.
[275] Claimant's Memorial, para. 159 (e)

520. Furthermore, the Claimant again fails to answer the true question that lies behind the assertion by SENER's top executive. The Claimant does not explain how it is possible that Mr Sendagorta held a view of the principle of reasonable profitability that is so radically opposed to that which the Claimants advocate. This contradiction is even harder to understand if we consider that SENER and the Claimants are partners in a Joint Venture that channels investments related to this Arbitration.

IBERDROLA

521. The principle of reasonable profitability and its dynamic nature have been upheld by Iberdrola, the leader in the Spanish Wind Sector. The Claimants identify their own Expectations with the Legitimate Expectations that Iberdrola had in RD 661/2007[276]. However, Iberdrola had expectations that in no way match those of the Claimants. An Iberdrola PPT Presentation from 2006 is provided, in which RD 436/2004 is described. This presentation states the true Legitimate Expectations held by Iberdrola:

> *"This system would not affect retroactivity in the fundamental principles of the support framework as it would not infringe on the investor's legitimate expectations by ensuring Reasonable profitability for the activity."*[277]

522. Iberdrola recognised the dynamic nature of the regulatory framework and the need for adjustment to ensure the sustainability of the SES in February 2012:

> *"The unsustainable construction of renewable energies needs to be stopped and, in particular, that of hybrid gas-solar technologies, the most expensive of all today". [...] The chairman of the electricity company has strongly opposed the premium system for renewable energy [...]*
>
> *Galán appeared before the press with a very clear message: the current system is unsustainable and it must be completely changed. [...]*
>
> *Iberdrola's chairman has turned his attention to solar and solar-gas hybrid power. At present, "the pool price (conventional energy) is* ***€61/MWh****, while for wind it is €70/MWh, PV is €121/MWh and solar-gas hybrid is* ***€332/MWh****!". (Emphasis added)*[278]

523. In July 2012, Iberdrola again requested a cut in premiums for renewables because of the system's lack of sustainability:

> *"Sánchez Galán also insisted that the Supreme Court upholds possible cuts in premiums for renewables and believes the review of this matter to be "logical" in the current economic crisis. "The judgements and legislation talk about* ***reasonable***

[276] Counter-Memorial, paragraphs 230 and 231.
[277] "Iberdrola Power Point Presentation. Renewable targets in Spain. 2006.pdf", R-0214.
[278] "Iberdrola demands premiums for renewables stop: *"Every month that passes, the bubble gets bigger"*. News published on the Digital Newspaper Libremercado.es on 23 February 2012, available at: http://www.libremercado.com/2012-02-23/iberdrola-exige-detener-la-construccion-de-nuevas-plantas-de-renovables-1276451004/. R-0215.

profitability. *In the* ***United States***[279]*, this is called retributive* ***adjustment, and not retroactivity****", he said.*

If the new circumstances mean adjustments in all productive sectors, it is not reasonable that these are not extended to renewables when faced with a situation of widespread economic crisis and tariff deficit", he said. [...]

*He also stated, "****It is not sustainable*** *to maintain an electricity system in the middle of a crisis based on subsidies that can reach between 8,000 and 10,000 million per year."*[280] *(Emphasis added)*

524. From Iberdrola's Statements, it is clearly deduced that their understanding of the concept of reasonable profitability and its dynamism is not similar to that of the Claimants. It is evident that Iberdrola publicly requested a cut in premiums for renewables because of believing that there was an evident situation of over-remuneration (particularly to the thermosolar sector) and due to the existence of an unsustainable imbalance in the SES.

THE MOST IMPORTANT COMPANIES IN THE CSP SECTOR IN SPAIN

525. This opinion by SENER is confirmed, shared and upheld by the most important companies in the Spanish RE Sector, besides SENER. The large companies in the solar thermal sector in Spain have not brought claims to the Supreme Court demanding that RD 661/2007 be frozen in their favour, nor are there any agreements in this regard. To the contrary, these companies demand that the principle of reasonable profitability be respected:

"The large thermosolar sector companies have joined forces to take the Government to the Supreme Court for the successive regulatory changes [...] Abengoa, FCC, Sacyr, Elecnor, Samca and Sener presented a joint legal action before the High Court on 15 April to try to stop the impact of the regulatory measures approved by the Minister for Industry [...] Thermosolar sector companies are asking the Supreme Court to recognise the legal precept of Reasonable profitability for thermosolar plants. The Memorial on the Merits challenges the new fixed electricity tariffs for the facilities and promotes their review so that the companies affected can "obtain the Reasonable profitability guaranteed by Law".[281] (Emphasis added).

526. It has been established that the CSP technology association (PROTERMOSOLAR), the wind technology association (AEE), the main RE Sector association (APPA), the Claimant's partner (SENER), the biggest investor in RE in Spain (IBERDROLA) and the most important companies in the CSP sector did consider that the **guarantee** in the

[279] This company operates in the energy market of the United States of America, with over 5,000 MW in 2011 and a market share of 10%: "*Iberdrola. The electricity company exceeds 5,000 MW of capacity in the US* "News from the financial newspaper Cinco Días, dated 17 October 2011, available at: http://cincodias.com/cincodias/2011/10/17/empresas/1318858780_850215.html R-0216.

[280] *"Iberdrola warns the Government: the "tax collection" measures will cut investment and damage income"* News published by the Online Financial Newspaper "Expansión.com, on 25 July 2012, available at: http://www.expansion.com/2012/07/25/empresas/energia/1343212765.html
R-0217.

[281] News published by Helionoticias, Solar Thermal Energy News Portal: R-0086.

regulatory framework was the granting of **reasonable profitability**, not the frozen tariffs of RD 661/2007 throughout the entire operational life of their plants.

527. These are the objective expectations that any diligent investor could have had after a comprehensive examination of the regulatory framework and the legal interpretation thereof by Supreme Court case-law since 2005.

528. In light of this clear evidence, the Claimant did not request any legal Due Diligence whatsoever in 2008, and "*Mubadala Legal*" took over the legal counsel for this project[282]. The regulatory Due Diligence report requested from Pöyry in 2009 advises on (1) the consequences of the rise in the tariff deficit and (2) the Government's commitment to grant reasonable profitability through subsidies, not the tariffs and premiums under RD 661/2007. It is a proven fact that the Claimant could not have objective expectations regarding the existence of a commitment by the Government "in clear and unambiguous terms"[283] to keep RD 661/2007 in force indefinitely, in the Claimant's favour.

(v) The doctrine positions are contrary to the Claimants' line of argument

529. Moreover, faced with the astounding argument made by the Claimants we must echo what is stated in 2010 in the manual *"Powering the Green Economy. The feed in tariff handbook*" where it was established:

> "*Different names have been used to describe the tariff calculation approach based on actual cost and profitability for producers. The German FIT scheme is based on the notion of "cost-covering remuneration", the Spanish support mechanism speaks of a "reasonable rate of return" and the French "profitability index method" guarantees "fair and sufficient" profitability. Despite the variety in names and notions, in all cases the legislator sets the tariff level in order to allow for a certain internal rate of return, usually between a 5 and 10 per cent return on investment per year*".[284] (Emphasis added)

530. In the Spanish case, said manual is aware of the legislator's intention to grant a 7% return on investment:

> *"To give an example, the Spanish legislator calculated the tariffs based on 7 per cent returns on investment under the fixed tariff option, and 5-9 per cent under premium FIT option."*[285]

(b) Reasonable profitability is an end that can be achieved in various ways

531. Act 54/1997 did not define the specific mechanism through which the RE subsidy system should be articulated. This law did not require the Government to establish a "feed in tariff" system to articulate the RE remuneration regime. In fact, no specific system was established. The law was confined to establishing the limits and the objective

[282] Document C-0042, page 34.
[283] Reply on the Merits, paragraphs. 20, 108, 296, 334, 411 and 512. Furthermore, this is reiterated in similar terms in paragraphs. 266, 269, 301, 302, 303, 319.o), 403, 405, 406, 491, 506 and 513.
[284] Powering the Green Economy. The feed in tariff handbook., pag 19. R-0058
[285] Ibid. paragraph 42.

for the Government, in the exercise of its discretionary powers and with full respect for the law, to establish it.

532. In compliance with this legal mandate, since 1997, the Regulator has established different mechanisms to achieve the objectives set by this law. Changes from one set of mechanisms to another set of mechanisms brought about major litigation on which the Supreme Court of the Kingdom of Spain has ruled[286].

533. In all cases, the supreme interpreter of Spanish Law has held that, while the remuneration system hinges on the principle of reasonable profitability *"the remuneration regime that we analysed does not guarantee (...) operators of special regime facilities the inviolability of a certain level of profits or revenues relative to those obtained in previous financial years, nor the indefinite nature of the formulas used to set the premiums"* (Emphasis added)[287].

534. This case-law of 2006 was subsequently reiterated in a Judgement on 3 December 2009[288] and in two Judgements on 9 December 2009.[289] In this specific regard, we must highlight what the Spanish Supreme Court pointed out in the latter of these Judgments

> *"It must be stated that the establishment of the economic regime for electric power production by facilities under the special regime advocated under RD 661/2007, of 25 March, cannot be abstractly classified as arbitrary, when it is subject to the objective of ensuring Reasonable profitability throughout the useful life of these facilities and thus, the Government, pursuant to article 15.2 of Act 54/1997, of 27 November, on the Electricity Sector, is entitled to pass methodology for calculating and updating the remuneration of the said activity using objective, transparent and non-discriminatory criteria (...)" (Emphasis added)*[290]

535. Thus, no investor who had a rational understanding of the Spanish Regulatory Framework could have the expectation of, and much less the right to, a specific formula or mechanism for remuneration in force at any time remaining indefinitely *petrified*. And all the more so when the Kingdom of Spain never promised this regulatory petrification to the Claimants or any other investor.

(c) Reasonable profitability as a guarantee of balance

536. "Reasonable profitability" imposes a necessary balance between the cost to the SES of the subsidy regime for renewables and the profitability generated for the investor.

537. Based on purely argumentative grounds, the Claimant denies this essential characteristic of the Spanish remuneration model.

538. The Claimant asserts as undisputed fact the idea that the rollout of Renewables in Spain is subject to the Guidelines arising from European Union regulations. However, the

[286] Counter-Memorial, paragraphs 523 to 549.
[287] Judgement from the Third Chamber of the Supreme Court, of 25 October 2006. R-0071.
[288] Judgement of the Supreme Court, of 3 December 2009, Third Point of Law. R-0076.
[289] Judgement from the Third Chamber of the Supreme Court, of 9 December 2009 R-0077
[290] Judgement of the Supreme Court, of 3 December 2009, Fourth Point of Law. R-0076.

Claimants forget to mention that a subsidy or aid regime implemented by a Member State is subject to EU rules on State Aid[291]. That is, it is subject to the principle of proportionality[292].

539. The Claimant ignores that the "reasonable" qualifier used in Article 30 (4) to describe the profitability means that it must be reasonable for investors, but also for the consumers who pay it. Furthermore, not violating European Union regulations on State Aid.

540. Indeed, the Claimant once again omits the fact that the entire mechanism of subsidies for renewables is a cost of the SES and thus, subject to its economic sustainability.

541. The Claimant fails to note that all the rules developed under 30 (4) spotlighted the need to maintain this balance.

542. The Explanatory Memorandum to RD 436/2004 expressly recalled that:

> *"Whatever the remuneration mechanism chosen, the Royal Decree guarantees the operators of special regime facilities reasonable remuneration for their investments and electricity consumers a likewise reasonable allocation of the costs attributable to the electricity system (...)"*[293].

543. In the same vein, the Explanatory Memorandum to Royal Decree 661/2007 states:

> *"The economic framework laid-down by this Royal Decree develops the principles contained in Act 54/1997, of 27 November, on the Electricity Sector, ensuring the operators of special regime facilities Reasonable profitability on their investments and electricity consumers a likewise reasonable allocation of the costs attributable to the electricity system"*[294].

544. Moreover, in case there is any doubt in this regard, the aforementioned balance is expressly stated in the Renewable Energy Plan 2005-2010:

> *"The analysis conducted aims to balance the application of resources so that levels of return on investment are obtained that make it attractive relative to other*

[291] Counter-Memorial, paragraphs 469 to 476.

[292] Specifically, Article 4 (1) of the Directive stipulates: *"Without prejudice to the provisions of Articles 87 and 88 of the Treaty, the Commission will assess the application of the mechanisms used in Member States, under which electricity producers receive, in accordance with regulations issued by the public authorities, direct or indirect aid, and which could restrict trade, considering the fact that they contribute to achieving the objectives set out in Articles 6 and 174 of the Treaty*" Directive 2001/77/EC of the European Parliament and of the Council, of 27 September 2001, on the promotion of electricity generated from renewable energy sources in the internal electricity market. C-0022 _ ESP.

[293] Royal Decree 436/2004, of 12 March, establishing the method for the updating and systematisation of the legal and economic regime of the activity of electricity production under the special regime. C-0024_ESP.R-0148 Bis.

[294] Royal Decree 661/2007, of 25 May, regulating the activity of energy production under the special regime. C- 0038_ESP. R-0150 Bis,

alternatives in an equivalent sector in terms of profitability, risk and liquidity, always aiming to optimise available public resources."[295]

545. As we stated in Section IV.A.2.2. (a) RD 661/2007 was a response by the Spanish Regulatory to the loss of said balance. However, the Claimant omits this piece of information.

546. There is a great deal of evidence that demonstrates as a proven fact in this case that the principle of reasonable profitability requires a *balance* between the profits to be received by producers and the cost that said profit represents for the SES and, thus, for Spanish consumers.

(d) Reasonable profitability has a dynamic nature

547. The Claimant denies the dynamic nature of the Principle of Reasonable profitability. However, such denial is based on purely subjective considerations of the Spanish regulatory framework. The Claimant's view is based on several fundamental errors that weaken their entire line of reasoning.

548. By defining the remuneration regime for renewables as if it were an island isolated from the SES, the Claimant bases its line of reasoning on erroneous grounds. In Section IV.A.1.4. herein we have analysed this subject in detail. This error leads the Claimants to ignore the fact that the subsidies for renewables are a cost of the SES and thus, subject to its sustainability. In order to protect the economic sustainability of the SES, the definition of one of its main costs (the subsidies for renewables) must be dynamic enough to enable it to be adjusted in the event that the economic sustainability of the SES is jeopardised.

549. In addition to the first error, the Claimants make another mistake. As explained above, "Reasonable profitability" is a simple programmatic principle. It is a duty that must necessarily be respected, not only due to the obligations of article 30 (4) of Act 54/1997 but also because it is required under the European regulations on state aid to which the system of support for renewables is subject.

550. Therefore, the support models for renewables must be dynamic enough to make it possible to correct situations of over- or under-remuneration. Proof of this is the fact that RD 661/2007 itself was passed in order to correct situations of over-remuneration which were occurring in relation to wind technology.

551. Finally, the Claimant makes a third mistake. They have not understood the relationship that exists under Spanish law between Act and Regulation that we have explained in Section IV.A.1.3. herein. This relationship is based on the principle of hierarchy. As a result of this fundamental principle in Spanish law, no article in a regulation can contradict the terms of an Act, nor can it prevent the adoption of changes in regulations aimed at complying with the terms of the Act.

[295] Spain Renewable Energy Plan. 2005-2010. Institute for Diversification and Energy Saving of the Ministry of Industry, Tourism and Trade. Page 27 R-0201.

552. Thus, the principle of hierarchy, within the framework of Act 54/1997, arises as the mechanism used to afford the Spanish regulatory framework the necessary dynamism to guarantee the economic sustainability of the SES and to correct situations of over- or under-remuneration that oppose the principle of Reasonable profitability.

553. Consequently, without altering the essential principles of the Spanish regulatory framework set forth in the act, amendments can be made to the regulations as required to comply with the law. Hence, it is easily verifiable that Act 54/1997, as regards the subject at hand, has not been modified, whereas the regulations that implement it have experienced several amendments.

554. Therefore, the remuneration model derived from Act 54/1997 guaranteed its dynamism through the principle of hierarchy. However, the manner in which said dynamism was expressed was through regulatory amendments implementing the necessary means for guaranteeing the fulfilment of the Act. In other words, the means by which this mechanism was carried out was not very flexible. It required constant regulatory reforms of the implementing regulations.

555. In order to avoid this situation in the current remuneration model, as we shall assess below, the Act establishes the different cases in which modifications can be made and the time at which such modifications can be rendered. At any rate, all these modifications are provided for in order to guarantee the two essential principles on which the new remuneration model is built: economic sustainability of the SES and respect for the principle of Reasonable profitability.

556. Therefore, we confirm that under both Act 54/1997 and RD-Act 54/1997, the remuneration model is essentially dynamic, notwithstanding the fact that the current model is less abrupt and more predictable as regards the way of implementing the modifications: it is more flexible.

557. Beyond this, the Claimants disregard other factors that highlight the dynamic nature derived from Reasonable profitability: (i) The wording of Article 30 (4) of the Act 54/1997 (ii) This was interpreted by the Supreme Court of the Kingdom of Spain long before the Claimants made their investment; (iii) This was understood by the renewable sector in Spain; (iv) The dynamic nature is stated in the actual contracts that financed the construction of the plants; (v) Pöyry warned the Claimants of the risk of such dynamism; and (vi) This dynamism was accepted by the Claimants.

(i) The dynamic nature is imposed by the wording of Article 30 (4) of Act 54/1997

558. In holding their position, the Claimants fail to read article 30 (4) of Act 54/1997. The failure to read this article leads to their unawareness of the fact that Article 30 (4) of Act 54/1997, when describing the profitability that the system is to provide investors, does not use the terms *"unchangeable"*, *"fixed"*, or anything similar. Act 54/1997 uses the term "*reasonable*".

559. The Claimants again commit a manifest error when they state that "However, the cost of money in capital markets that is referenced in Article 30 (4) of the 1997 Electricity

Law simply serves as a guideline for the regulator in defining the economic regime"[296]. Nothing could be further from reality.

560. From a simple reading of the aforementioned Article, it is concluded that *"the cost of money on the capital market"* is the element used by the Act to determine the reasonableness of the profitability.

561. The Claimants overlook the fact that Article 30 (4) of the 1997 Act uses the expression *"with reference to"*. The Dictionary of the Spanish Royal Academy defines "reference to" as the *"action or effect of referring"*[297] and "refer" is defined as *"to direct, guide or order something to a specific and determined end or object or put something in connection with something else or with a person."*[298] .

562. Consequently, the cost of money on the capital market is not simply a "guideline". Far from it, it is the benchmark imposed by Law that allows the regulator to determine whether profitability at a given time is reasonable or not. Thus, the criterion used by the legislator to judge such reasonableness is not a static element, but is a fundamentally *dynamic* element. As dynamic as is the *cost of money on the capital market.*

(ii) Case-law has interpreted the principle of Reasonable profitability as a principle of a dynamic nature

563. The Supreme Court of the Kingdom of Spain, from its earliest Judgements on the matter, highlighted the dynamic nature of a system based on the principle of Reasonable profitability, noting that:

> *"Article 30 of the LSE allows the respective companies to pursue for premiums to be incorporated, in setting them as a relevant factor in obtaining "Reasonable profitability with reference to the cost of money on the capital market"[...]. The remuneration regime we analysed does not guarantee, however, operators of special regime facilities the inviolability of a certain level of profits or revenues relative to those obtained in previous financial years, nor the indefinite nature of the formulas used to set the premiums." (Emphasis added)299.*

564. The Claimant also forgets that the multiple Judgements that the Supreme Court of the Kingdom of Spain has handed down to date expressly advise that the principle of Reasonable profitability, because of having to attend to the specific situation of the SES and the economy, has a dynamic nature[300].

565. Moreover, any investor could see that Article 30.4 of Act 54/1997 has not undergone any substantial alteration since its introduction in 1997. Therefore, a diligent investor

[296] Reply on the merits, paragraph. 213.
[297] Meaning of the word reference. RAE - Meaning of the word reference. (RAE) Dictionary of the Spanish language electronic version (twenty-third edition October 2014) R- 0218.
[298] Meaning of the word refer. (RAE). Dictionary of the Spanish language electronic version (twenty-third edition October 2014). R-0219.
[299] Judgement from the Third Chamber of the Supreme Court dated 25 October 2006, Appeal 12/2005, reference El Derecho EDJ 2006/282164 (Spanish). Third Legal Basis. R-0071.
[300] Counter-Memorial, paragraphs 338-415.

should have known that, while Act 54/1997 did not change, no regulatory Article could generate the expectation that given levels of profitability would be maintained for an indefinite period of time.

566. The Arbitral Tribunal on the case Charanne and Construction Investment v. Kingdom of Spain stated the following regarding this:

> *"The Tribunal believes that the Claimants could have, at the time they made their investment in 2009, conducted an analysis of the legal framework of their investment under Spanish Law and understood that there was a possibility that the regulations adopted in 2007 and 2008 could be subject to change. At least, this is the level of diligence one would expect from a foreign investor in a highly regulated sector such as the energy sector, in which a preliminary and comprehensive analysis of the legal framework applicable to the sector is essential in order to make the investment"*[301]

(iii) Pöyry advised the Claimants about the dynamic nature of the SES and the limits to this dynamism

567. The Claimant forgets that Pöyry specifically stressed to them that:

> "*In addition, recent history tells us that even though renewable technology are expensive, the Government is willing to provide a reasonable profitability for investors by keeping the subsidies, even if the event of tariff deficits being generated over time"*[302]

568. Pöyry expressly warned the Claimants of the grounds that could justify regulatory changes. On this issue, Pöyry's report noted the close relationship between the subsidies for renewables and the economic sustainability of the SES. In this regard, he warned about the role that these subsidies, as a cost of the SES, have in generating the tariff deficit:

> *"The renewable feed-in tariff structure in Spain contributes to generate further tariff deficits so future development plans needs to take into account the system costs of promoting expensive renewable technologies"*[303]

569. Along the same lines, Pöyry highlighted, as one of the key factors on the Spanish market, that:

> "*The Spanish system is under stress when cost of generation increases (generation tariff deficit"*[304]

[301] Charanne B.V. and Construction Investment S.A.R.L. v. Kingdom of Spain SCC No 062/2012. Final Award, 21 January 2016. RL-0071
[302] "Current and Future Trends in the Spanish Solar System". Pöyry March 2009 Edition. Pag. 131 C-0049.
[303] Ibid. Page 131.
[304] Ibid. Page 131.

570. While he considered that "the Spanish renewable business will be developing in the long term and pushing to meet the targets"[305] the analysis made by Pöyry at that time clearly established an exception to this conclusion:

> *"The only issue against it is represented by the financial crisis"*[306]

571. In the analysis of the relationship between the subsidies for CSP technology and the tariff deficit, Pöyry pointed out a risk of a drop in the subsidies when he noted that:

> *"It is clear that the total contribution of Solar to the tariff deficit would be much higher than the contribution from wind. Consequently, the risk of wind projects having further reductions of the subsidy is low while the solar business risk is higher. Seeing as Solar PV has just experienced a reduction of the regulate tariff, we believe that the risk is now concentrated in the CSP industry"*[307]

572. Pöyry also stressed that the amendments introduced under RD 661/2007 were based on the economic sustainability of the SES and correcting situations of over-remuneration.

573. Specifically, in his report from March 2009, Pöyry noted, when analysing the background of the subsidies:

> *"The average reference tariff (ARET) was one of the key components to the remuneration of renewable energy projects in Spain, and in the case of solar PV projects was the only component under the previous regulatory framework (RD 436/2004). Hence, higher average reference tariffs were beneficial for solar PV projects*
>
> *With high pool prices due to high gas prices, the average reference tariffs were set to increase over and above the inflation rate.*
>
> *The rise in the ARET would have created very significant returns for special regime generators (especially wind farms) which in turn would further increase the end user tariff and ARET. This is due to the "tariff feedback", where the ARET drove renewable earnings which contribute to total system costs which again drove ARET*
>
> *The Spanish government was not willing to deal with this issue by raising tariffs to avoid potential inflation risk, therefore the changed the renewable scheme from RD 436/2004 (linked to the ARET) to RD 661/2007 and subsequently reviewed the Solar PV tariffs or 661/2007 via the publishing of RD 1578"*[308]

574. Likewise, Pöyry expressly advised the Claimants that:

> *"Furthermore, given recent high Pool prices, Special Regime generators, in particular wind farms, had, according to the Spanish Government, been making supra-normal profits, As a result of these excessive profits the government has intervened in order to cap profits by modifying RD 436/2004 (the main special*

[305] Ibid. Page 131.
[306] Ibid. Page 131.
[307] Ibid. Page 133.
[308] Ibid. Page 75.

regime legislation for the period 2004-07) and publishing RD 661/2007 to replace it"[309]

575. In his report, Pöyry noted the possibilities of changes in the regulations on renewables. In fact, Pöyry expressly indicated to the Claimants the reasons that would justify said regulatory changes: the guarantee of the economic sustainability of the SES and elimination of situations of over-remuneration. Likewise, the consultancy emphasised that the limit on the regulatory changes was found *in the* Government's commitment to guarantee the Reasonable profitability of the investments by maintaining subsidies*: "the Government is willing to provide a reasonable profitability for investors by keeping the subsidies".* At no time has this commitment been violated.

576. As we shall see in the Claimant's subjective expectations, none of these elements set forth by Pöyry was assessed.

(e) The manner in which Reasonable profitability was set at the time of the Claimants' investment

577. As has been discussed in the preceding paragraphs, Act 54/1997 established the objective and the limits to be taken into account when developing the RE economic regime. Act 54/1994 also established that, when setting the subsidies, the objectives established by the PER were necessarily taken into account[310].

578. By legal mandate, the Renewable Energy Plan (PER) 2005-2010 is an essential part of the economic system of the Kingdom of Spain. As we discussed in Section IV.A.1.4, the premiums on renewables are a cost of the SES (Spanish Electricity System) and therefore their implementation, must ensure the economic sustainability of these costs. This requires planning the impact of the deployment to renewables in connection with the economic sustainability of the SES. This analysis, as we have stated above, is carried out in the so-called Renewable Energy Plan 2005-2010 as it is a requirement of Act 54/1997 itself.

579. The RD 661/2007 itself links its content to that plan when its states:

"Certain reference installed power targets are established which coincide with the targets of the Renewable Energy Plan 2005-2010 and the Strategy for Energy Saving and Efficiency in Spain (E4), for which the compensation system set out in this Royal Decree shall be applicable."[311]

580. The terms indicated show that the subsidies established under RD 661/2007 are, by legal mandate, based on the PER 2005-2010. The PER 2005-2010 is the regulatory

[309] Ibid. page 113.
[310] Act 54/1997, of 27 November, on the Electricity Sector. Sixteenth Transitional Provision. R-0191 and Act 17/2007, of 4 July, amending Act 54/1997, of 27 November, on the Electricity Sector, to adapt it to the provisions of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003, concerning common rules for the internal electricity market. It introduces Additional Provision 26 of Act 54/1997. R- 0200.
[311] Royal Decree 661/2007, of 25 May, regulating the activity of electricity production.
under the special regime. Preamble. C-0038-ESP R-0150 BIS

instrument that connects the essential principles of the regulatory model set forth in Act 54/1997 to the subsidies established in RD 661/2007. Consequently, the PER 2005-2010 is an essential regulatory instrument for understanding the principle of Reasonable profitability and the way in which this principle is defined. In no way can RD 661/2007 be understood outside the scope of the PER 2005-2010.

581. We shall take a look at the following issues below: (i) The PER analyses the energy scenario in which it is expected that the deployment of renewables will be implemented; (ii) The PER analyses the possibilities of each technology as well as the barriers that affect them; (iii) The PER determines the cost that the deployment of renewables will have for the SES based on the returns offered to the *standardised installations* foreseen for each technology; (iv) The subsidies set in RD 661/2007 aim to achieve the profitability established in the PER for the *standardised installation*; (v) The importance of the PER 2005-2010 and its connection to RD 661/2007 was known by the system operators.

(i) Energy scenario in which the deployment of the RE is expected

582. The energy scenario in which it is expected that the deployment of the renewables will be implemented is the scenario in the Renewable Energy Plan 2005 - 2010. This scenario is based on forecasts of the electricity demand on which the sustainability of the SES pivots[312]:

> *"Therefore, for the preparation of this Renewable Energy Plan 2005-2010, we have designed two general energy scenarios (called Trend Scenario and Efficiency Scenario) and three other scenarios for the development of renewable energies (Current, Likely and Optimistic), having chosen the Trend energy scenario as a reference for setting the targets of the Plan, and as the renewable energy scenario, the one labelled "Likely", whose targets provide the basis for this Renewable Energy Plan 2005-2010, which once integrated into the reference energy scenario chosen, form the so-called PER Scenario or Plan Scenario. The analysis of the scenarios was the subject of a specific document and is briefly discussed in Chapter 2 of this document."*[313].

583. Consequently, the specification of the returns by technology that are included in the Renewable Energy Plan 2005-2010 (which we analyse later) is subject to a certain scenario of primary energy consumption, to a certain evolution of the electricity demand.

(ii) State of solar thermal technology, barriers and measures to overcome these barriers.

584. The PER 2005-2010 addresses the status of solar thermal technology[314]. Depending on the state of the art and with the aim of achieving an installed power of 500 MW, the PER

[312] Spain Renewable Energy Plan. 2005-2010. Point 5.4 New energy and renewable energy scenarios. The scenario of the Renewable Energy Plan 2005 - 2010. R-0201.
[313] Ibid. Page 323.
[314] Ibid. Pages 130 to 154.

(1) details the barriers[315] and (2) establishes the measures to be taken to overcome those barriers[316].

585. Among the existing barriers, there were technological aspects such as "Doubts about basic technical aspects such as storage, work flow, etc." and "Lack of specialised companies engaged in the manufacture of essential components".

586. Despite detecting such technological barriers the PER 2005 - 2010 did not propose increasing subsidies relative to those in the RD 436/2004. Specifically, the PER 2005-2010 stated:

> *"The measures to achieve this target of 500 MW of rated power in thermoelectric power plants are mainly: Maintenance of the conditions of RD 436/2004, increasing the limit of the legal framework up to 500 MW, and of RD 2351/04"*[317] *(Emphasis added).*

587. The PER 2005-2010 considered that the technological risks of solar thermal energy were covered by the premium set out in Royal Decree 436/2004:

> *"RD 436/2004, with its premiums, has stimulated new projects. Currently and accounting for existing projects that are in different stages of execution, in the development of the promotion or at the beginning of the measurement phase, it can be noted that globally projects are being promoted with a total capacity of about 500 MW"*[318].

588. Through this explanation, the mistake made by the Claimant in asserting that the achievement of planning targets for renewables required an increase in subsidies is clear. Quite the contrary, as evidenced above, the target regarding solar thermal required no increase in subsidies whatsoever.

(iii) The PER 2005-2010 required a valuation of the cost of implementing the targets of implementation and funding thereof by the SES.

589. The premiums are a cost of the SES. Therefore, the PER 2005-2010 analyses the cost for the SES created by the implementation of the various targets set for each technology and the financing of that cost. Specifically:

> *‘"To make a success of its stated goals, a detailed assessment has been conducted of the investment that it is expected shall be made during the period, the nature of that investment and government support necessary to achieve the targets. The methodology and criteria of economic and financial analysis that were applied in the Development Plan in 1999 have been maintained. The analysis, based on the specificities of each technology —degree of maturity, costs, contribution to the global target—, is founded on the balancing of all the factors, such that it manages*

[315] Ibid. Pages 142 and 143.
[316] Ibid. Pages 142 and 143.
[317] Ibid. Page 144.
[318] Ibid. Page 145.

to achieve private and public profitability, mobilising the necessary resources to carry out the planned investments". [319]

590. Accordingly, the methodology used to determine this cost is described as follows:

"Taking as a baseline the proposed energy objectives, the financing requirements have been determined for each technology according to its profitability, defining a range of standard projects for the calculation model.

These standard projects have been characterised by technical parameters relating to their size, equivalent operating hours, unit costs, periods of implementation, lifespan, operating and maintenance costs and sale prices per final unit of energy. Similarly, some financing assumptions have been applied, as well as a series of measures or financial aid designed according to the requirements of each technology." (Emphasis added)[320]

591. Specifically, for solar thermal technology a standardised installation is established and the various parameters are set that are required for this Plant to reach a project return close to 7% stating that:

*"**Profitability of standardised projects**: calculated on the basis of maintaining an Internal Rate of Return (IRR), measured in local currency and for each standardised project, **close to 7%**, with own capital (before financing) and after tax"* (Emphasis added) [321]

592. It should be noted that the PER 2005-2010 was based, for solar thermal projects, on an opportunity cost on equity of 5%[322].

(iv) The subsidies set in RD 661/2007 aim to achieve the profitability on standardised installations established in the PER.

593. By application of Act 54/1997 the premiums established in RD 661/2007 find their foundation and rationale in the PER 2005 - 2010. This is the sense of the contents of the Preamble to RD 661/2007. The PER establishes a profitability target by standardised installation to which the premiums should be subject. This target was established for solar thermal projects at approximately 7% of profitability, based on an opportunity cost on equity of 5%.

594. Said profitability target is not only relevant for investors but also for the other interested party, the consumers, who need to know the cost of implementing each technology. That is, the cost to the SES, to the consumer, that would be entailed by reaching the implementation targets with the projected profitability.

595. The SES does not calculate the profitability by taking into account the individual costs of each investor. The premiums established by Royal Decree 661/2007 are set with the

[319] Ibid. Pages 272.
[320] Ibid. pp. 273, 274 and 280.
[321] Ibid. Page 274.
[322] Ibid. Page 141.

aim of providing a standardised installation a return of about 7% according to the standards set in the PER 2005 - 2010 itself: the CAPEX of a standardised installation, the OPEX of a standardised installation, equivalent operating hours, unit costs, implementation periods, useful life and selling prices of the final energy unit.

596. The SES does not arbitrarily set the profitability. According to the PER 2005 - 2010, the Regulator proceeds to recognise and reconstruct an economic structure of exploitation by identifying the standard cost of a standardised installation (CAPEX) and its operating and maintenance costs (OPEX), according to the actions of a diligent investor. Once this first phase has concluded, it proceeds to set a balanced and proportionate target of economic return in terms of profitability, according to certain standards established for a standardised installation.

597. That is the system followed to set the profitability target to which the subsidies deriving from RD 661/2007 were to be aimed. Moreover, this is the methodology that currently exists to set the subsidies that make it possible to achieve the profitability established directly in the current Act.

598. Despite the clarity of the mechanism used in the SES for fixing tariffs, the Claimant, based on the Brattle regulatory report, calls into question the above stating:

> *"As Brattle explains, the RD 661/2007 regime guaranteed a particular FIT, not a reasonable profitability on a fixed cost target. Even if Spain did develop an implicit cost target to derive the GIT under the previous regime, that cost target was never disclosed and could not form the basis of Claimants´ legitimate expectations"*[323] *(Footnotes omitted)*

599. This argument seems to overlook the fact that both the need for a PER and its purpose were established in Act 54/1997 itself. This argument also ignores the fact that Royal Decree 661/2007 was referring to said PER 2005-2010 in its Preamble. In fact, the PER 2005-2010 was known by the Claimants, as is evidenced by their Memorial on the Merits [324]. However, in their Reply on the merits, the references to the PER 2005-2010 have disappeared.

600. Brattle, who claims to be an expert consultant on regulations, should also be aware that said methodology was not something new starting with Royal Decree 661/2007. Indeed, the methodology used by the regulator to set the subsidies under RD 661/2007 was the same as that used to set the subsidies under RD 436/2004.

601. In application of LSE 54/1997, in December 1999 the Development Plan of Renewable Energies 2000-2010 was approved[325] (hereinafter, **"PFER"**). The close link between premiums (cost of the SES) and the economic sustainability of the SES require the rollout of renewable technologies and their impact on the sustainability of the SES to be planned

[323] Reply on the merits, paragraph. 192.
[324] Memorial on the Merits , paragraph 100 to 109.
[325] Renewable Energy Promotion Plan 2000-2010. R-0202.

with due detail. Thus, the PFER 2000-2010 set the targets for implementation of REs for a baseline scenario of an annual increase in electricity demand at 2%[326].

602. The PFER established the economic conditions and basic techniques and methodology to be followed for determining the remunerative regime of the RE, which should be implemented by regulation.

603. Specifically, this methodology consisted (and has always consisted) of defining, within each technology and according to the state of the art existing from time to time, different *installation types.* Once these *installation types* had been determined, different *standards* were established in each one of them (investment cost, operation cost, useful life of the plant, hours of rewarded production, market price) that allowed such plant to reach, in a given period of time (useful life), a Reasonable profitability according to the cost of money in the capital market[327]. The profitability of the *standard projects* is estimated at *"7% with own resources, before financing and after tax"*[328].

604. In this sense, the PER 2000-2010 noted:

> *"Taking as a baseline the proposed energy objectives, the financing requirements have been determined for each technology according to its profitability, defining a range of* ***standard projects*** *for the calculation model. These standard projects have been characterised by technical parameters relating to their size, equivalent hours of operation, unit costs, periods of implementation, lifespan, operational and maintenance costs and sale prices per final unit of energy. Similarly, some financing assumptions have been applied, as well as a series of measures or financial aid."*[329]

605. RD 436/2004 was issued in order to achieve by 2011 the targets of installed capacity planned in the PFER. At this point, it is relevant to note the consideration contained in the Economic Report of RD 436/2004. In this report it states:

> *"The A parameter (investment, operation and maintenance costs for each technology) has great weight in setting the amount of the regulated fee sold to the distributor. Thus, any plant in the special regime installed in Spain will get Reasonable profitability, provided that it is equal or better than that of the group (standard plant type)"*[330].

606. This methodology, based on Installation Type, was used by the NEC to prepare its report on the draft version of RD 436/2004. The NEC used the A+B+C methodology. According to this methodology, parameter A was the essential parameter in determining the Reasonable profitability of the investments in renewable energy. It was explained as follows:

> *"Parameter A is the production cost that must be considered for the investments made to reach a Reasonable profitability, taking into account the characteristics of*

[326] Ibid. paragraph 31.
[327] Ibid. pages 200-218.
[328] Ibid. paragraph 182.
[329] Ibid. paragraph 180.
[330] Financial Report of RD 436/2004 R-0220.

each type of technology. The income needed for the investment considered in each project type to reach an internal rate of return on free and post-tax cash flows similar to those of a regulated activity shall be determined. The basic information for each technology type as regards the investment and operating income and costs corresponds to the average values from facilities in operation over the four years of validity of the premiums. The average technical and economic characteristics considered for each technology are:

- Hours of use.

- Yield.

- Economic life of the project and investment amortisation period.

- Unit investment cost and, where applicable, grants.

- Corporate income tax and, where appropriate, valid deductions.

- Aid under the Promotion Plan and from the Autonomous Regions.

- Operating costs: fuel, operation and maintenance, insurance, charges (for use of the land or water volume (and others).

- Operating income other than from the sale of electrical energy to the system: sales of electrical energy for self-consumption in the associated industry, sales of thermal energy to that same industry, sales of by-products (pomace, dry residue, fertiliser, etc.), energy recovery or waste reduction charges and, where appropriate, revenue from emissions allowances or the sale of green certificates."[331] *(Emphasis added)*

607. This same methodology was again used by the NEC in the report it issued on the draft version of Royal Decree 661/2007[332].

608. Moreover, faced with the astounding argument made by the Claimants, based on their regulatory expert, we must echo what is stated in 2010 in the manual *"Powering the Green Economy. The feed in tariff handbook*" where it was established:

"*Different names have been used to describe the tariff calculation approach based on actual cost and profitability for producers. The German FIT scheme is based on the notion of "cost-covering remuneration", the Spanish support mechanism speaks of a "reasonable rate of return" and the French "profitability index method" guarantees "fair and sufficient" profitability. Despite the variety in names and notions, in all cases the legislator sets the tariff level in order to allow for a certain internal rate of return, usually between a 5 and 10 per cent return on investment per year*".[333] (Emphasis added)

609. The Manual goes on to state that:

[331] NEC Report 4/2004, of 22 January, regarding the Royal Decree proposal, which establishes the methodology for the updating and systematisation of the legal and economic regime for electricity production in the special regime. Page: 8-9 R-0221.

[332] NEC Report 3/2007, of 14 February 2007, regarding the Royal Decree proposal, regulating the activity of electricity production under the special regime. Page: 14. R-0203.

[333] Powering the Green Economy. The feed in tariff handbook., Pag. 19. R- 0058.

"After a good frame of reference is established for tariffs, cost factors related to renewable electricity generation have to be evaluated. We recommend basing the calculation on the following criteria:

. Investment cost for each plant (including material and capital cost);

. Grid-related and administrative cost (including grid connection cost, costs for the licensing procedure, etc);

. Operation and maintenance costs;

. Fuel Costs (in case of biomass and biogas); and

. Decommissioning costs (where applicable)"[334]

610. These costs were taken into account in the PERs. However, we must make it clear that in the Spanish system the financial costs have never been considered as investment costs when analysing the target profitability[335]. At this point, we must recall the terms of the economic impact report of RD 436/2004, which stated:

"Below follows a review of the hypotheses, estimates and assumptions taken into account in the preparation of this proposal: (...)

Project funding: it is assumed, in all cases, that 100% of the funding will come from equity. The leverage and percentage between equity and other sources of funding are independent decisions in each project and for each promoter that, when made wisely, should provide better ratios than those estimated in this report"[336]*(Emphasis inherent in the text)*

611. Likewise, contrary to what the Claimant states in paragraphs 96 and 97 of their Memorial, we must recall that, in the Spanish model, the CAPEX and OPEX were never prepared in reference to a specific facility of a certain investor. These costs have always referred to a *standardised* installation. Always imagining an efficient investor in terms of cost. Moreover, said Manual states:

"For the estimate of the average generation cost, regulators can use standard investment calculation methods (such as the annuity method). The Spanish legislator even obliges renewable electricity producers to disclose all costs related to electricity generation in order to have optimal information when setting the tariff"[337]

612. The provision referred to in the Manual is article 44 (4) of RD 661/2007. The precedent for this article is article 40 (4) of RD 436/2004.

613. Furthermore, if it is true that the Claimant's expectations were based, among other grounds, on document C-157, we cannot understand their lack of knowledge of the clear warning made therein on the methodology for setting subsidies within the Spanish

[334] Ibid Page 20.
[335] Spain Renewable Energy Plan. 2005-2010. Institute for Diversification and Energy Saving of the Ministry of Industry, Tourism and Trade. Pages 274. R-0201.
[336] Economic Report of RD 436/2004.Page 5/10 R-0220.
[337] Powering the Green Economy. The feed in tariff handbook., pag 20. R-0058.

regulatory framework. Said document highlights some of the disadvantages of RD 661/2007, stating:

> *"Disadvantages*
>
> *Some windfall profits in the market in a transitional period (from RD 434/2004 to RD 661/2007).*
>
> *Follow-up of real cost are necessary"*[338]

614. Consequently, the Claimants overlook the methodology used by the Spanish regulator to set the premiums. This methodology was set forth in diverse regulatory instruments prior to and contemporary with the time of their investment.

615. This proves that the Claimants' expectations were not based on a proper understanding of the Spanish regulatory framework. The declarations made by the Claimants in the statements in this arbitration proceeding spotlight the lack of knowledge of the Spanish regulatory framework.

616. In any case, it is essential to understand that the Reasonable profitability was attributed to the investment in the plants. Consequently, the guarantee of Reasonable profitability established in Act 54/1997 applies only to the capital employed directly in the economic activity that allows the formation of the assets to be used in electricity generation. In any case, the concept of Reasonable profitability is attributable to other costs, such as premiums of a financial nature paid to acquire a solar thermal plant.

617. A diligent investor who has examined the PER 2005-2010 should know that the profitability target stipulated in the Plan, for whose attainment the subsidies in RD 661/2007 were established, had its foundation in the economic sustainability of the SES. Consequently, any investor should be aware that the subsidies in RD 661/2007 had their foundation and rationale in the scenario of projected electricity demand used as a basis for drawing up the PER 2005-2010.

618. Similarly, every investor should also be aware that the determination of the subsidies included in the various regulations implementing the Act were preceded by a major planning effort. In this work, the Regulator examines and reconstructs an economic structure of exploitation by identifying the *standard* cost of a *standardised* installation (CAPEX) and its *operating and maintenance* costs (OPEX), according to the actions of a diligent investor. Once this first phase has concluded, it proceeds to set a balanced and proportionate target of economic return in terms of profitability, according to certain standards established for a standardised installation. This economic profitability target is subject to its reasonability and to the economic sustainability of the system. And this is the target pursued through the application of the subsidies provided in the Regulations.

(v) The importance of the PER 2005-2010 and its connection to RD 661/2007 was known by the System operators

[338] C-157. Page: 42.

619. ISOLUX is the leading Spanish company in the Spanish PV sector. Royal Decree 1565/2010, of 19 November, limited the rewarded production hours of the installations operating with PV technology. Isolux filed against RD 1565/2010 an appeal to the Supreme Court in May 2011[339]. ISOLUX filed its Claim together with an expert report from the consultancy firm Deloitte, in which it attempted to prove the expected remuneration under the regulatory framework of REs, the remuneration received at its plants under RD 661/2007 and the reduction implemented by RD 1565/2010.

620. The Deloitte expert report of 23 May 2011 estimates that the expected return is close to 7%. This expert report calculates the profitability of PV plants after RD 661/2007 at **6.41%,** and after RD 1565/2010 it quantifies it at **5.43%** or **5.77%[340].** The Deloitte Expert Report of 23 May 2011 reflects the profitability that it considers "reasonable" within the regulatory framework of REs in Spain in 2011:

> *"The Spanish Renewable Energy Plan 2005-2010 (August 2005) of the Ministry of Industry, Tourism and Trade-Institute for Diversification and Saving of Energy, assumes that the profitability of a standardised project of renewable energy is 7%.*
>
> *Spanish Renewable Energy Plan 2005-2010 (August 2005)*
>
> *"Profitability of standardised projects: calculated on the basis of maintaining an Internal Rate of Return (IRR), measured in local currency and for each standardised project, close to 7%, with own capital (before financing) and after tax"[341] (emphasis added)*

621. In addition, the Deloitte experts make a comparison with a parameter that they consider comparable, the Spanish 10-year bond, to examine the profitability derived from RD 1565/2010[342].

622. Consequently, by providing this expert testimony to the Supreme Court, ISOLUX is stating that a diligent investor knows that the methodology for setting the premiums is found in the PER 2005-2010 and that the target profitability to be achieved with the subsidies under RD 661/2007 must be *"close to 7% with equity and after taxes."*

623. Abengoa was the leading Spanish company in the solar thermal sector in Spain until it sold its CSP plants to the company Atlántica Yield in 2014. In 2012, the NEC issued the Report of March 7[343], in which it declared the over-remuneration of the Solar Thermal Sector and the need for reforms to reduce such remuneration to the Plants already installed. As a result of this Report, the Chairman of Abengoa sent a letter to the Minister for Industry, Mr. Soria, enclosing an expert report by KPMG to prove that there was no

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[339] Brief filing appeal brought by Grupo ISOLUX Corsán S.A., on 27 May 2011, in ordinary proceedings 60/2011. Said appeal was, however, dismissed by a Supreme Court Ruling of 24 September 2012 R-222.
[340] Expert report DELOITTE, ISOLUX and T-SOLAR GLOBAL GROUP of 23 May 2011, page 52/177. R-0233.
[341] Ibid. pages 57/177.
[342] Ibid.
[343] Report on the Spanish Energy Sector. Introduction and Executive Summary, Part I. Measures to guarantee the economic-financial sustainability of the electricity system. National Energy Commission, 7 March 2012. R-0098

over-remuneration at its CSP plants, as they were achieving the Reasonable profitability target that Spain had promised *"in a range close to 7%":*

> *"The profitability of the solar thermal plants in Spain is reasonable, as evidenced by the KPMG analysis performed at our plants. The internal rate of the project hovers in a range close to* ***7%.*** *This study was performed by KPMG after accessing our funding models and the actual amounts invested and the sales of plants in operation."*[344]

624. The attention of the Arbitral Tribunal was called to this letter. Abengoa, after the cuts proposed by the NEC for the solar thermal sector regarding remuneration, does not hold or defend any *blocking* of its rights under RD 661/2007 or RD 1614/2010. Nor does it argue that the Government would breach promises or stabilisation Clauses. On the contrary, it states and tries to prove that it obtains the Reasonable profitability that the Government set as a reference value. In addition, Abengoa is willing to negotiate. It is not clear from the letter that the Government is in breach of any promise or stabilisation Clause.

625. As discussed, Abengoa enclosed with the letter an expert report by KPMG holding that:

> *"Concept of Reasonable profitability:*
>
> *• The regulations governing the implementation of the Special Regime is based on the concept of Reasonable profitability, mentioned in Act 54/1997 on the Electricity Sector but does not define a value for it.*
>
> ***▪ In this report, a Reasonable profitability shall be deemed to be a profitability of 7%*** *(before financing) and after taxes, which is the reference value used in the PER 2005-2010 and used by the NEC in its reports."*[345]

626. It is clear that the Reasonable profitability declared by the Spanish leader in solar thermal technology does not match that of the Claimants. It only estimates an IRR at around 7% to be required. Consequently, it is clear that it was aware that the premiums under RD 661/2007 were set in line with the economic scenario described in the Renewable Energy Plan 2005-2007.

627. Therefore, we must conclude that the Claimants (who describe themselves as sophisticated investors) read the Plan 2005-2010, as did Deloitte, KPMG, Isolux and Abengoa, and they understood it correctly.

(f) The Claimants ignore their own "due diligence"

628. The "due diligence" report entrusted to Pöyry expressly warned the Claimants that the PER 2005-2010 was the key instrument in understanding the formula through which the subsidies in RD 661/2007 were established. This "due diligence" report states:

[344] Letter of Felipe Benjumea Llorente, Chairman of Abengoa, the Minister for Industry, dated 20 May 2012. R-0224.
[345] KPMG report provided by Abengoa, May 2012. R- 0225.

"The PER sets out the specific growth projections for each technology and breaks it down by autonomous region. Using the PER´s the Government then sets a tariff (published in the form of a Royal Decree) for each technology depending on the level of growth that is required

The PER´s are the best indication of the future development of the different renewable technologies."[346]

629. The Claimants, however, are resoundingly silent as regards the PER 2005-2010. In this way, the Claimants endeavour to deliberately ignore essential aspects of the Spanish regulatory framework that they knew of, which highlights the inconsistency of their entire argument.

(g) The Reasonable profitability should take account of the applicable EU rules on illegal state aid, due to over-remuneration and distortion of market rules

630. Among the obligations that the TFEU imposes on EU Member States is the prohibition on granting state aid, except in the cases permitted by the Treaties. In accordance with Article 107.1 of the TFEU, *"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".*

631. Following the definition that the aforementioned *Elcogas*[347] Court Order provided on the concept of State Aid in relation to the amounts paid by energy consumers, the Respondent was obliged, under the provisions of Articles 107 and 108 TFEU, to notify the European Commission of the existence of support measures for renewable energy and cogeneration in Spain, through Order IET/1045/2014. To this effect, the Commission has opened proceedings No. SA.40348 2014/N.

632. According to Article 108 TFEU, the Commission has exclusive competence to declare aid to be compatible with EU law. The only body competent to review the legality of that decision is the Court of Justice of the European Union, according to settled case-law.

633. Both the exclusive competence of the Commission to declare the compatibility of the aid, and that of the Court of Justice of the Union to review the legality of the declaration, are mandatory regulations that do not permit any possible derogation and form part of the public policy of the European Union, which is applicable International law.

[346] "Current and Future Trends in the Spanish Solar System". Pöyry March 2009. Edition. Page 37 C-0049

[347] Order of the Court of Justice of the European Union laid down regarding the preliminary ruling C-275/13, ELCOGAS, on 22 October 2014. (English version) R-0030.

634. This circumstance is particularly relevant in the light of the decision of the Commission of 26 May 2014[348], ordering Romania to suspend payment of an award handed down in an ICSID arbitration, *Micula v Romania*.

635. Subsequently, through a decision on 30 March 2015[349], the Commission decided that "the payment of compensation by Romania to two Swedish investors by dint of the revoked aid regime breaches the EU State Aid rules" and that "by paying the compensation granted to the Claimants, Romania is actually granting an advantage equivalent to the revoked aid regime".

(2) The economic sustainability of the SES and the elimination of situations of over-remuneration as a *"leitmotif"* of the measures in this arbitration

636. The examination of the justification of the measures taken by the Kingdom of Spain can only be approached from a rational understanding of the SES as a whole. In addition any approach to this problem must be based on the undoubted fact that the subsidised production from renewable sources is an integral part of the SES and, therefore, is subject to its principles and purposes.

637. The achievement and maintenance of the basic principles and purposes of the SES are the reasons for the adoption of the regulatory measures adopted during the years 2012 and 2013. It must be emphasised from the outset that, contrary to what appears from the Memorials of the Claimant, these measures affected all the activities of the SES and not only the RE production.

638. Firstly, the necessary analysis performed by the national regulators of the Electric System emphasised that the remuneration that was paid via electricity bills, should be revised in order to comply with the standards of the EU and domestic law, to ensure the guarantee of a Reasonable profitability.

639. Secondly, it seems beyond doubt that the difficult economic situation facing the Kingdom of Spain due to the existence of a deep economic crisis required the adoption of measures in the SES.

640. A proper understanding of the SES leads to the conclusion that the first impact of the economic crisis on the SES was a sharp reduction in electricity demand[350]. Such reduction in demand resulted in a substantial reduction in income available to the SES to address its costs, which included the subsidies to renewables.

[348] Document by the Commission C (2014) 6848 final of 1 October 2014, ordering Romania to suspend payment of an award handed down in an ICSID arbitration, *Micula v Romania* R- 0139.
[349] European Commission decision of 30 March 2015 declaring the compensation recognised in arbitral award Micula v. Romania (Press Communication of the Commission, English version) to be State Aid incompatible with the TFEU. R-0140.
[350] Accuracy Second Report on the incentives for the thermosolar sector in Spain of 9 June 2016. Par. 412

641. Meanwhile, the costs of the SES, designed in a context of a radically different economic situation, not only continued but increased[351]. This compromised the economic sustainability of the SES.

642. Finally, in this context, the different preliminary analyses, regulatory developments, technical knowledge and technological developments, revealed the existence of remuneration which, either by default or by excess, did not maintain the criterion of *Reasonable profitability* established for the remuneration of the so-called special regime and that of *adequate remuneration* for the rest of the regulated activities, especially transport and distribution activities.

643. Having explained the foregoing, it is necessary to approach the following issues separately: (i) The economic sustainability of the SES (essential principle of the regulatory framework) and the principle of Reasonable profitability (cornerstone of the Kingdom of Spain) prompted the measures that are the subject of this arbitration; (ii) Such *leitmotif* was evident in regulatory measures prior to the Claimants' investment; (iii) The risks of regulatory measures based on those grounds were known to the Claimants; (iv) The Claimants assessed and accepted the possibility of future regulatory measures based on those grounds.

(2.1) The economic sustainability of the SES, as an essential principle of the Spanish regulatory framework, and the principle of Reasonable profitability, a cornerstone of the Kingdom of Spain, are the grounds which have justified the regulatory measures related to this arbitration.

644. On 19 December 2011, the then candidate for President of the Government of the Kingdom of Spain, announced in the Spanish Congress the need for urgent reform of the SES. In such intervention, he clearly laid out the reasons for this need:

> *"We must be very aware that Spain has an important energy problem, especially in the electricity sector, with an annual deficit of over 3,000 million euros and an accumulated tariff debt of more than 22,000 million.*
>
> *Electricity tariffs for domestic consumers are the third most expensive in Europe and the fifth highest for industrial consumers.*
>
> *[...] If reforms are not undertaken, the imbalance will be unsustainable and increases in prices and tariffs would place Spain in the most disadvantaged situation in terms of energy costs throughout the developed world. We will therefore have to apply a policy based on curbing and reducing the average costs of the system in which decisions are taken without demagoguery, using all available technologies, without exception, and regulate it with the primary objective of the competitiveness of our economy."*[352] *(Emphasis added)*

645. The NEC issued Report 2/2012 *"On the Spanish Energy Sector" 203* on 7 March 2012, the first part of which is dedicated to the *"Measures to Ensure the Economic and*

[351] Ibid. Para. 413

[352] Transcription of the Speech of Mariano Rajoy in his inaugural address as President of the Government, to the Spanish Congress, Monday 19 December 2011, www.lamoncloa.gob.es. R-0092.

Financial Sustainability of the Electricity System". For the preparation of this report, the NEC had begun a period of public consultation in early February 2012 in which 477 claims were received from companies and sectors affected[353].

646. Specifically, in order to ensure the economic sustainability of the SES, the NEC proposes a series of measures in the short and medium term in relation to the production activity in the Kingdom of Spain with solar thermal technology. Much of these proposals were taken into account in the adoption of the measures subject to this arbitration: (i) "establish the time-frames of the premiums to be received by the solar thermal power plants registered in the pre-assignment registry, but without a final commissioning certificate because it is the technology with the greatest degree of penetration in the medium term and the most committed"[354]; (ii) the limitation on the use of fossil fuels with premium support to 5 percent of primary energy[355]; (iii) avoid the automatic increase in the X factor of the efficiency in the tariffs and premiums update index (CPI-X); (iv) make uniform the premium on the tariff applicable to solar thermal plants to avoid situations of over-remuneration[356] (v) the partial financing of the Kingdom of Spain premiums charged to income charged to CO2 auctions, performed under Directive 2009/29/EC[357]; (vi) the possible partial financing of premiums of the Kingdom of Spain partially charged to sectors responsible for the consumption of fossil fuels or alternatively through the General State Budget; (vii) the modulation of the rate of penetration initially expected in the PER in line with the provisions of Royal Decree-Law 1/2012[358];

647. It also proposed measures to be taken in the medium term: (i) The establishment of competitive mechanisms (auctions) and premiums based on regulatory cost information[359] and (ii) the elimination of subsidies based on the end of the economic life (estimated useful life) of the plant[360].

648. Many of these measures were subsequently adopted in 2012 and 2013. However, with regard to the measures subject to this arbitration, we can see that the NEC proposes these measures because (1) they contribute to the sustainability of the SES; (2) it aims to correct situations of excess remuneration, and (3) it did not affect the Reasonable profitability of the plants

649. In particular, the situation of excess remuneration was appreciated by the NEC (1) in situations of pool plus premium in the solar thermal sector; (2) the automatic increase in the X factor of efficiency in the tariffs and premiums update index (CPI-X); and (3) in the maintenance of subsidies beyond the economic life (estimated useful life of the plant).

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[353] Information on the public consultation on regulatory adjustment measures in the energy sector of 2 February and 9 March 2012, published at the National Energy Commission website: www.cne.es. R-0097.

[354] "Report on the Spanish Energy Sector Part I. Measures to guarantee the financial-economic sustainability of the electricity sector, National Energy Commission, 7 March 2012, pages 52. R-0098

[355] Ibid. paragraphs 23 and 24.

[356] Ibid. paragraph 23.

[357] Ibid. paragraph 40.

[358] Ibid. paragraphs 40 and 41.

[359] Ibid. paragraph 78-80.

[360] Ibid. paragraph 81-82.

650. Based on the purpose of ensuring the economic sustainability of the SES and avoiding situations of over-remuneration, the measures subject to this arbitration and previously announced by the NEC were introduced. This purpose is clearly spelled out in the Preambles to each and every one of the Regulations subject to this arbitration[361]

(2.2) The economic sustainability of the SES and the elimination of situations of over remuneration were the reasons justifying the regulatory measures prior and contemporary to the Claimants' investment.

651. The Claimant bases their argument on an erroneous assessment of RD 661/2007. It cannot be accepted that RD 661/2007 was enacted for the purposes of increasing subsidies for renewables. As we shall see below, RD 661/2007 was enacted for two reasons: (i) the need to protect the economic sustainability of the SES from the potential danger deriving from linking the subsidies to the Average Reference Electricity Tariff (ARET); (ii) correcting situations of over-remuneration.

652. Furthermore, the Claimants fail to mention, even though they are aware of it, that each and every regulatory measure implemented after 2007 was based on the same purposes as mentioned above.

653. Below, we shall prove the above by starting with an analysis of Royal Decree 661/2007 and continuing with an examination of the different regulatory measures adopted by the Kingdom of Spain prior to enactment of the measures that are the subject-matter herein.

(a) Royal Decree 661/2007 was passed for the purposes of guaranteeing the economic sustainability of the SES, not with the aim of enhancing the profitability of renewable technology activities.

654. In the Counter-Memorial on Jurisdiction, the Claimant makes the assumption that Royal Decree 661/2007 was enacted for the sole purpose of increasing the profitability of the diverse renewable technologies. This argument is not true. In fact, this argument can only reflect two things: (i) an evident ignorance of the evolution of the Spanish regulatory framework; (ii) a vain attempt to furnish the Tribunal with an image that is not in line with reality

655. In order to provide the Tribunal with the actual facts, we shall indicate the following points: (i) Characteristics of the remuneration model derived from RD 661/2007; (ii) The introduction of RD 661/2007 was prompted by the need to guarantee the economic sustainability of the SES; (ii) the Claimant was expressly notified of the reasons that justified the introduction of Royal Decree 661/2007; (iii) the introduction of Royal Decree 661/2007 did not lead to an overall increase in profitability; (iii) The sector rejected the reform required under RDL 7/2006 and implemented under Royal Decree 661/2007.

[361] Royal Decree-Law 2/2013, of 1 February, on urgent measures in the electricity sector and the financial sector. R-0226.

(i) The introduction of RD 661/2007 was prompted by the need to guarantee the economic sustainability of the SES

656. RD 436/2004, of 12 March,[362] repealed RD 2818/1998, in order to achieve the objectives of the PFER and eradicate the volatility of the previous system of calculating the remuneration of the REs. All of this was always subject to the principles of economic sustainability of the SES and permitting a Reasonable profitability, according to the cost of money in the capital market enshrined in Act 54/1997.

657. The said Royal Decree set the subsidies using the calculation methodology contained in the PER 2000-2010[363]. This methodology involves identifying the economic exploitation structure of each technology *(installation type)*, and within each installation type, in accordance with certain standards (useful life, equivalent operating hours, unit costs, execution periods, operation and maintenance costs and selling prices of the final energy unit) sets a remuneration that is sufficient to achieve a given profitability target. This methodology, which also applies in RD 661/2007, also applies to the calculation of the remuneration of REs today.

658. At this point it is relevant to note the consideration contained in the Economic Report of RD 436/2004. In this report it states:

> *"The A parameter (investment, operation and maintenance costs for each technology) has great weight in setting the amount of the regulated fee sold to the distributor. Thus, any plant in the special regime installed in Spain will get Reasonable profitability, provided that it is equal or better than that of the group* ***(standard plant type)****"*[364].

659. From the above it follows that the subsidies established in RD 436/2004 are not intended to grant an indeterminate profitability. These subsidies respond to a specific methodology aimed at granting a *installation type* a Reasonable profitability over a given period of time.

660. On this basis, the Royal Decree defined a system based on the free will of the owner of the facility, which could choose between (i) selling its production or surplus electricity to the distribution system, receiving remuneration in the form of a regulated tariff or (ii) selling such products directly on the daily market, receiving in this case the price traded in the market, plus an incentive for participating in it and a premium, if the particular facility was entitled to it.

661. Under the new model, the Tariff, or as the case may be a Premium and the incentive, consisted of a multiple of the Average Reference Tariff (hereinafter **"ARET"**). For example, in the case of wind power, in the tariff option, the incentive decreased as the years of use of the facility increased. Specifically, the facilities would receive a tariff

[362] Royal Decree 436/2004, dated 12 March, establishing the methodology for the updating and systematisation of the legal and economic regime for electric power production in the special regime. C-0024 R-0148 Bis.
[363] Renewable Energy Promotion Plan 2000-2010. R-0202.
[364] Financial Report of RD 436/2004 R-0220.

equal to 90 percent of the ARET during the first five years of its commissioning, 85 percent over the next 10 years and 80 percent thereafter[365].

662. The ARET was set by the Regulator in response to the procedure set by RD 1432/2002[366] and determined the selling price of electricity to consumers. It was subject to variables such as electricity demand, generation costs, inflation, capital costs, which are volatile variables.

(ii) RD 436/2004 led to perverse effects for the sustainability of the SES

663. Linking the RE subsidies to the ARET generated a potential risk to the economic sustainability of the SES. This was because the ARET was calculated on the basis of the costs of the SES themselves, including subsidies to the RE. Therefore, a loop arose in the mechanism for setting premiums: the premium was a percentage of the ARET which, in turn, was calculated taking into account the increase in the amount of the premiums. This constant feedback meant a disproportionate increase in the costs of the SES.

664. For 2006, the weight of REs (especially wind) in the SES already represented 17% of the total production[367]. The problem of cost overrun was compounded in light of the

[365] The possibility that the remuneration to be received by the existing facilities declined over time was endorsed by the NEC in its report 4/20004 of 22 January 2004 on the Royal Decree proposal which established the methodology for the updating and systematization of the legal and economic regime of the special regime activity:
"The application to existing installations of the new regulated tariff regime, which includes a decrease as the years pass, does not mean retroactivity, since it is only a compensation formula based on costs. Furthermore, it should be noted that during the five years of RD 2818/1998 the existing facilities have received remuneration that equals or exceeds the remuneration now being proposed for the first years of life. For example, wind has received during the last five years remuneration above 90% of the average price of electricity, which is what is set in the proposal for the first phase of its economic life (...) Therefore, we can say that the application at this time of declining remuneration as the economic life moves forward does not harm existing facilities, as these facilities have already received or are receiving a remuneration equal to or exceeding that set in the proposal for the first part of their economic life." Speaking of the transitional regime, it adds: "Production facilities included in the special regime are entitled to receive a certain remuneration for the energy sold, but obviously they only have the vested right to receive such compensation relative to the energy already sold, but not with respect to the energy they foresee selling in the future, which is only an expectation.
The Second Transitional Provision of the draft Royal Decree does not therefore violate the principle of non-retroactivity of rules restricting rights, and it cannot be regarded that since it is a transitional provision it cannot modify "pro futuro" the regime established in Royal Decree 2818/98, without affecting any vested right.
Nor can it be considered that it is violating the principle of non-retroactivity of restrictive rules due to the fact that for the purposes of calculating the compensation for each installation it takes into account the age of the same (Articles 34.1,34.2, 35.1, 36.2, 37.1 and 37.2, all of the draft Royal Decree), since it is simply a calculation rule, which besides being reasonable, is only taken into account in setting future remuneration, that is, for the energy sold in the future, not for that already sold under other legislation." R-0221.
[366] RD 1432/2002, of 27 December, which establishes the methodology for the approval or modification of the average or reference electricity tariff and amends certain articles of Royal Decree
2017/1997, of 26 December, which organises and regulates the settlement procedure for transport, distribution and tariff-based sales costs, system overhead costs and the costs of diversification and security of energy supply. R-0072
[367] Renewable Energy Promotion Plan 2000-2010, p. 18. R-0202.

planning targets established in the PER 2005-2010, which would have meant a greater participation of the RE in electricity generation.

665. As a result, the Regulator urgently approved RD Law 7/2006, of 23 June. This regulation, in its Preamble, highlighted the inefficiency of the current remuneration system. Therefore, its Second Transitory Provision froze the RE subsidies until a new remuneration system was implemented based on the modifications that RD-Law 7/2006 introduced into Act 54/1997[368].

666. These changes included the untying of premiums from the ARET. Therefore, updating the ARET operated by RD 809/2006, of 30 June, according to which the electricity tariff is revised from 1 July 2006, was not applicable to the premiums and tariffs of the RE.

667. Furthermore, RD 436/2004 generated "windfall profits" for the benefit of wind farms that it was necessary to eradicate. Windfall profits which also pushed upwards the tariff deficit existing at the time.

668. The new remuneration model announced in RDL 7/2006 was enacted under RD 661/2007, of 25 May. In its Preamble, it is stated for the record that the aforementioned Regulation was enacted to eliminate the perverse effect that the previous system, based on the ARET, produced for the SES' economic sustainability. The Preamble of RD 661/2007 stipulates:

> *"The economic circumstances established by Royal Decree 436/2004, of 12 March, due to the behaviour of market prices, in which lately some variables not contemplated in the aforementioned remuneration regime of the special regime have been more relevant, make it necessary to modify the remuneration regime and de-link it from the Mean Electricity Tariff, or Reference Tariff, which has been used to date."*[369]

669. The potential risk of unsustainability of the SES derived from linking the subsidies to the ARET and the correction of situations of over-remuneration prompted the elimination of Royal Decree 436/2004 and the enactment of Royal Decree 661/2007.

(iii) The Claimants were expressly notified of the reasons that justified the introduction of Royal Decree 661/2007 in their Due Diligence report

670. The line of reasoning held by the Claimant is completely artificial if we consider that the reasons that justified replacing Royal Decree 436/2004 with RD 661/2007 were specifically spotlighted by Pöyry.

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[368] Royal Decree-Law 7/2006, of 23 June, establishing urgent measures in the energy sector. Second Transitory provision. *"Until the regulatory implementation of the provisions contained in paragraphs one to twelve of Article 1 in accordance with the provisions of the second final provision of this Royal Decree-Law: 2. The revision of the average rate performed by the Government shall not apply to prices, premiums, incentives and tariffs that form part of the remuneration of the activity of production of electricity in the special regime*" C-0033 ESP R-0154 Bis.-

[369] Royal Decree 661/2007, of 25 May. C-0038_ESP R-0150 Bis.

671. Specifically, in his report from March 2009, Pöyry noted, when analysing the background of the subsidies:

> *"The average reference tariff (ARET) was one of the key components to the remuneration of renewable energy projects in Spain, and in the case of solar PV projects was the only component under the previous regulatory framework (RD 436/2004). Hence higher average reference tariffs were beneficial for solar PV projects*
>
> *With high pool prices due to high gas prices, the average reference tariffs were set to increase over and above the inflation rate.*
>
> *The rise in the ARET would have created very significant returns for special regime generators (especially wind farms) which in turn would further increase the end user tariff and ARET. This is due to the "tariff feedback", where the ARET drove renewable earnings which contribute to total system costs which again drove ARET*
>
> *The Spanish government was not willing to deal with this issue by raising tariffs to avoid potential inflation risk, therefore the changed the renewable scheme from RD 436/2004 (linked to the ARET) to RD 661/2007 and subsequently reviewed the Solar PV tariffs or 661/2007 via the publishing of RD 1578"*[370]

672. Likewise, Pöyry advised the Claimant that:

> *"Furthermore, given recent high Pool prices, Special Regime generators, in particular wind farms, had, according to the Spanish Government, been making supra-normal profits, As a result of these excessive profits the government has intervened in order to cap profits by modifying RD 436/2004 (the main special regime legislation for the period 2004-07) and publishing RD 661/2007 to replace it"*[371]

(iv) The modification of RD 436/2004 was harshly criticised by the Sector.

673. The Claimant's theory on RD 661/2007 contrasts with the opinion held by the Sector in the period in which the regulatory change took place.

674. The leading associations of the renewables sector, AEE, PIA and APPA sent a joint letter to the Minister of Industry on 26 July 2006 where, in relation to RD-L 7/2006 and the reform of the remuneration model of renewables which said RD-Law announced, they requested the *"immediate cessation of the ongoing regulatory process."* These associations then said[372]:

- *"the appearing business associations can only express their rejection, their deepest discomfort and most serious concern, both in substance and in the ways in which the process is being carried out."*

[370] "Current and Future Trends in the Spanish Solar System". Pöyry March 2009 Edition. Page 75 C-0049
[371] Ibid. page 113.
[372] "The Controversial Energy Decree-Law", AREP Info magazine no. 22, May –July 2006. Editorial. R-0227.

- *"RD-L 7/2006 substantially breaks the regulation of renewable energy established in the Electricity Sector Law (Act 54/1997)"*

- *"RD-L 7/2006 abolishes the objective parameters that set the minimum remuneration for the various renewable energies included in the Law. These minimums were the guarantee of stability, predictability and durability that have attracted investment to the sector* (...)"

- *"This situation, already compromised and disconcerting, is further compounded when it is learned that the planned revision of RD 436/2004 is becoming the delivery system for a new regulatory framework- in which none of the signatory associations was able to take part before it will be made public through the CN- whose remuneration criteria are clearly and objectively discouraging for addressing the development of the projects planned under the 2005-2010 Renewable Energies Plan (PER), approved by the Cabinet on 26 August 2005.*"

- *This approach would cause a widespread adverse reaction by investors and financial institutions in a very difficult economic situation that could lead to the deactivation of the renewable energy sector"*

675. In December 2006, the association APPA continues to criticize very harshly said RD-Law:

- *"Royal Decree 436/2004 [...] is conditioned both by the elements of* ***retroactivity and legal uncertainty*** *introduced in the sector by the aforementioned RD-L 7/2006."*

- *"Last June, Royal Decree-Law 7/2006 was approved, which contains a* ***frontal attack*** *against the national policy of promoting renewables: it eliminates the 80-90% band and the retributive stability mechanisms [of RD 436/2004], without also contemplating the guarantees and timeframes established. The regulation, which breaks the rules of the game in the middle of the match, introduces* ***retroactivity*** *and* ***grievously breaks*** *the legitimate expectations of the investors.*"[373] (Emphasis added)

676. Therefore, the measures introduced by RD-Law 7/2006 and Royal Decree 661/2007, at least for the sector and in the period in which they took place, had a strong impact. At least this was the perception by the affected parties. At that time, as at present, certain parties used expressions such as the following to define the changes: "*substantial destruction of the system*", "*frontal attack against the national policy of promoting renewables*", "*breaking the rules of the game halfway through the match*", etc.

677. To assert that RD-L 7/2006 and RD 661/2007 represented an improvement in remuneration, in light of the responses at that time in the affected Sector, is reckless, to say the least.

(v) The PER 2005 – 2010 did not contain an overall increase in profitability for RE.

[373] "RD-L 7/06 and review of RD 436/04. Storm in the renewable energy sector", AREP Info Magazine No. 23, August-December 2006. Editorial and page 9. R-0228.

678. As we shall examine in further detail later, the PER 2005 – 2010 is an essential regulatory instrument for setting the tariffs. In their Memorial on the Merits , the Claimants fully agree with this assertion. However, in their Counter-Memorial on Jurisdiction, they are completely quiet about the PER 2005-2010. Below we shall attempt to offer a plausible explanation as to this omission.

679. The PER 2005-2010, the basic instrument for setting the subsidies in RD 661/2007, did not mention any rise in subsidies. In fact, the PER 2005-2010 established maintaining, in general, the subsidies from the PFER 2000-2010, which were reflected in RD 436/2004.

680. Here, we must recall that the PFER 2000-2010 established, in general, for all technologies, profitability for *standard projects* amounting to "*7 % with own resources, before financing and after tax"*[374]. In turn, the PER 2005-2010 set forth, in general and for all technologies:

> "**Profitability of standardised projects**: calculated on the basis of maintaining an Internal Rate of Return (IRR), measured in local currency and for each standardised project, close to 7%, with own capital (before financing) and after tax." (Emphasis added) [375]

681. Indeed, if we look at each technology area analysed by the PER 2005-2010, far from seeing a desire to increase profitability, the idea emerges that the targets forecast in the PLAN 2005 -2010 can be achieved by maintaining the remuneration level. This is expressly stated for wind[376], hydro[377], solar thermal[378], photovoltaic[379], and biogas technology[380]. Said PLAN 2005-2010 only included increases in subsidies for thermoelectric technology[381] and for biomass[382].

(vi) The Report on the Regulatory Impact of Royal Decree 661/2007 did not include an overall increase in subsidies

682. The purpose of Royal Decree 661/2007 is contained in the Report on the Regulatory Impact thereon[383]. An examination of this Report cannot lead to the conclusion that the purpose of RD 661/2007 is an overall increase of the subsidies for renewables.

683. Said document emphasises the link between the PER 2005-2010 and RD 661/2007 when it states that:

> *"In turn, on 26 August 2005, the Cabinet passed the Renewable Energy Plan 2005-2010. Chapter 3 of this Plan, on the Sector Analysis, includes a summary for each*

[374] Renewable Energy Promotion Plan 2000-2010, p. 182. R-0202.
[375] Renewable Energy Plan 2005-2010. Page 274. R-0201.
[376] Ibid. page 59.
[377] Ibid. page 87.
[378] Ibid. page 145.
[379] Ibid. page 176.
[380] Ibid. page 247.
[381] Ibid. page 116.
[382] Ibid. page 227.
[383] Report on Regulatory Impact of Royal Decree 661/2007. R-0229.

renewable area of the regulatory obstacles still existing in Spain. Likewise, a summary is given of the measures deemed necessary to remove said obstacles and, in each case, increase the rate of growth of renewable energy"[384].

684. In the preceding section of this Memorial, we already had the chance to examine how the PER 2005-2010 did not consider an increase in subsidies for most technologies as a measure to foster the growth of renewable energy.

685. In line with the above, the Report on RD 661/2007 continues by stating that:

"*This document presents a proposal for the amendment of Royal Decree 436/2004, so that it includes all the regulatory measures that are in line with achievement of the targets set forth in the Renewable Energy Plan 2000-2010, and the target set forth in the Action Plan 2005/2007 of the E4 to develop the full potential of cogeneration in this country"*[385]

686. In line with PER 2005-2010, the regulatory impact report of Royal Decree 661/2007 stated that:

"The regulated tariff has been calculated in order to ensure a return of between 7% and 8% depending on the technology. Premiums have been calculated following the same criteria as in Royal Decree 436/2004, that is to say, the premium is calculated as the difference between the regulated tariff and the expected average market price for these technologies"[386]

687. Specifically, the regulatory impact report includes the following table of levels of profitability:

-	Regulated tariff by installation type	Pool profitability plus premium by installation type
Cogeneration or other forms of production based on	Installations using natural gas- 7% Installations with liquid fuels and LPG - 6%	Receipt of a premium that is updated quarterly.
Photovoltaic	Installations of up to 10 MW power – approximately 7%. Installations of over 10 MW power – an Internal Rate of Return (IRR) of	RD 661/2007 eliminated the pool plus premium option for this type of installation.

[384] Ibid. pages 1/26.
[385] Ibid. pages 2/26
[386] Ibid. Pages 13-18.

	under 7% is provided	
Thermoelectric Solar	8 %	9.5 % for a typical case over 25 years with a minimum of 7.6% and a maximum of 11%.
Wind	7 %	Between 5% and 9%
Hydroelectric	7%	Between 5% and 9%

688. From this table the conclusion can be reached that RD 661/2007 did not have as an objective the establishment of a generalised increase in levels of profitability. In line with the PER.

(vii) Analysis of the NEC

689. The previous points reflect how RD 661/2007 was not created with the aim of increasing subsidies in order to attract investment. Far from this artificial thesis, it has been shown that the aim of RD 661/2007 was to maintain the profitability objectives of RD 436/2004, eliminating the significant distortions to this objective of profitability produced by the link between subsides and ARET. This link created an artificial and irrational increase in the levels of profitability of the installations, creating a potential danger for the economic sustainability of the SES. This risk was compounded when the new implementation objectives laid down in the 2005-2010 PER were taken into account.

690. Despite what is stated here, the Claimants are trying to build their argument around the statements of the NEC and of some of its members.

691. Before analysing what is stated by the NEC, we should recall that this institution is not competent to define or implement the Spanish regulatory framework. That is to say, it is not competent to pass the rules that make up the aforementioned Regulatory Framework[387]. The Claimants were well aware of the aforementioned clarification. At the very least, the Pöyry consultancy expressly warned of this circumstance when it stated:

> *"The NEC (Spanish National Energy Commission) was created by the Hydrocarbons Law (Law 34/1998) and acts as the regulatory entity of the energy sector. The powers of NEC are limited at present to consultation, participation, inspection, arbitration, and the provision of reports"*[388]

[387] Counter-Memorial. Paragraphs 398 to 405

[388] "Current and Future Trends in the Spanish Solar System". Pöyry March 2009 Edition. Page: 30 C-0049

692. Consequently, the Claimants must have known that the NEC did not take the place of the Government in setting and implementing the regulatory policy. They likewise knew that the NEC does not substitute the Supreme Court as the ultimate interpreter of Spanish law. Far from this, as we explain below, the NEC is bound by the case law of the Supreme Court that it must follow and respect. Its competences are definitively limited to purely consultative functions.

693. Despite what is stated above, the Claimants maintain that when the NEC notified them of Draft RD 661/2007 it recognised an increase in subsidies in the different technologies. Nonetheless, the Claimant does not take into account three important factors when evaluating the analysis by the NEC.

First:

694. The Claimants do not pay attention to the way in which the NEC made this comparison. This comparison is contained in Annex III of the NEC report[389]. On page 41 of said report it is precisely stated that the comparison of profitabilities between RD 661/2007 and RD 436/2004 takes as its starting point the updates to subsidies during the corresponding lifespan of the plant, both for the subsidies laid out in RD 436/2004 as well as in those laid down in RD 661/2007 in accordance with the CPI less the corresponding difference. That is to say, in accordance with the update mechanism laid down in RD 661/2007.

695. Nonetheless, the correct comparison of the profitabilities must be made by applying to the subsidies from RD 436/2004 the update to the ARET that this regulation anticipated and to the subsidies from RD 661/2007 the update in line with the CPI less the proper differential that is [incomplete sentence in the source file]

696. Having made this comparison, it is apparent that the profitabilities that RD 661/2007 provides during the lifespan that are taken into account in these calculations are lower than the profitabilities that would derive from the lifespan of the same plants linked to the ARET and its updates as laid down by RD 436/2004.

697. The wind sector is a clear example of what we have just stated. If the Claimant's claim were correct, it would not be possible to understand the behaviour of the wind sector since RD 661/2007 came into effect.

698. The First Transitional Provision of RD 661/2007[390] eliminated the possibility for those installations that had originally invoked the option of Royal Decree 436/2004 for sale of

[389] NEC Report 3/2007, of 14 February 2007, regarding the Royal Decree proposal, regulating the activity of electricity production under the special regime. Pages 41-51. R-0203.

[390] RD 661/2007. Transitional Provision One: "*1. Facilities in Categories a), b), and c) under Article 2 (therefore including wind energy and small hydro) of Royal Decree 4?6/2004, of 12 March, who possess a final deed of entry into service prior to 1 January 2008, may continue in the transitory period covered in the following paragraph. To this effect, they should elect prior to 1 January 2008, one of the two options for the sale of electricity energy covered under Article 22.1 of Royal Decree 436/2004, of 12 March, and they will not have the opportunity to change that option. For cases in which the option elected is option a) under the cited Article 22.1, the present transitory regime shall be applicable for the*

electricity at market price plus a premium to benefit during the whole lifespan of the installation from the premiums system laid down in Royal Decree 436/2004.

699. The installations referred to, in accordance with the transitional regime, had the option of invoking RD 661/2007 immediately or continuing to receive the premiums (in addition to the market price) originally laid down in RD 436/2004 until 31 December 2012. However, these premiums in the transitional period would be frozen without any type of update. Once the transitory period had passed, they would then be governed, according to their economic regime, as provided in RD 661/2007.

700. However, we must remember that RD-Law 7/2006, had decoupled the updating of premiums and rates under the ARET due to disturbances generated. That is, since the entry into force of RD-Law 7/2006 the rates and premiums of RD 436/2004 had not been updated.

701. Consequently, during the transitional period laid down in RD 661/2007 the premiums drawn by the installations that wished to remain in the pool plus premium option of RD 436/2004 would remain frozen. That is to say, these premiums did not undergo any type of update from 2006 until 2012.

702. Despite the freezing of subsidies, wind installations favoured staying at the 2006 remuneration level instead of invoking the remunerations from RD 661/2007. The Wind Sector quantified the impact of the reform, stating that:

> *"In 2007 wind energy remuneration fell to the levels of 2003 and 2004*
>
> *In the seven months that the new RD 661/2007 has been in force, the premium has been lower than that of RD 436/2004 by 5.07 E/MWh*
>
> *All of the wind farms have remained on RD 436/2007 (sic.) with an average remuneration of 77.62 E/MWh throughout 2007, as if they had moved onto RD 661/2007 it would have been 74.11 E/MWh"*[391]

703. This behaviour makes it clear that the link between subsidies and the ARET when making the comparison over the lifespan of the plant generated greater profits than the remuneration model of RD 661/2007.

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remainder of the life of the facility. In the event that no change of option is notified, the option shall become permanent as from the date cited.
For facilities indicated in the preceding paragraph which have elected option a) under Article 22.1, the regulated tariffs under this Royal Decree shall not be applicable. Those facilities which have elected option b) under Article 22.1 may maintain the values of the premiums and incentives set out in Royal Decree 436/2004, of 12 March, instead of those determined in the present Royal Decree until 31 December 2012. A marginal note shall be entered for such facilities indicating the specific fact that they are availing themselves of a transitory provision deriving from Royal Decree 436/2004, of 12 March. The settlement of the incentives shall be effected in accordance with the provisions established for the premiums under Article 30 of this Royal Decree." (emphasis added)". Royal Decree 661/2007, of 25 May. C-0038_ESP R-0150 Bis.

[391] "In 2007 wind energy remuneration fell to the levels of 2003 and 2004", SWA press release 10 January 2008 R-0230.

Second:

704. In any case, the NEC report does not question that the aim profitability pursued by RD 661/2007 was different from 7%. Furthermore, at no moment does it question whether the OPEX or CAPEX calculations for the installation types taken into account in the proposal analysed are incorrect. In this way it states that:

> *"By means of this Circular the costs of the installations put into operation in the period covering the years 2004, 2005 and the first half of 2006 has been compiled, and so it is possible determine the average profitability of the tariffs and the premiums contained in the draft Royal Decree for the technologies developed most during this period, namely wind energy, photovoltaic, minihydro, landfill biogas and small-scale cogeneration with natural gas. As a result of this determination, that is included below, and in a more developed form in Annex III, levels of profitability have been calculated that are generally higher than those proposed by the Ministry for the regulated tariffs (namely, 7%)"*[392]

705. This report by the NEC reveals that RD 661/2007 started from a profitability objective for installation types of 7%. Nonetheless, the Claimants overlook this point.

Third:

706. Without prejudice to what has so far been stated, the Claimants make their comparison in a biased manner. They only take into account what the NEC said about the comparison of the two regulations regarding the tariff option, also without specifying what has been stated in the two previous points.

707. However, in Annex III[393] of its report the NEC makes the comparison between both Regulations in the pool plus premium option. In this comparison it concludes that RD 436/2004 offered higher levels of profitability. Even starting from the update to premiums of RD 436/2004 in accordance with the CPI minus a difference of one point and not in accordance with the ARET.

(b) RD-Law 6/2009, of 7 May

708. The Claimants knew before their investment that RD-Law 6/2009 of 7 May was issued to ensure the economic sustainability of the system. The Claimants also knew that the measures were based on (1) the international economic crisis and (2) its impact on the tariff deficit. It suffices to read the Preamble to said regulation.

709. The Preamble to RD 6/2009 stated in this regard that:

> *The increasing tariff deficit [...]is causing serious problems which in the current context of international financial crisis, is profoundly affecting the system and endangering, not only the financial situation of the companies in the electricity sector, but the system's sustainability itself. This imbalance is unsustainable and has*

[392] NEC Report 3/2007, of 14 February 2007, regarding the Royal Decree proposal, regulating the activity of electricity production under the special regime. pp. 41-51 and p. 21. R-0203.
[393] Ibid. Annex III.

serious consequences by deteriorating the security and investment financing capacity necessary to supply electricity in the quality and safety levels demanded by Spanish society. " [...]

Fourthly, by its increasing incidence on the tariff deficit, mechanisms are established with regard to the remuneration system of the facilities under the special regime. The trends followed by these technologies could put at risk in the short term, the sustainability of the system, both from the economic point of view due to their impact on the electricity tariff, and from a technical point of view, further compromising the economic viability of the already completed facilities, whose operation depends on the proper balance between manageable and non-manageable generation[394] *(Emphasis added)*

710. The main measure of this RD-Law was to set a goal to eliminate the tariff deficit. In particular, it was established that, from 1 January 2013, access tariffs should be sufficient to meet the entire cost of regulated activities without ex ante deficit could appear[395].

711. Consequently, from this moment all agents related to the SES were aware that the Regulator would adopt, within the Spanish legal framework, the necessary regulatory steps to achieve the aforementioned objective. That is, while this objective was not achieved, all SES' cost items and revenue would be subject to their achievement.

712. Moreover, the RD-Law noted that the REs would not be outside the regulatory measures necessary to adopt. The RD-Law 6/2009 expressly warned that because of "*The trends followed by these technologies could put at risk in the short term, the sustainability of the system both from the economic point of view due to their impact on the electricity tariff, and from a technical point of view (...)".* Therefore, the RD-Law noted that without prejudice to other immediate measures that could be taken, it was necessary to set *"the basis for the establishment of new economic regimes that foster compliance with the intended objectives."*[396]

713. Thus, in order to achieve the established objective, RD-Law 6/2009 introduced significant changes to RD 661/2007: a) the Registry of pre-allocation was created, and b) assigned to the Government the power to stagger the entry into operation of the pre-registered Facilities when so required by the SES' economic and technical sustainability. This power was made effective by The Spanish Cabinet Meeting Decision of 13 November 2009, staggering the entry into operation of the pre-registered facilities[397]

[394] Royal Decree Law 6/2009, of 30 April, on certain measures in the energy sector and approving the Social Tariff. Preamble. R-0231.
[395] Ibid. Article 1.
[396] Ibid Preamble
[397] Ruling of 19 November 2009, of the Secretariat of State for Energy, publishing the Spanish Cabinet Meeting Decision of 13 November 2009, proceeding to the management planning of the projects or facilities submitted to the administrative register for pre-assignment of remuneration electric energy production plants, specified in RD Law 6/2009, of 30 April, adopting certain measures in the energy sector and approving the social tariff. "Spanish Cabinet Meeting Decision of 13 November 2009. R-0088

714. RD-Law 6/2009 is omitted by the Claimants to the Arbitration Tribunal. Nonetheless, it is important that the Arbitration Tribunal should know the position of the Renewables Sector in Spain with regards to this Royal Decree-Law.

715. In May 2009, the most important Association of the RE sector, APPA, ran a strong editorial against the then Minister of Industry making him responsible for the publication of RD-Law 6/2009. When analysing the RD-law said editorial states:

> *"[The Minister] has never received [the RE Sector] nor has he taken the sector into account for regulatory changes"*
>
> *"Adopts various measures to reduce tariff deficit which increase the administrative burden of clean energies".*
>
> *"The measures of the RDL, [...] will further hinder the development of the sector, which suffers, like the rest, financing problems arising from the crisis"*
>
> *''The government has a unique opportunity with the Renewable Energy Law, for which it has a proposal from Greenpeace and APPA to demonstrate its commitment towards a "green economy" and allow Spain to lead, for the first time in history, in technology and development worldwide''*[398] *(Emphasis added)*

716. The previous editorial was accompanied by a joint Letter signed by various associations from the renewable sector against R-DL 6/2009. The title of the Memorandum read *"The RDL 6/2009, new imposed decree against renewables"*. This letter was presented by APPA in its Partner gazette:

> *"APPA, ADAP, APREAN, EolicCat, GiWatt and The Extremadura Cluster of Energy harshly criticised the decree and asked the Government for its contents to be developed in the future Law on Renewable Energy."* [399] *(Emphasis added)*

717. Through this joint letter, the various signatories Associations strongly criticised this rule, referring to its similarity to the previous RD 1578/2008, of 26 September, Issued in the PV Sector months before:

> *"There is a clear and ominous experience in RD 1578, which regulates the activity of photovoltaic solar technology and which has actually caused the stoppage of this sector, with factory closures and relocation of investments. The new RDL can cause the same effect on the rest of renewable technologies and affect even the most developed technology, wind power technology"*[400]*. (Emphasis added)*

718. Simply reading the Preamble of RD-Act 6/2009 is enough to appreciate that Spain had not committed to or guaranteed the freezing of any legal regime. On the contrary, the Government was convinced of the need to take measures to rebalance the tariff deficit.

719. The imbalance of the SES emanated largely by the sharp reduction in electricity demand as a result of the crisis. This made SES reform necessary, at least in the

[398] "Europe, new policy. Spain, new imposed decree". AREP Info 29 May 2009. Editorial.R-0232
[399] Ibid. Pages 12 to 13.
[400] Ibid. Pages 12 to 13.

remuneration regime of the REs. As we have already stated, that was the understanding of the Regulator and the industry. To that end, the RE Sector created a reform proposal for the RE Remuneration Framework RE which we will state below.

(c) Remuneration Framework Proposal for the RE Sector by APPA on 20 May 2009

720. The RE Producer Associations were fully aware of the dynamic nature of the reasonable profitability and the need to take steps to ensure the SES' economic sustainability in line with the objectives established by RD-Law 6/2009.

721. Since January 2009 the Association of Renewable Energy Producers (APPA), the largest Spanish association of renewable energy producers, worked on the drafting of an Act that would meet the RE Sector's demands. To do so, they commissioned a law firm, Cuatrecasas Gonçalves Pereira, with the drafting of a proposed "Draft Act on the Promotion of Renewable Energy".

722. Said draft Act was presented jointly by the APPA Association and Greenpeace on 20 May 2009 by Press Release[401]. That is, before the Claimants made their investment. This Press Release from APPA refers to the need to change the energy model, developing a Draft Act based on the *"regulatory best practices for RE"* and on a *"sustainable energy model"*:

> *"APPA and Greenpeace with legal support from Cuatrecasas, Gonçalves Pereira, have worked in a separate RE promotion draft act whose first objective is the transposition of the new Directive into Spanish law. This draft is based on the best practices for RE legislation in different countries and in a sustainable energy model, and sees the new RE directive [...] as a starting point for a change in the current energy model. In addition, it aims to assist the Government in formulating an ambitious and forward-looking RE law. But above all, this draft wants to be a legislative instrument that provides security and stability to the necessary investments for the REs to develop their full potential in a sustainable and lasting way." (emphasis added)*

723. The two largest newspapers in Spain made public this news, both the El Mundo and[402] El País[403] newspapers. Clearly, the main RE sector association was keen to publicise their Draft Act. Moreover, said presentation was also made public by other RE Associations, such as the wind power association, APECYL in May 2009[404] and by Foundations

[401] AREP-Greenpeace Press Release concerning the Draft Bill for the Promotion of Renewable Energy, dated 20 May 2009. R-0212.
[402] News release, "Spain could be 100% renewable by 2050", El Mundo, 25 May 2009. R-0233.
[403] News release, "Too many renewables or too expensive?" El País of 26 May. El País of 26 May 2009, on this presentation: *"The Association of Renewable Energy Producers (AREP) and Greenpeace. Both organisations presented this week a draft law to promote renewable energy which proposes to reach 30% renewable on gross final consumption by 2020*". R-.0234
[404] Apecyl Press Release, "Greenpeace and renewable energy producers propose a law to make Spain a leader in clean energy", 20 May 2009 R-0235

dedicated to the REs[405]. This proposal was also subsequently reiterated by the APPA Association[406].

724. APPA and Greenpeace suggested the Government that the reasonable profitability guaranteed to the REs, as the axis of its remuneration regime should be determined by reference to the Treasury obligations yield to 10 years, plus a spread of 300 basis points:

> *"The Government shall set the amounts for regulated tariffs, premiums and supplements, in all cases assessing the operation and maintenance costs and the investment costs incurred by facility operators in order to reach reasonable profitability with reference to the cost of money on the capital market. As for the capital remuneration tariff, an annual percentage equal to the average of the previous year's remuneration average of Treasury obligations to 10 years will be taken, plus a spread of 300 basis points."*[407] *(emphasis added)*

725. The index proposed by the concerned associations to set reasonable profitability is precisely equivalent to the one established by the Kingdom of Spain in the challenged measures in this Arbitration. As stated by the most important Association in the RE sector when proposing it, this is a method that provides *"security and stability for the necessary investments so that REs can develop their full potential in a sustainable and lasting manner"*[408].

726. Since this is the very same regime proposed by the RE sector, it is clear, then, the reasonableness of the remuneration regime established in the challenged measures in this Arbitration.

727. Moreover, the APPA Association also proposed in 2009 that the estimated investment costs be carried out through *installation types*, according to the *usual market prices*, in order to avoid speculative costs:

> *"To this effect, the Government will estimate investment costs associated with the different kinds of facilities, differentiated by technology and size, in order to reflect the common values that such investments reach in reality."*[409] *(emphasis added)*

728. The similarity between the proposal from the RE sector of May 2009 and the measures taken by the Kingdom of Spain in 2013 is evident. In 2009 the RE sector was already fully aware of the economic and technical sustainability difficulties the SES was going

[405] Presentation of the "Fundación Ciudadanía y Valores" (Foundation on Citizenship and Values) on the AREP and Greenpeace proposal, November 2009. R-0236.
[406] AREP Magazine, "Info" No. 30, 2010, p. 14: "The AREP-Greenpeace agreement is a consensus model to consolidate Spain as a world leader in renewable energy." [...] the Draft Act on Renewables presented in May by AREP and Greenpeace is to date the only document submitted in the sector [...] As such, it is a proposal that is open to debate with the different Administrations and with the social actors affected." R-0237.
[407] Presentation to MINETUR (Ministry of Industry, Energy and Tourism) of the Draft Act presented by AREP-Greenpeace in May 2009. Article 23.4 R-0238.
[408] AREP-Greenpeace Press Release concerning the Draft Bill for the Promotion of Renewable Energy, dated 20 May 2009. R.0212.
[409] Presentation to MINETUR (Ministry of Industry, Energy and Tourism) of the Draft Act presented by AREP-Greenpeace in May 2009. Article 23.5 R-0238.

through. Therefore, an Act was proposed to amend the remuneration scheme of the REs, within the limits of respecting the principle of a "reasonable profitability according to the capital markets" as enshrined in Act 54/1997.

729. Moreover, since the RE sector was fully aware that the management principles of the SES' remuneration regime were contained in an Act Law (and not in the development regulations), they sought to elevate the hierarchy of the regulation in which the reasonable profitability was developed into a formal Act. The most authoritative doctrine reported this claim:

> *"The Spanish FIT scheme has the legal Rank of a Royal Decree. Even though it is "stronger" than for instance a Ministerial Order, the Spanish renewable associations have long called for a FIT Act. Before the last general elections, the current Socialist government had promised to initiate the respective legislative process, but up to now nothing has changed."*[410]

730. The Preamble of the Draft Act of 2009 proposed by APPA to the Government refers to the need to strengthen legal certainty:

> *"the rank itself of the standard [proposal] should serve to reflect the will of stability and continuity that aims to provide measures contained therein, in order to generate adequate confidence and credibility for the legal and economic model chosen and thereby ensuring security and certainty required by investments covered thereby. " (emphasis added)*

731. The Draft Act proposal from the most relevant APPA Association certifies that any investor in Spain knew or should have known the *dynamic* nature of the reasonable profitability guaranteed by Article 30.4 of Act 54/1997 and the need for *sustainability in the* SES. Therefore, the Claimants knew or should have known that no regulation issued in implementation of Act 54/1997 offered a *sine die* freezing of investors' remunerations. And even less in the scenario of international crisis, declining in electricity demand and an increasing of the tariff deficit since 2008.

732. In fact, it is undisputed that since January 2009 the main Spanish RE Association, which the Claimant belongs to, knew and gave public importance to the influence of the tariff deficit and the international crisis on the sustainability of the SES, as causes that justified the need to amend the regulation and remuneration applicable to the REs.

(d) National Action Plan for Renewable Energy in Spain 2011- 2020.

733. Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources establishes the need for each Member State to prepare and notify the European Commission (EC), no later than 30 June 2010, a National Action Plan for Renewable Energy (hereinafter "NREAP") for 2011-2020, in order to meet the binding targets established by the Directive.

[410] Powering the Green Economy. The feed in tariff handbook. Miguel Mendonça, David Jacobs and Benjamin Socacool. Editorial. Earthscan, 2010. R-0058.

734. Pursuant to this mandate the Directive the Kingdom of Spain adopted its NREAP on 30 June 2010[411]. It must be highlighted that prior to said NREAP's final approval, a participatory process involving companies, associations and citizens was open until 22 June 2010. In this phase many contributions and suggestions were made and they were very useful for the preparation of the final document of NREAP 2011-2020.

735. In the NREAP, after making an analysis of the expected final energy consumption in the 2010-2020 period and defining the objectives and paths of renewable energy, support measures are determined to achieve those objectives. Specifically in determining the measures in the field of renewable energy with power generation the NREAP provides:

> *"Establishing a stable, predictable, flexible, controllable and safe framework for developers and the electrical system"*[412].

736. The warning that the NREAP made regarding support measures involving the commitment of financial resources must be highlighted:

> "*The application of measures involving the commitment of financial resources must be conducted in a manner compatible with the adjustment and balance needs the Spanish economy must meet."*[413] .

737. Later, in describing the legal framework on which the financial assistance is based on for electricity generation with renewable energy sources, it states that the tariff and premium regime for special regime facilities *"includes levels of remuneration for electricity generation pursuing obtaining reasonable rates of return on investment. For its determination the specific technical and economic aspects of each technology, the facility power and date of commissioning are taken into account, all of this using criteria on sustainability and economic efficiency in the system"*[414].

738. The necessary control and adaptability mechanisms the Spanish systems uses on subsidies for renewables are described as follows. In particular, and with regard to flexibility mechanisms, the NREAP states the possibility of changing the remuneration levels for renewable technologies:

> *"The levels of remuneration may be changed depending on the sector technological evolution, market behaviour, the degree of compliance with renewable energy targets, the degree of participation of the special regime in demand coverage and its impact on the system's technical and economic management, while always ensuring reasonable profitability - the current RD 661/2007 establishes four-year reviews. In any case, these reviews address the evolution of specific costs associated with each technology, with the triple ultimate goal for renewable technologies to achieve the highest level of competitiveness possible with the Ordinary Regime, favouring a*

[411] National Action Plan for Renewable Energy in Spain (NREAP) 2011-2020. R-0134
[412] Ibid. Page 50.
[413] Ibid. paragraph 61.
[414] Ibid. Page 116.

balanced technological development and for the remuneration scheme to evolve towards the minimum socio-economic and environmental cost."[415] (emphasis added)

739. Moreover, when addressing the future evolution of the remuneration system for renewable energy, according to the methodology followed to date, the NREAP relies on a premise:

"For the determination of the remuneration, technical parameters and investment costs incurred will be taken into account, with the purpose of achieving reasonable profitability with reference to the cost of money in the capital market, taking into account the provisions of the Electricity Sector Act." [416] *(emphasis added)*

740. Then the NREAP emphasizes the Government's duty to control the subsidies' remuneration system, and where appropriate, to take any necessary measures to avoid unwanted retributive adjustment:

"*In addition, the effective protection of the Administration must ensure the transfer to society of the gain from the proper development of these technologies in terms of relative cost competitiveness, minimising speculative risks, caused in the past by excessive profitability that damages not only to consumers, but also the industry in the perception we have of it. It will therefore be necessary to arbitrate sufficiently flexible and transparent systems to provide and obtain economic and market signals that minimise the risks associated with both the investment and its remuneration and those caused by fluctuations in the energy market"*[417]*. (emphasis added)*

741. Accordingly, the Kingdom of Spain, through the NREAP notes that remuneration mechanism for renewable based on the principle of reasonable profitability on investment has to rest on its necessary "flexibility" to avoid unwanted situations.

(e) Royal Decree 1565/2010, of 19 November

742. The need to ensure the technical sustainability of the SES, as a result of the increasing degree of penetration of the REs, forced the regulator to dictate Royal Decree 1565/2010, of 19 November, which regulates and modifies certain aspects concerning the activity of electricity production under the special regime (hereinafter "RD 1565/2010"). In this regard, the Preamble showed that the RE sector:

"Is a very dynamic sector with a very fast pace of technological evolution. Currently, about 25 percent of the electricity produced comes from renewable energies. These facts, combined with the structural characteristics of our electrical system, require the establishment of additional technical requirements to ensure the functioning of the system and enabling the growth of these technologies."[418]

[415] Ibid. Page 119.
[416] Ibid. Page 123.
[417] Ibid. Page 123.
[418] RD 1565/2010, Preamble: R-0078.

743. On the one hand, for technological development reasons, it was agreed to extend the deadline for wind farm suitability meeting response requirements due to voltage voids[419].

744. On the other hand, it included additional requirements for reactive power supplement[420]. In this sense, all facilities under the special regime, with the exceptions established by regulation, would receive a supplement or penalty, as appropriate, for keeping certain power factor values. That is, the facilities were obliged to be maintained on an hourly basis, within the required power factor range, expressly sanctioning noncompliance with the payment of penalties for the incurred noncompliance hours.

745. Additionally, the definition of the concept of substantial modification[421] of a facility for the renewal of the economic regime was specified, to the extent that it was anticipated that this concept would be abundantly used in the coming years, since the power generation facility had reached certain age in which equipment renewal became necessary.

746. It is noteworthy that the Claimant omits any mention of RD 1565/2010. The aforementioned Royal Decree introduced important technical and economic measures on the Wind Energy Sector and, consequently, on their own wind farms. This omission is especially striking in view of the allegations made by the AEE before the NEC while processing this RD 1565/2010[422].

747. In those allegations the AEE, after recalling the case law of the Supreme Court, states that:

> *"Any review of the Remuneration Regime established in Royal Decree 661/2007 must necessarily ensure reasonable profitability on investment and also meet the criteria themselves established in that Royal Decree (which have not been modified) and the higher principles of legal certainty and proportionality"*[423].

748. These allegations are very relevant, because they prove that the RE sector is fully aware of the possibility that the remuneration regime of RD 661/2007 is modified, with the only limit to ensure the perception of a reasonable profitability.

(f) Royal Decree 1614/2010, of 7 December

749. Continuing with the same *leitmotif* of the preceding measures, namely the need to ensure the economic sustainability of the SES, the RD 1614/2010 was adopted by the Government of Spain before the imminent need to reform the RES remuneration regime.

[419] Ibid. Article 15, which amends the Fifth Transitory Provision of RD 661/2007.
[420] Ibid. Article 8 amending Article 29 of RD 661/2007.
[421] Ibid. Article 1 amending Article 4.3 of RD 661/2007. .
[422] SWA allegations before the NEC during the Spanish National Energy Commission open process on the proposed Royal Decree which regulates and modifies certain aspects of the special regime. R-0182.
[423] Ibid. paragraph 7.

750. The main Association of REs producers, APPA, also recognised the need to undertake a REs regime reform and for this purpose it presented its proposal for a Renewable Energy Act, discussed above.

751. In the same vein, the AEE was aware of the need to take measures because of "*the exceptional drop in electricity demand*"[424] Therefore, the whole RE sector knew that they approval of RD 1614/2010 responded to a basic purpose and so in its preamble the following was explained:

> *"So the support regime, as is recognised in its formulation must be adapted, with legal certainty of investment and the principle of reasonable profitability, to the dynamic reality of the learning curves of various technologies and technical conditions that arise with their increasing penetration in the generation 'mix', in order to maintain a necessary support and sufficiently coherent with market conditions and strategic objectives on energy and contributing to the transfer to society of the gain from the proper development of these technologies.*
>
> *"Therefore, the present royal decree intends to resolve certain inefficiencies in the implementation of Royal Decree-Law 6/2009 of 30 April, for wind and solar thermal technologies (...)[425]".*

752. In short, the aim was to rebalance the contribution of different technologies to the SES' sustainability, according to their varying degrees of penetration. It was obvious, and therefore investors were aware, that there was a clear will on the Government to achieve the objective and, therefore, any necessary measures would be taken to achieve them.

753. The fact that during the elaboration of RD 1614/2010 support by operators in the sector were achieved, does not alter (i) neither the legal nature of the *erga omnes* norm, (ii) nor its contents (iii) nor the possibility of adopting new measures aimed at achieving the same end, if Macroeconomic circumstances so require.

754. The sector also knew that the reform would be adopted regardless of whether this was accepted by them. The necessary sustainability of the SES demanded it. In this regard it should be remembered that more stringent measures regarding the photovoltaic sector were also adopted, despite its opposition.[426]

755. REs producers were aware that the alleged agreement of 2 July 2010 contained no commitment on freezing the remuneration regime. In this regard, it is clear that the AEE Association does not advocate the existence of any freezing commitment as stated in its allegations of 29 August 2010:

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[424] Ibid. paragraph 2.
[425] Royal Decree 1614/2010 of 7 December, Preamble, paragraphs 4 and 5. C-0064_ESP. R-0151 Bis.
[425] Ibid. Preamble
[426] In this regard, measures regarding the photovoltaic sector were adopted by the RD 1565/2010 (R-0078) and RD-Law 14/2010 (C-0064_ESP R-0152 Bis), although the latter also affected the wind and thermosolar sectors, as will be discussed later.

*"In any case, safeguarding legal certainty and ensuring reasonable returns on investments constitute inviolable limits of **any regulatory changes affecting existing facilities.**"*[427] *(emphasis added)*

756. That is, the AEE not only recognises the lack of commitments but admits that there may be further changes in the profitability and the regime of existing facilities. It's only required that two principles are respected: legal certainty and ensuring reasonable profitability.

757. In addition, the AEE Association expressly recognises before the NEC the existence and linking the consolidated stated case law:

*"It is true that the Supreme Court has stated, in relation to this type of retroactive reforms, that there is no "unalterable right" for the economic regime to remain unchanged and that "from the prescriptive content of Act 54/1997 of 27 November of the Electricity Sector no freezing of the electricity power facility holders' remuneration regime in special regime can be drawn nor the impossibility to reform such regime", **recognising thus a relatively wide margin of the Administration's "ius variandi" in a regulated sector where general interests are involved.** However, without prejudice to the above, the case-law established limits to the Administration's "ius variandi" regarding the retroactive amendment of that remuneration framework, especially "that the requirements of the Electricity Sector Act are respected regarding the reasonable profitability on the investments". Moreover, a breach of the principle of legal certainty for a retroactive rule "can only be settled case by case "(...)".*[428] *(emphasis added and footnotes omitted).*

758. In short, the AEE revealed in its allegations that they had complete knowledge of the Spanish legal system, quoting Supreme Court judgements of 25 October 2006, 3 December 2009 and 9 December 2009. This reflects clearly the expectations that RE producers had regarding *"any"* regulatory change. The AEE does not claim, neither the freezing the remuneration regime contained in RD 661/2007, nor the assumptions or commitments established in RD-Law 6/2009, nor in the agreement with the Ministry of Industry one month before submitting these allegations. All they claim is respect for the legal principle of reasonable profitability and legal security of the rule.

759. It is therefore clear that the Claimant knew the *"relatively **wide** range of" ius variandi "of* the Administration in a regulated sector where general interests are involved." That is, it knew the possibility of future regulatory changes and limits that could adjust these regulatory changes: the SES' economic sustainability and ensuring reasonable profitability.

760. And what is relevant for the purposes of the biased statement of facts made by the Claimant is that it is clear that the Claimant knew and handled the Supreme Court case law invoked before the NEC by the AEE. It is therefore surprising that in the 166 pages

[427] SWA allegations before the NEC during the Spanish National Energy Commission public process on the proposed Royal Decree which regulates and modifies certain aspects of the special regime, page 2. R-0182

[428] Ibid. Page 6.

of their Memorial, these Supreme Court Judgments are omitted, bringing other irrelevant judgements to this case.

761. The Claimant tries to convey the message that RD 1614/2010 constitutes an alleged agreement with the Thermosolar Energy Sector. However reading the Project's Analysis Memory of Regulatory Impact of RD 1614/2010 (hereinafter "MAIN") is enough to realise that this only intended to ensure SES sustainability, through cost containment linked to the REs subsidy:

> *"The aims of installed power under the Renewable Energy Plan 2005-2010 have been reached or exceeded for thermosolar and wind power technologies. While this development can be considered a major achievement of all stakeholders (...) it has also caused problems that need to be addressed before they pose an irreversible threat to the economic and technical sustainability of the system[429]." (emphasis added).*

762. This Memory adds:

> *"This Royal Decree provides a series of austerity measures to contribute to the transferring to society the gain from the proper evolution of these technologies in terms of competitiveness in relative costs, reducing the deficit of the electrical system, while safeguarding the legal security of investments and the principle of reasonable profitability[430]" (emphasis added).*

763. Therefore, it is clear that the purpose of RD 1614/2010 was consistent with the rest of the measures taken so far: ensuring a reasonable profitability for investors, in the context of sustainable SES. In fact, this objective is what motivates each and every one of the measures contained in RD 1614/2010, as discussed below.

(g) Royal Decree-Law 14/2010, of 23 December

764. The deficit ceilings established by Royal Decree-Law 6/2009 for the years 2010, 2011 and 2012 were raised by Royal Decree Law 14/2010[431] since the previous limits could not be met. In fact, this is explained in its preamble:

> *"Since the adoption of Royal Decree-Law [RD-L 6/2009] a series of circumstances have taken place which have had a direct impact on the tariff deficit forecast for the electricity system and have meant that the maximum [...] deficit limit has been widely exceeded. The impact of the global crisis in the Spanish economy has led to a significant drop in power demand while some circumstances on the supply side have had an impact such as [...] favourable weather conditions that have led to increased electricity production from renewable sources.''[432] (emphasis added).*

[429] The Project's Analysis Memory of Regulatory Impact of Royal Decree 1614/2010 regulating and modifying certain aspects related to electric energy production using thermoelectric solar and wind power technologies. R-0239.
[430] Ibid.
[431] Royal Decree-Law 14/2010 of 23 December, establishing urgent measures to correct the tariff deficit in the electricity industry. C-0064_ESP.
[432] Ibid. Preamble.

766. So regarding all RE technologies, RD-Law 14/2010 established in Article 1.2 that:

> *"The remuneration of regulated activities will be financed through the revenue from access fee to transmission and distribution networks by consumers and producers."* [433]

767. This RD-Law requires therefore that all power producers, both OR and SR, pay an access fee for the use of transmission and distribution networks[434]. This affected the profits of the RE producers, demonstrating the inconsistency of the Claimant's argument on the *freezing or* impossibility to reform the RD 661/2007 regime after RD 1614/2010. In fact, the access fee introduced by RD-Law 14/2010 was challenged by some Photovoltaic producers in the Supreme Court, which dismissed the appeal, reiterating (once again) its consolidated case law[435].

768. Again, this case law emphasised that investors knew that their remuneration could be affected by future measures, both positive and negative, without any remuneration inalterability taking place in time or the mechanism to obtain it. However, they also knew, as established by the case law, that measures should always respect the principle of *reasonable profitability.*

769. Indeed, access fees and limiting the equivalent operating hours introduced by this RD-Law 14/2010, along with other adjustment measures adopted for the photovoltaic sector by RD 1578/2008, were the subject of the first international arbitration against the Kingdom of Spain. This arbitration has been resolved by the Award of 21 January 2016, dismissing all of the Claimants' claims.[436]

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[433] Ibid. Article 1.2

[434] Ibid. First transitory provision.

[435] In this regard, the Supreme Court has also spoken in the case of various appeals against the ministerial orders setting tolls for 2011 (starting with Order 1TC/3353/2010), in which the RD-Law was being indirectly challenged. The Supreme Court ruling of 25 June 2013 is worth noting, in which, among other considerations, states:

"The rationale of the appellants' complaint is limited, in short, to the fact that the payment of the toll impacts negatively on their income statements, and therefore, the profitability of their investments. And as they are based on the premise - even though they may not be expressed in the same way - that the legal situation laid down in Royal Decree 661/2007 is virtually inalterable or unchangeable over the next thirty years (and even later), any unfavourable measure that alters it would violate the principles repeatedly invoked (principles of legal certainty and legitimate expectations). This inalterability, in their understanding, would extend even to subsequent provisions of a tax nature —which is the nature they attribute to the tolls— which would also not be allowed to affect adversely the profits stemming from the remunerative regime they enjoyed under RD 661/2007.

This Chamber of the Court has rejected this premise in the preceding judgments and will do the same in this one. If the former, referring to the challenge of RD 1565/2010, we held that the principles invoked by the appellants did not obstruct the regulatory power holder from - within the respect for the limits of "Reasonable profitability" set by the LSE - introducing certain modifications in the remuneration regime established by Royal Decree 661/2007, the more we must confirm that these principles do not obstruct the holder of legislative power (...) to take general or non-tax measures, that affect them. It may therefore legitimately decide that all electricity generators, without exception, should contribute by paying tolls on the costs attributable to the investments required precisely so that the energy they produce may be transported and distributed." (emphasis added) R-0089.

[436] Award in the case *Charanne B.V v. Kingdom of Spain.* RL-0071.

770. The fact that the Claimant does not even mention this RD-Law 14/2010 should be highlighted. In her mind, this standard never existed. Clearly, the intention of this omission is to cover that the implementation of access fees had an economic impact on the profitability of their plants. In addition, the adoption of this standard on 23 December 2010 (i.e., 16 days after RD 1614/2010) shows that the latter Royal Decree in no case meant the freezing of the economic regime in RD 661/2007.

(2.3) The risks of future regulatory measures were known by the Experts and by the Doctrine.

771. On the date on which the Claimants executed their investment many analysts believed that the adoption of future regulatory measures would be conditional on the evolution of the economic sustainability of the SES. The Claimants themselves must have been aware of this risk when they requested from Pöyry a report or a note to analyse this risk and the impact on their investment.

(i) Pöyry:

772. In its report from March 2009 as we explained in Section IV.A.1.4. (c), the consultancy firm Pöyry expressly warned that the economic sustainability of the SES and the elimination of situations of excess remuneration were the grounds that justified the elimination of RD 436/2004[437].

773. In said report Pöyry expressly warned (i) that the greatest risk to the system of subsidies was the sustainability of the SES affected by the tariff deficit (ii) the significant contribution to this deficit of the subsidies for thermosolar technology.

774. Likewise, the consultancy firm emphasised that the limit on the regulatory changes was found *in the* Government's commitment to guarantee the reasonable profitability of the investments by maintaining subsidies*: "the Government is willing to provide a reasonable profitability for investors by keeping the subsidies".* At no moment has this commitment not been met. The Claimant forgets that Pöyry expressly warned them that.

(ii) Brattle:

775. Together with Pöyry's opinion, other analysts such as Brattle warned, on dates close to the implementation of the investment by the Claimants, that the SES was unsustainable and that the adoption of reforms was necessary. Thus, Brattle warned in September 2010 of the unsustainability of the Spanish system due mainly to the fact that the renewable subsidies were too generous. Therefore, it maintains that it is necessary to make the relevant changes in the model of subsidies for renewables:

> *"There are two main short-term policy challenges related to renewable power and resource adequacy. The first is how to cope with the high costs (estimated at over €6 billion for 2010 alone) of subsidies to existing renewable power plants. A significant share of the subsidies accumulated over the past years has not yet been passed*

[437] "Current and Future Trends in the Spanish Solar System". Pöyry, March 2009 Edition. pp. 131-134 C-0049

through to consumers; this has contributed to a growing and unsustainable "tariff deficit". Many solutions to this are on the table, including recovering the cost from taxpayers or from all carbon-emitting energy sales, not just from electricity. But the central point is that Spain set feed-in tariffs far too generously and now needs to change its renewables model without losing the confidence of investors." [438] *(emphasis added)*

(iii) Miguel Mendonca, David Jacobs and Benjamin K. Sovacool

776. The authors of the book "*Powering the Green Economy: The Feed-in tariff hand book"* also warned what the main problem was in a *feed in tariff* system, noting that:

"When designing FITs, the idea is to provide a balance between investment security for producers on the one hand and the elimination for windfall profits (in order to reduce the additional cost for the final consume) on the other"[439]

777. At this point we must remember that the greatest difficulty encountered by any regulator that intends to use a Feed in tariff system in order to enable investors to recoup their investment costs, their operating costs and obtain a reasonable profitability, is found in correctly setting the amounts of such subsidies. At this point we must remember:

"One of the most urgent questions for policy makers dealing with FITs i show to get the tariff level right. A tariff that is too low will not spur any investment in the field of renewable energies while a tariff that is too high might cause unnecessary profits and higher costs for the final consumer"[440]

778. In the same vein, the authors of the book "Powering the Green Economy: The feed in tariff handbook" pointed out:

"It has to be noted, however, that the vast amount of installed capacity in Spain was due to a combination of two "bad" design options: extremely high tariffs and capacity cap"

"Who will argue for an extremely high tariff? It seems logical that the renewables industry will argue for high or even extremely high tariffs: the higher tariffs, the higher the profitability margin, However, people with this attitude should be warned that short-term profitability can sometimes endanger long-term objectives. The main objective of renewable energy industry associations should be the transformation of the entire power sector, and not unsustainable internal rates of return"441

779. In that statement, it must be added that in the Spanish case, subsidies for renewables are a cost of the SES and that they directly affect the sustainability of the SES. Consequently, an FITs system must necessarily have the adjustment mechanisms required to correct such undesirable situations. Adjustment mechanisms which in the Spanish case

[438] Report "Resource Adequacy and Renewable Energy in Competitive Wholesale Electricity Markets" – The Brattle Group (Serena Hesmondhalgh, Johannes Pfeifenberger and David Robinson) – Pages 9 and 10. R-.0240
[439] Powering the Green Economy. The feed-in tariff handbook. Pag 15. R-0058.
[440] Ibid. paragraph 19. R -0058.
[441] Ibid. paragraph 59. R-0039.

are even more necessary due to the implication that said cost has for the sustainability of the SES.

(2.4) How did the economic sustainability of the SES develop once the Claimants made their investment?

780. Understanding the measures adopted by the Kingdom of Spain throughout 2012 and 2013 requires analysis of the evolution of Spanish macroeconomic data from when the Claimant planned its investment until the adoption of the regulatory measures relating to this arbitration. [442]

Table 4.1 - Evolution of the main macroeconomic indicators of Spain

Indicator	2007	2008	2009	2010	2011	2012	2013
Public deficit (in % GDP)	2.0 %	(4.4)%	(10.9)%	(9.4)%	(9.5)%	(10.5)%	(7.0)%
Unemployment Rate	8.2 %	11.3 %	17.9 %	19.9 %	21.4 %	24.8 %	26.1 %
Variation of GDP	3.8 %	1.1 %	(3.6)%	0.0 %	(1.0)%	(2.6)%	(1.7)%
Risk premium (in bps)	9	38	75	149	278	427	293

Source: IMF Database, Bloomberg and Accuracy analysis

781. The negative evolution of the Spanish economy as a result of the international economic crisis produced a substantial reduction in demand for electricity during 2009, 2010, 2011, 2012 and 2013 with a subsequent fall in income for the SES[443]:

782. In consequence, the effects of the international economic crisis led to the realization of a risk that the Claimant had been warned of in its due diligence: an increase in the tariff deficit.

(2.5) Did the Kingdom of Spain adjust its behaviour to what was expected by the Claimants when faced with a possible situation of economic unsustainability in the SES

783. As discussed above, after the Claimant had executed its investment, the SES continued to suffer a sharp decline in revenue due to the lower demand for electricity in a context of very serious global economic crisis. Meanwhile, its costs, designed in the context of a radically different economic situation, not only continued but increased. This compromised the economic sustainability of the SES.

784. In this context, (1) the different preliminary analyses, (2) regulatory developments, (3) technical knowledge and (4) technological developments, revealed the existence of remuneration which, either by default or by excess, did not maintain the criterion of r*easonable profitability* established for the remuneration of the so-called special regime and that of *adequate remuneration* for the rest of the regulated activities, especially transport and distribution activities.

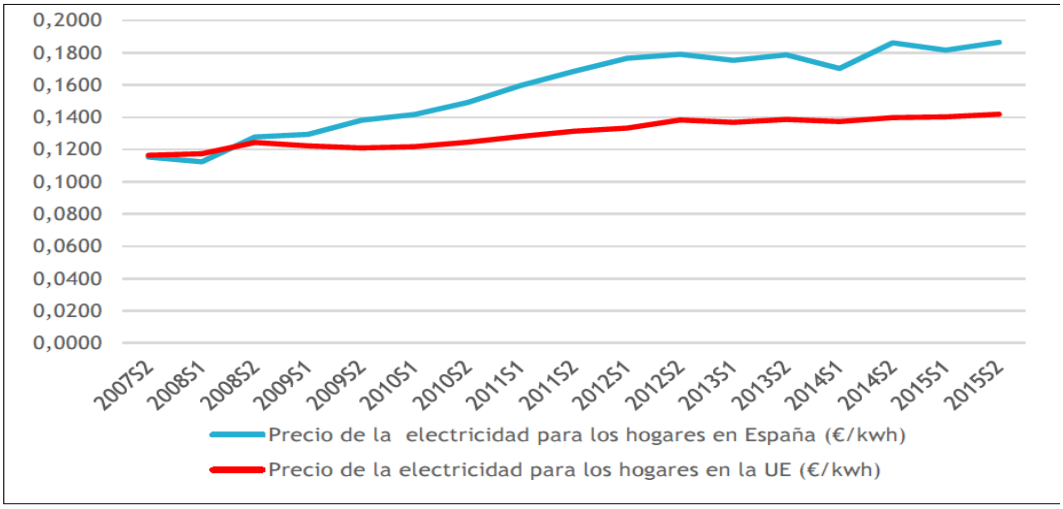
785. Given this situation the SES continued to evolve, as it had been doing to date, in a rational and proportional manner. At least the way in which the Claimants themselves had considered before executing their investment.

[442] Accuracy Second Report on the incentives for the thermosolar sector in Spain. Par. 411
[443] Accuracy Second Report on the incentives for the thermosolar sector in Spain of 9 June 2016. Par. 412

786. On this point, we should note what behaviour the Claimants anticipated from the Kingdom of Spain to confront the tariff deficit. The "due diligence by Pöyry" covered this question, stating:

> *"In this regard, the NEC has been proposing substantial increases of the regulated tariffs in order to avoid future tariff deficits (NEC proposed to increase end-user tariffs by 30% during 2008).We do not believe that the Government will undertake such increases in 1 year but we estimate that it could be done gradually, provided there is political will given the economic situation, over a 2 year period, This increase will have a political cost for the Government (whatever the political party is in Office) that needs to be addressed, as this political cost might provoke that the Government delays (once again) taking the decision about when the deficit situation is managed and solved"*[444]

787. Firstly, the Government of Spain, in line with what Pöyry noted, increased the tariffs that Spanish consumers and industry pay. We should recall that between 2007 and 2014 the price of electricity increased by 61.81% in Spanish homes.



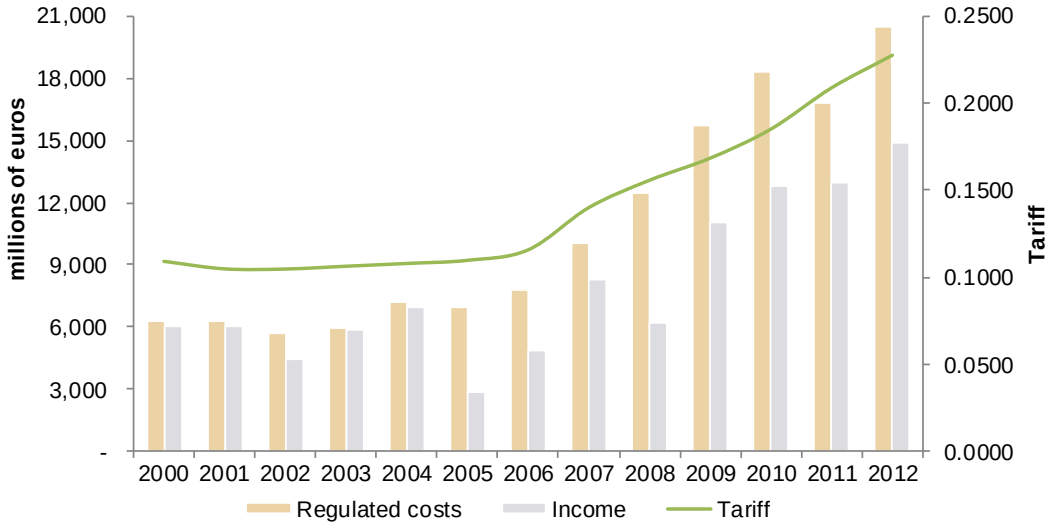
Fuente: datos obtenidos de Eurostat.

788. This meant that Spain in 2014 was the country with fourth most expensive electricity in the eurozone at the domestic consumer level and the fifth in relation to industrial consumers[445]. An increase that took place in a scenario of a strong economic crisis.

789. The strong increase in regulated tariffs paid by consumers helped to alleviate the effects of the tariff deficit. Nonetheless, the increase in tariffs was not sufficient and could not be the only instrument in a scenario of strong economic crisis to confront the tariff deficit. The attached table shows the evolution of the costs of the system and the evolution of the tariffs paid by Spanish electricity consumers:[446]

[444] Current and Future Trends in the Spanish Solar System". Pöyry March 2009. Edition. Page 131 C-0049
[445] Accuracy First Economic Report on the incentives for the thermosolar sector in Spain. Paragraph 248.
[446] Accuracy Second Economic Report on the incentives for the thermosolar sector in Spain. Paragraph 413.

Figure 4.3 - Energy deficit



Source: public information available (www.energiaysociedad.es)

790. It is true that the Claimants could have considered that achieving the objective of the deficit set *ex ante* in RD-L 6/2009 for 2013 could be postponed. However, we must remember that the Kingdom of Spain in 2012 signed the so-called Memorandum of Understanding with the European Union.

791. The Kingdom of Spain, in 2012, signed the so-called *Memorandum of Understanding* with the European Union on 20 July 2012, as a result of the need to make an adjustment in the framework of the financial crisis[447]. The *Memorandum* links the financial contributions with the adoption by the Kingdom of Spain of a set of macroeconomic control measures to resolve structural imbalances in the Spanish economy[448]. Among such *structural reforms*, the *Memorandum* explicitly mentions the need to:

> *"address the electricity tariff deficit in a comprehensive way".*

792. The signing of the Memorandum of Understanding prevented the Kingdom of Spain from delaying beyond 2013 the problem of the tariff deficit.

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[448] Memorandum of Understanding signed with the European Union on 20 July 2012: "*VI. Public Finances, Macroeconomic Imbalances And Financial Sector Reform:*
29. There is a close relationship between macroeconomic imbalances, public finances and financial sector soundness. Hence, [...], with a view to correcting any macroeconomic imbalances as identified within the framework of the European semester, will be regularly and closely monitored in parallel with the formal review process as envisioned in this MoU. [...]
31. Regarding **structural reforms**, the Spanish authorities **are committed** to implement the country-specific recommendations in the context of the European Semester. These reforms aim at **correcting macroeconomic imbalances,** as identified in the in-depth review under the Macroeconomic Imbalance Procedure (MIP). In particular, these recommendations invite Spain to: [...] 6) [...] address **the electricity tariff deficit in a comprehensive way**." (emphasis added) RL-0091

793. The Kingdom of Spain adopted, along with measures related to this arbitration, another plurality of measures to increase the income of the System and reduce the costs thereof. These measures were set out in our Counter-Memorial[449], but for the Claimants they went unnoticed.

794. On the income side, it was agreed to feed the SES with the sums deriving from the collection of the public revenues referred to in Act 15/2012. This measure represented an exception to the principle of the self-financing of the SES, based on the aim of promoting the development of Renewable Energies[450].

795. The measures to increase the revenues of the SES were linked to important measures to reduce the costs of the SES. Apart from the costs involved in the premiums on renewables, all the SES costs were reduced, in line with the recommendations made by the NEC on 7 March 2012, to adapt them to the new economic scenarios arising from the crisis[451].

796. In such a situation, a number of measures were carried out aimed at reducing the costs of the SES about which the Claimants have said nothing: It seems that the measures in question did not exist as far as they were concerned:

> 1) Spain suspended the entry into operation of new pre-assigned renewable energy[452]
>
> 2) The regulated remunerations of the activities of transmission and distribution were reduced[453],
>
> 3) The remunerations of production were reduced in non-peninsular systems[454],
>
> 4) The so-called capacity payments were reduced[455],
>
> 5) The costs of the non-interruption system were reduced[456],

[449] Counter-Memorial paragraphs 663 to 680

[450] Additional fifth provision of Act 17/2012, of 27 December, on the General State Budget for 2013:
"Fifth. Contributions to the Financing of the Electricity Sector
1. In the Laws of General State Budgets of each year an amount equivalent to the sum of the following will be used to finance the costs of the Electricity Sector ***relating to the promotion of renewable energies****, provided for in the Electricity Sector Law:*
a) The estimate of the annual collection derived from taxes included in the Act on tax measures for energy sustainability [Act 15/2012].
b) 90% of the estimated income from auctioning greenhouse gas emission rights, with a maximum of EUR 450 million.
2. 10% of the estimated income from auctioning greenhouse gas emission rights, with a maximum of EUR 50 million, is earmarked to the policy of combating climate change." (emphasis added). R-0118.

[451] Counter-Memorial, paragraph 257.

[452] Royal Decree-Law 1/2012, of 27 January, regulating the suspension of proceedings for remuneration pre-assignment and the removal of economic incentives for new installations of electricity production from co-generation, renewable energy sources and waste. R-0094

[453] Counter-Memorial, paragraph 663-665

[454] Counter-Memorial paragraphs 666-668.

[455] Counter-Memorial paragraphs 669-671.

6) The restrictions procedure of supply guarantees was removed, which subsidised the operation of coal plants[457].

(3) The Subjective Expectations of the Claimant

(3.1) Absence of legal due diligence and disregard of the legal interpretation from case law

797. The Claimant states that the source of its Legitimate Expectations when it invested in Spain in 2008 and 2009 was found in an alleged regulatory "*stabilisation clause*" contained in Art. 44(3) of RD 661/2007 in "*clear and precise terms*"[458], that indefinitely prevented any alteration to the economic regime of the RE producers. It is of note during all of its pleading that its expectations included the alleged non-adoption of retroactive measures on the plants in which it invested.

798. Nonetheless, the Claimants never requested legal due diligence on the Spanish regulatory framework in 2008, with "Mubadala Legal" taking on the legal guidance[459].

799. In 2009 it requested regulatory due diligence that warned it of (1) the effects that the increase in the tariff deficit might have and (2) the Government's commitment to provide a reasonable profitability through subsidies. The Pöyry report does not contain a single mention of the existence of any stabilization clause in RD 6612007. Neither does this report state that the tariffs and premiums of RD 661/2007 are guaranteed.

800. Therefore, the conclusion that the Claimant reaches regarding its expectations in 2008 and 2009 about the petrification of RD 661/2007 in its favour owing to an alleged stabilization clause in "clear and precise terms" is not reasonable. Nonetheless, as well as Article 44(3) RD 661/2007 it is appropriate to develop the other alleged sources of compromises on which the Claimant bases its expectations.

(3.2) The challenged measures are not retroactive.

801. The Claimant tries to give the Arbitration Tribunal a distorted view of the challenged measures, repeatedly describing them as "*retroactive*" throughout the Reply on the Merits[460]. That is to say, it attempts to legitimise its position based on how shocking it would be to adopt possible "*retroactive*" measures towards an investor. In its theory, the Claimant makes a basic, concept-based error: For that a regulation to be retroactive it must affect *acquired rights*.

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[456] Counter-Memorial, paragraphs 672 - 677
[457] Counter-Memorial, paragraph 678.
[458] Reply on the Merits, paragraphs. 20, 108, 296, 334, 411 and 512. Furthermore, this is reiterated in similar terms in paragraphs. 266, 269, 301, 302, 303, 319.o), 403, 405, 406, 491, 506 and 513.
[459] Section C-0042, page 34
[460] Reply on the Merits, paragraphs 7, 10, 11, 16, 24, 25, 80, 88, 98, 101, 105, 106, 153, 156, 158, 161, 163, 173, 197, 206, 216, 223, 255, 260, 262, 269, 279, 296, 301, 309, 319(o), 322, 332, 348, 349, 385(c), 401, 404, 473, 474, 483, 512.

802. As has already been shown in the Counter Memorial, the Claimant has never had an "*acquired right*" to future remuneration *sine die*, through a fixed and immovable FIT. As the Kingdom of Spain has shown, the reform contained in RDL 9/2013 is only effective in the future, without affecting *acquired rights.*

803. It is, therefore, highly relevant to note that when the Claimant uses the term "*retroactivity*", it does so with the aim of distorting reality to confuse the Tribunal. This misleading and obstinate intention is evident as, throughout the over 500 pages of its Memorials, the Claimant has been unable to quote even a single international arbitration precedent that supports its theory, because it do not exist. Furthermore, the ones that do refer to this question dismiss the Claimant's theory.

804. The fact that the existing arbitration precedents negate the Claimant's theory should be taken into account when evaluating the Claimant's temerity or its will to distort reality before the Arbitral Tribunal. Furthermore, this will to mislead is even more obvious when one of the existing precedents has already examined the Spanish regulatory framework since RD 661/2007. Nonetheless, the Claimant intentionally omits from the Tribunal all references to the reasoning that, on the possible retroactivity of the measures, were made in the very same Charanne arbitration precedent.

805. Consequently, to clarify that the challenged measures are not retroactive, the Respondent shall duly prove that:

(i) They are not retroactive in accordance with the parameters of International Law;

(ii) They are not retroactive, as a proven fact, under Spain's domestic law,

(iii) They are not retroactive according to case law or for diligent investors such as Iberdrola (invoked by the Claimant).

(iv) The Claimant knew that the challenged measures are not retroactive, as the Reports by the NEC from 2007 and 2008 expressly warned that it could introduce future reforms on existing installations.

806. The accreditation of these circumstances will highlight that a diligent and sophisticated investor could and should have anticipated that reforms could be introduced in the future that would affect already existing installations. These circumstances will also prove the Claimant's stubborn will to distort reality before the Arbitral Tribunal.

(i) The challenged measures are not retroactive in accordance with the arbitral precedents and according to International Law.

807. What the Claimants call *"retroactivity*" it is not really that according to international case law. The case Nations Energy v. Panama is particularly illustrative. On that occasion the Tribunal examined the concept of *retroactivity* within the protection against unlawful expropriation that the TBI granted:

"The Arbitral Tribunal does not share this thesis and considers that Law 6 ***does not have a retroactive nature because it does not have the effect of revoking acquired rights*** *and applies only to the future.[...]*

These requirements only apply to the future, and cannot have the effect of nullifying or reducing retroactively the deductions already made on income tax for previous years. [...]

In reality, the Claimants ***confuse*** *the principle of non-retroactivity and the principle of immediate effects of the new law for the future. Law 6 does not have the effect of nullifying retroactively acquired rights but of modifying the conditions under which holders of tax credits that have not yet been used could apply them in the future."* [461] *(emphasis added)*

808. This Award expresses the established principle in International Law of *Acquired Rights.* If the acquired rights are adversely affected or removed by a regulation subsequent to their acquisition, this regulation will be retroactive. This is different from the regulations that apply to *future events,* in relation to legal situations under way, but that do not affect *rights already acquired.*

809. The Claimant itself recognises that Royal Decree Law 9/2013 respects the remuneration received by the installations before it came into effect[462], and so the new remuneration system only has future effects[463]. For the new regime to retroactively affect the levels of profitability received in accordance with RD 661/2007, it should have ordered the reimbursement of the excess payments made by Spain prior to Royal Decree Law 9/2013. Therefore, the new regime's effects are projected in the future, not towards rights already acquired such as profitabilities already paid.

810. In effect, the legislator has modified the remuneration regime of the installations establishing a reasonable profitability for the useful activity of the installation. This remuneration makes it possible to take into consideration the remunerations already received from the facility commissioning date, for the purpose of calculating the future subsidies to be received outside of the market, without incurring in retroactivity.

811. In other words, Art. 30.4 of LSE guarantees remuneration alongside the market income. This remuneration or premium ensures that the investor, throughout the useful life of the installation, recovers its investment (investment cost), covers its running costs (operational costs) and obtains a reasonable profitability. The parameters established by the new remuneration system perform a calculation for each installation type of both costs and set the subsidies to be received from its entry into effect to guarantee the reasonable profitability. The payment of remuneration under the new system is deployed

[461] Case Nations Energy Inc. and others v. Republic of Panama (ICSID Case No. ARB/06/19) paragraphs 642, 644, 646 RL-0080.

[462] Claimants' Memorial, paragraph. 250.: "*the Claimant does not have to return the sums received under the economic regime of RD 661/2007, except in the case of the transitional regime*"

[463] This is clearly stated in the Third Final Provision.4 of the LSE 2013: *Under no circumstances can there be a claim of the remuneration received by the energy produced prior to 14 July 2013 from the new remuneration model, even if it is stated that on that date this profitability may have been exceeded."* Act 24/2013, of 26 December, on the Electricity Sector. Final provision Three.4: R-0192

in the future, respecting the payments made prior to the entry into force. In this case, to establish future remuneration it is evident that the part of the Investment costs and Operational costs that has already been compensated via the payments previously made cannot be overlooked. Otherwise this would result in double payments or compensation. There is not, therefore, the retroactivity that is invoked in contrast.

812. It is worth noting one precedent omitted by the Claimant that has already ruled on the non-retroactivity of measures adopted by the Kingdom of Spain. The Award of Charanne v. Kingdom of Spain confirms the reasoning of the *Nations Energy v. Panama* Case when it states:

> *"the current situation is very different from the situation addressed in the award CMS v. Argentina, in which the subject was the breach of contractual commitments. In the present case there is no such commitment. Herein we must assess to what extent the State can modify, with immediate effect, generally applicable regulatory provisions.*
>
> *In fact, the Claimants' argument of retroactivity is no more than a different formulation of the argument according to which the State did not have the possibility of altering the regulatory framework that benefited the Claimants' plants in any way. [...] That attitude would lead, in effect to freezing the regulatory framework, limiting any change to the regulation of new plants that were installed after such changes.* [464] *(emphasis added)*

813. In this paragraph the Final Award accepts an evident consequence: the concept of retroactivity that the Claimant proposes is really that of the petrification of the rules *sine die*, with regards to subsidies that are not paid by a single payment but through periodical payments over the whole of the lifespan of the installation. This alleged petrification would be against the objective and aims of the ECT.

814. In effect, it is worth recalling that there are different degrees for distinguishing the retroactivity of the legal regulations. Far from carrying out a purely theoretical analysis, we shall refer to the specific object of this arbitration proceeding.

815. The Claimant accepts that the rules relating to RE can be modified, but opposes this modification affecting the RE Plants put into operation with RD 661/2007. In reality, what it claims is the indefinite petrification of RD 661/2007 in favour of RE plants. This freezing of the legal framework is contrary to the objective and aim of the ECT. As we shall set out below, the ECT Guide expressly allows the adoption of macroeconomic control measures, even if this entails a loss of profits for investors. Furthermore, this potential petrification or freezing in favour of some particular plants is expressly denied in the Charanne Case, as has just been stated[465].

816. Having discounted the position maintained by the Claimant, it is possible to apply temporarily the rules relating to RE in what is known as a moderate retroactivity In accordance with this degree of retroactivity, the rule applies to legal situations that

[464] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain (SCC v. 062/2012), Final Award, 21 January 2016, and separate opinion, paragraphs 545 and 546, RL-0071
[465] Ibid. paragraph 546.

originated before it came into effect but only with regards to future effects (after the entrance into effect of the rule).

817. This retroactivity is not prohibited under international law, as the precedent of Nations Energy v. Panama. This arbitration case law has been confirmed by the Charanne Case. However, this is the standard for retroactivity in accordance with international law that must be considered with regards to the contested measures, that are applied in the future or already existing situations without affecting acquired and consolidated rights.

818. The Respondent has already proven that the Claimant does not have an acquired right that is affected by the new regulation. The arbitral precedent also reached this conclusion regarding the measures that affected Charanne in 2010:

> *"It is undisputed that the 2010 regulations applied immediately, from their entry into force, to the plants already in operation, and that **they did not apply retroactively** to previous time periods. The Arbitral Tribunal considers that there is no principle of international law, except in the case that there are specific commitments such as those resulting from a contract, **which prohibits a State from taking regulatory measures with immediate effect regarding situations in progress".**[466] (emphasis added)*

819. The arbitral precedents set out are fully applicable to the present case, when the challenged measures are applied going forward to legal situations that are ongoing but do not affect already acquired rights. Consequently, it must be concluded that, pursuant to international case law, the concept of forbidden retroactivity under International Law does not apply to the alleged measures.

(ii) The alleged measures are also not retroactive, as a PROVEN fact, in accordance with Spanish domestic legislation or under European Community law.

820. The Supreme Court and the Council of State have ratified the legality of those legislative changes which, without affecting acquired rights, are applied to the future.[467] This Doctrine is the same as that applied by international arbitral precedents.

821. The Spanish Constitutional Court has examined the measures adopted based on RD-Law 9/2013 and ruled that they are not retroactive as their effectiveness applies to the future, without affecting acquired rights. In this regard, the Judgement of 17 December 2015 declared in an enlightening way that:

> *"Non-retroactivity is only applicable to the consolidated rights, assumed and integrated in the subject's equity and not to that pending, futures, conditioned and expected […]*
>
> *The provisions that, lacking ablative or derogatory effects to the past, deploy their immediate effectiveness to the future even if this entails influencing a relationship or legal situation still in progress do not fall within the scope of the prohibited*

[466] Ibid. para. 548.

[467] Judgements of the Supreme Court of 09 December 2009. Document R-0077. The opinion of the Standing Committee of the Council of State 937/2013, of 12 September 2013 is also cited and set out. General Comment VI, document R-0136.

retroactivity. [...] There is no forbidden retroactivity when a regulation governs pro future the legal situations created prior to its entry into force or whose effects have not been consummated"[468] *(emphasis added)*

822. Two subsequent rulings of the Spanish Constitutional Court, dated 18 February 2016[469] upheld this Decision.

823. As a consequence of this case law of the Constitutional Court, recent judgements by the Supreme Court of 2016 have expressly confirmed that the reform implemented by the challenged measures is not retroactive. This retroactivity was maintained by the appellants. Nonetheless, the Supreme Court has rejected this claim in various judgements handed down[470]. The Judgement of the Spanish Supreme Court no. 1260/2016 of 1 June 2016 establishes that:

The modification to the reasonable profitability for the lifespan of an installation […] only affects the overall calculation of the profitability that the owners of these installations are entitled to receive without any effect on the amounts received in the past. The contrary would involve recognising the consolidated right to receive a given profitability in the future as well. This possibility would involve petrifying the already existing remuneration regime, something that has been expressly rejected by this Court and by the Constitutional Court in judgements cited […]"[471] *(emphasis added)*

824. In its reasonings, the Supreme Court examines the lack of retroactivity as the remunerations already received in the subsidies that will be paid by the Respondent in the future are taken into account.

the legislator has modified the remuneration regime of such installations establishing a reasonable profitability for the useful activity of the installation as a whole, making it possible to take into account the remunerations already received since the start of its operation, for the purposes of calculating the remuneration that it is entitled to receive outside the market, without this being prohibited retroactivity."[472]

825. The attention of the Arbitral Tribunal is drawn to another significant fact. This reasoning by the Spanish Supreme Court is fully coherent with European Community law, as if the subsidies already received in the past were not taken into account in the calculation of future subsidies, excess remuneration for the plants could occur, thus distorting the market rules comprising illegal State Aid, with an infraction of EU Law.

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[468] Constitutional Court ruling of 17 December 2015, delivered in an appeal of unconstitutionality 5347/2013. R-0193.

[469] Judgement of the Constitutional Court of 18 February 2016, issued in the appeal of unconstitutionality 5852/2013 R-0241 and Judgement of the Constitutional Court of 18 February 2016, issued in the appeal of unconstitutionality 6031/2013 R-0272.

[470] Judgements of the Spanish Supreme Court nos. 1260/2016, of 1 June 2016 (R-0242), 1266/2016, of 1 June 2016 (R-0243), 1259/2016, of 1 June 2016 (R-0244), 1261/2016, of 1 June 2016 (R-0245), 1264/2016, of 1 June 2016 (R-0246),

[471] Judgement of the Spanish Supreme Court no. 1260/2016 of 1 June 2016, pages 14 and 15 R-0242.

[472] Judgement of the Spanish Supreme Court no. 1260/2016 of 1 June 2016, page 15 R-0242.

826. As is explained in the previous paragraph, the payment of the remuneration under the new system is deployed in the future, respecting the payments made prior to the entry into force. In this case, future remuneration cannot overlook the part of the Investment costs and Operational costs that has already been compensated via the payments previously made. Otherwise this would result in double payments or compensation. The Claimant intends that the challenged measures be declared to be retroactive as they take into account previous subsidies to calculate future subsidies. This theory involves overlooking the EU's State Aid regime that is fully applicable to the Claimant's investments in Spain. When taking into account past remunerations in future subsidies, the challenged measures avoid the existence of possible excess remuneration that distort the market. This thereby avoids their being declared to be illegal State Aid and, consequently, avoids the possible obligation to have to return the subsidies received or to be received by the owners of the RE plants.

827. It must, therefore, be concluded that as a FACT proven in this arbitration, that the challenged measures are neither retroactive under Domestic law, nor under Community law, as they do not affect the investor's acquired rights.

(iii) The measures have not been considered to be "retroactive" by RE Sector Associations and by other Investors, including Sener, the Claimant's partner.

828. The possibility of adopting measures going forward that affect the existing installations was known and even claimed publicly by a diligent investor such as Iberdrola. The attention of the Arbitral Tribunal is drawn to the fact that the Claimant itself recognises Iberdrola's character as the most significant investor in the RE Sector in Spain[473]. In 2012 Iberdrola requested a cut in the RE premiums because of the unsustainability of the system:

> *"Sánchez Galán also insisted that the Supreme Court upholds possible cuts in premiums for renewables and believes the review of this matter to be "logical" in the current economic crisis. "The judgements and legislation talk about r**easonable profitability.** In the **United States**[474], this is called retributive **adjustment, and not retroactivity**", he said.*
>
> *If the new circumstances [of economic downturn] mean adjustments in all productive sectors, it is not reasonable that these are not extended to renewables when faced with a situation of widespread economic crisis and tariff deficit", he said.*[475] *(emphasis added)*

[473] Reply on the Merits, paragraphs. 121 and 122: "*Iberdrola, Spain's largest energy group by market capitalisation and a global leader in RE projects*."

[474] Iberdrola operates in the energy market of the United States of America, with over 5,000 MW in 2011 and a market share of 10%: "*Iberdrola. The electricity company exceeds 5,000 MW of capacity in the US* "News from the financial newspaper Cinco Días, dated 17 October 2011, available at: http://cincodias.com/cincodias/2011/10/17/empresas/1318858780_850215.html. R-0216.

[475] *"Iberdrola warns the Government: the "tax collection" measures will cut investment and damage income"* News published by the Online Financial Newspaper "Expansión.com, on 25 July 2012, available at: http://www.expansion.com/2012/07/25/empresas/energia/1343212765.html
R-0217.

829. From Iberdrola's Statements, it is clearly deduced that their understanding of the concept of "*retroactivity*" is not similar to that of the Claimants. The Tribunal's attention is drawn to the fact that the aforementioned company identifies the concept of *"retributive adjustment"* in the regulatory framework of the United States of America with the concept used by the Claimant when talking about "retroactivity". Iberdrola knows that a reform that affects existing installations is not prohibited under International Law when the new rules do not affect "*acquired rights*". Iberdrola expressly stated the following in this regard on another occasion:

> *"Premiums and retroactivity: Everything is modifiable. The only thing is that assurance must be given that the facility will have reasonable profitability. But this does not mean that the profitability has to be the cost of capital multiplied two or three times [as it would be with the current premium scheme]"*[476].

830. A diligent investor would be perfectly aware of the possible adoption of future measures. The same diligence can be required of the Claimant. Nonetheless, it has been established that the Claimant never requested a legal due diligence on this question.

831. This is even more surprising when the Claimant's own partner SENER considered admissible reforms that also respected reasonable profitability. In an article published in the Spanish press while RD 661/2007 was in force, the Chairman of SENER, Mr Jorge Sendagorta publicly argued that:

> *"there is another key idea that has to be taken into account, that of " reasonable profitability", laid-down by the Electricity Act as the basis for the Government to set the remuneration for new energies.* ***Reasonable profitability must, therefore, be a limit for any solution adopted****, and it does not leave much room for manoeuvre."*[477]

832. Furthermore, the most representative association of the whole wind sector, with 95% of interested parties, after the alleged agreement of July 2010 also argued for this possibility. It should be recalled that the Wind Sector is Spain's most significant RE production sector, and so its significance for the purposes of proving the representativeness of the RE sector is clear. AEE stated in September 2010 that

> *the Supreme Court has [recognised] a* ***relatively broad margin*** *for the Administration's "ius variandi" in a regulated sector in which general interests are involved. However, […] the* ***case law*** *established* ***limits*** *to the Administration's "ius variandi" regarding the* ***retroactive modification*** *of that remuneration framework, especially "that the requirements of the Electricity Sector Act* ***are respected*** *regarding the investments'* ***reasonable profitability****". Moreover, a breach of the*

[476] *"Iberdrola demands premiums for renewables stop: "Every month that passes, the bubble gets bigger"*. News published on the Digital Newspaper Libremercado.es on 23 February 2012, available at: http://www.libremercado.com/2012-02-23/iberdrola-exige-detener-la-construccion-de-nuevas-plantas-de-renovables-1276451004/. R-0215.

[477] Press article "Tariff deficit, retroactivity and Reasonable profitability" signed by Mr Jorge Sendagorta, Chairman of SENER, and published in:

- The financial newspaper "Expansión" on 19/7/2012: http://www.expansion.com/2012/07/19/opinion/tribunas/1342729151.html R-0084.
- The thermosolar sector's digital newspaper "Helio Noticias" on 22/7/2012: http://www.helionoticias.es/noticia.php?id_not=813 R-0085.

principle of legal certainty for a retroactive rule "can only be settled case by case".[478] *(emphasis added and footnotes omitted).*

833. Therefore, this Association from the Renewable Sector is perfectly aware of the possibility of modifying in the future the regulatory framework so long as "*the reasonable profitability of investments is respected*". And it expressly accepts that it is the Supreme Court that decides on a case-by-case basis whether or not there is retroactivity. As we have explained, it is a proven FACT that the contested measures are not retroactive according to the Spanish Supreme Court.

(iv) The Claimant knew the possible scope of the challenged measures, as it was expressly warned before its investment in 2007 and 2008.

834. Having shown that neither the precedents from International Law, nor Spanish Domestic Law, nor sophisticated investors in RE in Spain support the Claimant's theory, we shall now highlight another fact omitted by the Claimant that shows its will to confuse the Arbitral Tribunal.

835. The Claimant omits any reference to the case law of the Supreme Court set out in the Counter Memorial. This case law also considered the retroactivity or otherwise of the reforms in the energy sector. Nor does it appear to be proven that the Claimant examined this case law or requested legal due diligence on the possible reforms to be adopted under the essential Regulatory Framework.

836. The Claimant continuously relies on the opinion of the NEC, even though Pöyry had already expressly and clearly warned it in 2009 that the NEC was only a "*consultative*"[479] body. However, even hiding the case law of the Spanish Supreme Court and the Spanish Constitutional Court, a minimally diligent investor would know of their case law regarding retroactivity from a simple reading of the NEC Reports that the Claimant now invokes. We shall restrict ourselves to stating what the NEC set out in the Reports that the Claimant has produced and invoked in 2007 and 2008, from which it can clearly be deduced that the adoption of measures going forward affecting current installations was fully possible:

1. C-0136: **Draft of the Report on Proposed RD 661/2007** (pp. 17 to 23).

837. In this draft Report by the NEC from 25 January 2007, produced by the Claimant, the NEC puts forward in a detailed and clear way the valid case law at that time regarding the potential retroactivity or otherwise of the reforms.

"6.- LEGAL CONSIDERATIONS RELATING TO THE IMPROPER RETROACTIVITY OF PROPOSED ROYAL DECREE.

[478] SWA allegations before the NEC during the Spanish National Energy Commission public process on the elaboration of the proposed Royal Decree 1614/2010 which regulates and modifies certain aspects of the special regime. Page 6. R-0182.

[479] Document C-0049, page 5 "*The NEC (regulator) and IDAE advise the Government on the economic and technical viability of the different technologies and helps the Government to set the tariffs in order to provide the promoters with an acceptable IRR*."

[...] "As has been shown by both scientific doctrine and ***case law,*** *in a social and democratic state subject to the rule of law, the principles of legal certainty and the protection of legitimate expectations cannot be put forward as insurmountable obstacles to the innovation of the legal system, nor can they therefore serve as instruments to be used to freeze the Law in force at a given point in time. In other words: the principle of legal certainty […] does not mean that the system is resistant or immune to its reform. In this sense, these principles do not prevent the* ***dynamic innovation*** *of such system, nor do they prevent"* ***"new regulatory provisions from being applied in the future to pre-existing situations", but which continue to be present on the entry into force of the new regulations"*** *[…]*

*"****The future application of the new economic regime*** *for special regime electrical energy production* ***to all installations, including already existing ones*** *that have enjoyed tariffs, premiums, incentives and supplements under the previous regime...* • ***Does not imply the privation of rights that are acquired or with equity***. • *Nonetheless, it does undermine future expectations and, consequently, the legitimate trust created by article 40.3 of RD 436/2004, [...] Nonetheless, this effect does not per se entail the unconstitutionality of the regulatory change pursuant to article 9.3 of the Spanish Constitution." [...]*

838. This Document C-0136 quotes and sets out the case law of the Spanish Constitutional Court on retroactivity[480]. It also includes the reasoning of the Judgement of the Spanish Supreme Court of 25 October 2006 that the Claimant now says is irrelevant, although it never requested a legal due diligence to conclude that it is irrelevant. A simple reading of this Document C-0136 would enable the Claimant to know, with regards to Draft RD 661/2007, that:

"the owners of electrical energy production facilities under the special regime do not have an "unmodifiable right" to maintain unchanged the way in which the collection of premiums is governed."[481] *(emphasis not added)*

"Until such time as it is replaced by another, the aforementioned legal regulation (article 30 of the Law on the Electricity Sector) allows the respective companies to pursue for premiums to be incorporated, in setting them as a relevant factor in obtaining 'Reasonable profitability with reference to the cost of money on the capital market' or, to state it again using the wording of the preamble to Royal Decree 436/2004, 'a reasonable remuneration on their investments'".[482] *(emphasis not added)*

"Any companies that freely choose to enter a market such as the special regime electricity production market, […], are or must be aware that these may be modified, within legal guidelines, by these authorities. One of the "regulatory risks" to which they are subject, which they must necessarily take into account, is precisely the variation of the parameters of the premiums or incentives, which the Electricity

[480] It quotes and sets out the constitutional case law of Judgements no. 126/1987, 150/1990, 197/1992, 173/1996, 182/1997 and 234/2001 of the Spanish Constitutional Court.
[481] Document C-0136, page 35 of the PDF.
[482] Ibid. page 36.

Sector Law —in the sense above— tempers but does not exclude"[483]*. (emphasis added)*

839. It is therefore clear that with a simple reading of this Document that the Claimant invoked, it would know about both the possible future application of reforms to pre-existing installations as well as the existing regulatory risk in the Spanish Legal Framework, in accordance with the LSE and the Case Law of the Supreme Court.

2. C-0135: Report 3/2007 NEC on Draft RD 661/2007 (pp. 17 to 20).

840. In the NEC's final report of 14 February 2007, the NEC included the existing general case law.

"6.- LEGAL CONSIDERATIONS RELATING TO THE IMPROPER RETROACTIVITY OF PROPOSED ROYAL DECREE.

[...] "As has been shown by both scientific doctrine and ***case law,*** *in a social and democratic state subject to the rule of law, the principles of legal certainty and the protection of legitimate expectations cannot be put forward as insurmountable obstacles to the innovation of the legal system, nor can they therefore serve as instruments to be used to freeze the Law in force at a given point in time. In other words: the principle of legal certainty […] does not mean that the system is resistant or immune to its reform. In this sense, these principles do not prevent the* ***dynamic innovation*** *of such system, nor do they prevent* ***new regulatory provisions from being applied in the future to pre-existing situations, but which continue to be present on the entry into force of the new regulations****"*[484] *(emphasis added)*

841. Nonetheless, the majority of the Board of Directors modified the Draft of 25 January, asserting the "*retroactive*" character of draft RD 661/2007, as it affects already existing installations:

"The proposed Royal Decree subject to this report, which will be in force until the end of 2010, is equipped with retroactivity, as it aims to be applied not only to the productive assets to be installed from its entry into force, but also to those already installed since the promulgation of Royal Decree 436/2004."[485]

842. As has been proven, the NEC is a *consultative* body, whose reports are not binding on the Government. In fact, following this report that affirmed the "retroactive" character of RD 661/2007, any investor could, nonetheless, verify that RD 661/2007 had been approved. That is to say, that it affected installations that were already in operation. The Claimant who has invoked this Document C-0135 therefore knew, even though the NEC considered the draft RD 661/2007 to be "*retroactive*", that this RD 661/2007 had finally been approved by the Government.

843. This consideration was also set out by the RE Sector Associations. The Spanish Wind Energy Association confirmed in its 2007 Annual Report that RD 661/2007 annulled the

[483] Ibid. paragraph 36.
[484] Document C-0135, page 21 of the PDF.
[485] Ibid. page 22

non-retroactivity of revisions in the future[486]. The surprising thing is that with this significant question already having been raised in 2007, the Claimant never requested due Legal Diligence[487].

3. C-0143: NEC Report no. 30/2008, of 29 July 2008 (p. 9):

844. The Claimant, without any due Legal Diligence on the previous reports also did not request any clarification or any Report following Report 30/2008 concerning the potential future reform of the legal regime, on installations already launched before it came into effect.

> *"these principles do not prevent the dynamic innovation of such system, nor do they prevent new regulatory provisions from being applied in the future to situations already initiated before it came into effect."*[488]

845. The Claimant also does not state that it requested any legal Due Diligence to clarify this important question raised by the NEC, especially given the Fifth Additional Provision of RD 1578/2008[489]. No request for clarification of any type appears, either because the Claimant was already aware of the possibility of future modification or it was not diligent in its exhaustive examination of the Spanish regulatory framework in 2008 or in 2009. Despite this risk of reforms being applied to already existing plants, the Claimant made the investments in 2008 and 2009[490].

846. Throughout the facts set out it has been proven that the pleadings regarding retroactivity that the Claimant continuously makes have no basis whatsoever, neither in the field of International Law, nor as a proven FACT, in the field of Spanish Law. Furthermore, what has been proven is that the Claimant knew from the Documentation provided that the Spanish Regulatory Framework, while respecting acquired rights, could establish reforms going forwards that are applicable to pre-existing situations such as plants in operation.

(3.3) Article 44 (3) of Royal Decree 661/2007

847. The Claimant claims that Article 44 (3) of Royal Decree 661/2007 is a standard regulatory stabilisation clause freezing each and every one of the rules contained in that Regulation concerning installations in operation.

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[486] Eólica 2007, Annual Report of the Spanish Wind Energy Association, page 35: "*"The new Decree removes the incentive to participate in the electricity market and **annuls the non-retroactivity of this revision and of future revisions** concerning premiums and remuneration supplements, thereby **applying universally to all installations regardless of when they are commissioned***. The proposal also entails a high level of uncertainty with regard to the indices for the annual updating of all parameters. R-0247.

[487] Document C-0042, page 34: "*Project Advisory Services* [...] *Legal Advisor – Mubadala Legal*.". Document C-0043, p. 2: "*ADFEC has maintained BNP Paribas ("the financial advisor") to act as due diligence coordinator and financial consultant* [no LEGAL] *to MASDAR*".

[488] Document C-0143, page 10 of the PDF.

[489] Royal Decree 1578/2008, of 26 September, Fifth Additional Provision *"Modification to remuneration for production of electricity using photovoltaic energy:* "*During 2012, in view of the technological evolution of the sector and the market, and the operation of the remuneration regime, the remuneration for the production of electricity from photovoltaic solar technology can be modified*." R-0087

[490] Minutes of Mubadala Investment Committee, 16 June, 2009. R-0154.

848. The thesis of the Claimant is incorrect for various reasons, which will now be described separately: (a) due to the literal text of the norms cited; (b) because all regulatory precepts are subordinate to the Act; (c) because regulatory and case law antecedents maintained the contrary theses; (d) because the Claimants' Due legal Diligence warned that Art. 44(3) was not a stabilisation Clause; (e) because the Claimants could verify prior to the investment that the Kingdom of Spain had already adopted regulatory measures that affected RD 661/2007 and that its Article 44(3) was not an obstacle to this; and (f) because arbitral Doctrine has considered that Article 44(3) does not imply a stabilisation clause.

(a) The literal wording of Article 44(3) of RD 661/2007 is opposed to the theory of the Claimant

849. The Claimant asserts that Article 44(3) contains a clear and accurate stabilisation clause according to which *any* modification of the FIT will be applied to installations in operation. To top it off, the Claimant asserts that this issue is not disputed by the Kingdom of Spain[491]. It seems that the Claimant has not read the Counter-Memorial, in which the non-existence of a stabilisation clause is insistently denied.

850. From the literal wording of said article, no diligent and exhaustive investor can infer the existence of a stabilisation clause that puts a freeze on the Spanish regulatory framework indefinitely for *"any"* review. Article 44(3) establishes that:

> *"The revisions **referred to in this section** of the regulated tariff and the upper and lower limits will not affect installations whose commissioning certificate was granted before 1 January of the second year following the year in which the review was conducted."*[492] *(emphasis added)*

851. The article does not refer to *"any"* revisions of the regulated tariff and the upper and lower limits. That article limited its scope exclusively to the revisions provided in *"this section"*. The attention of the Honourable Tribunal is drawn to a significant fact. The Claimant transcribes this section deleting the paragraph "to which this section refers" in its Reply on the Merits[493].

852. That is, this paragraph of Article 44(3) RD 661/2007 only makes reference to the revisions which necessarily must be performed in "in 2010" and to the revisions which must necessarily be made every "four years"[494]. That article does not say anything else.

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[491] Reply on the Merits, paragraph. 20: "*a stabilisation clause was set out in Article 44.3. This provision stated in clear and unambiguous terms that **any** modifications to the FIT would only apply to new installations and not to installations which already qualified under the RD 661/2007 economic regime. None of this is in dispute."* This alleged Clause is reiterated in paragraphs 49, 65 and 99 to 111.

[492] Royal Decree 661/2007, of 25 May, regulating the activity of energy production under the special regime. R-0038 ESO R-0150 Bis.

[493] Reply on the Merits, paragraph 100.

[494] RD 661/2007, of 25 May, Article 44 (3 paragraph one): "*3. **During the year 2010**, on sight of the results of the monitoring reports on the degree of fulfilment of the Renewable Energies Plan (PER) 2005-2010, and of the Energy Efficiency and Savings Strategy in Spain (E4), together with such new targets as may be included in the subsequent Renewable Energies Plan 2011-2020, **there shall be a review of the***

853. The attention of the Arbitral Tribunal is drawn to another significant fact. The Claimant asserts that Article 44(3) encompasses "any" review, since paragraph one refers to the possible revisions of RD 661/2007. It asserts that:

> *The first paragraph of Article 44.3 deals with the times at which tariff reviews **might** occur: "during the year 2010" and "subsequently […] every four years"*[495].

854. Any diligent and exhaustive investor which has requested a legal Due Diligence could have concluded that the wording of paragraph one does not exclude other revisions. This paragraph asserts that there will be mandatory revisions to take advantage of the reductions in the costs inherent to RE technologies. However, it does not exclude other unplanned revisions such as (i) those arising from the adoption of macroeconomic control measures or (ii) to avoid over-compensation or of unreasonable profitability or (iii) to guarantee the economic sustainability of the SES. In fact, this paragraph 44(3) does not contain anything similar to:

> *"Outside of these mandatory revisions, the tariffs, prizes, (etc.) cannot be reviewed"*

855. It should be recalled that these types of express commitments were contained in Argentinean legislation on the energy sector. Therefore, any diligent and exhaustive investor in Spain who has requested a legal Due Diligence on this Article 44(3) would have objectively known that, in addition to the mandatory and planned revision of Article 44(3), there may be other different revisions. Revisions which, if they occur, would be exempted from said Article 44(3). However, given the hierarchically binding nature of the Law, these possible revisions must guarantee the reasonable profitability imposed by the LSE 54/1997 in all cases. It has already been accredited that this was the objective conception of the Associations of CSP and Wind technologies of the main Association APPA, of the Partner of the Claimant SENER, of the largest RE investor in Spain (Iberdrola) and of the leading CSP technology companies. In other words, it was something known by any diligent and exhaustive investor in Spain.

856. In addition to the foregoing, the Claimant's theory is unacceptable since it seeks to freeze the system of choice between premium and tariff, the CPI update or the possibility of producing subsidised energy by burning fossil fuels. No diligent and exhaustive investor of the regulatory Framework can infer that Article 44(3) is a stabilisation clause with respect to these other issues. Therefore, the freezing of each and every one of the articles of 661/2007 with respect to the existing plants and for an indefinite period of time cannot be inferred from the literal wording of this article. If we stick to the literal wording of Article 44(3) it only refers to the revisions *"of the regulated tariff and the upper and lower limits."* It does not refer to anything else.

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*tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree with regard to the costs associated with each of these technologies, the degree of participation of the special regime in covering the demand and its impact upon the technical and economic management of the system, and a reasonable rate of profitability shall always be guaranteed with reference to the cost of money in the capital markets. Subsequently a further review **shall be performed every** four years, maintaining the same criteria as previously*". C-0038 ESP R-0150 Bis.

[495] Reply on the Merits, paragraph. 100

857. The attention of the Honourable Tribunal is drawn to a significant fact. Said Article 44 (3):

(i) does not mention neither the gas nor Article 2 o RD 661/2007, relative to the conditions of use of the gas in solar thermal power plants;

(ii) neither does it refer to the update of the CPI;

(iii) neither does it refer to the possibility of introducing tax or other measures that will directly or indirectly impact the profitability of the plants and

(iv) neither does it refer to the freezing of the possibility of choosing between subsidies by means of tariffs or premiums.

858. In short, Article 44(3) only refers to the mandatory revisions "to which the preceding paragraph refers", not the entire regime of RD 661/2007, as the Claimants seek.

859. All of its theory arises from the "clear and accurate terms" of this Article 44(3), in force at the time of making the investments in 2008 and 2009. It has been accredited that the clear and accurate terms of Article 44(3) do not contain any stabilisation clause. Having accredited that its wording does not contain a stabilisation clause, all the alleged acts that "confirm" this commitment are disproved, including RD 1614/2010 (subsequent to its investment) and Decisions of 2010, relating to the mandatory revisions of Article 44(3) of RD 661/2007, not to "any" revision, as we shall see later.

(b) The Claimants' thesis opposes the principle of regulatory hierarchy

860. Based on the principle of regulatory hierarchy, there can be no regulatory provision that is contrary to the provisions of the Act. This issue, which was omitted by the Claimants, was widely discussed previously in point IV.1.2 of this document.

861. Consequently, no investor can claim that there is a regulatory provision that would prevent the adoption of measures to ensure the economic sustainability of the SES. If such a regulatory provision existed, it would be contrary to the basic principle on which Act 54/1997 rests: the sustainability of the SES[496]. A principle to which, by legal mandate, the economic regime of the Kingdom of Spain is subject[497], as the subsidies received by producers in the Kingdom of Spain are a cost of the SES[498], which necessarily affects its sustainability.

862. Similarly, no investor can claim the existence of a regulatory provision that allows the maintenance of a level of subsidies that generates a profitability greater than what can be described as reasonable in the capital market. Such an interpretation would be contrary to Act 54/1997 where a clear limit is established on the result to be produced by the

[496] Counter-Memorial, paragraphs 284 and 285.
[497] Act 54/1997, of 27 November, on the Electricity Sector. Article 29 R-0191.
[498] Ibid. Article 16 (6).

subsidised regime by stating that the binomial market price plus subsidy aims to provide a reasonable profitability under the capital market[499].

(c) The regulatory and judicial precedents emerging in Spain held the opposite view to that of the Claimants

863. Article 44(3) of RD 661/2007 did not represent a new development in the Spanish Regulatory Framework. RD 436/2004[500] contained a similar provision when it stated:

> *"The tariffs, premiums, incentives and supplements resulting from any of the revisions referred to in this section shall apply only to the installations that become operational after the date of entry into force referred to in the preceding paragraph, without retroactivity to previous tariffs and premiums"*[501]

864. The Claimant knew that said article did not prevent the introduction of RD 661/2007, which gave rise to a reduction in the returns of wind farms in operation.

865. Moreover, this regulatory change resulted in a significant number of judgments of the Supreme Court which endorsed the regulatory changes implemented through a confirmation of the previous jurisprudential pronouncements[502]. In those Judgments it became clear that a regulatory article such as the one mentioned was no obstacle to the introduction of regulatory measures, provided such measures were in accordance with Act 54/1997 and respected the principle of reasonable profitability.

(d) The Claimant did not observe the existence of a stabilisation clause in Article 44(3) of RD 661/2007.

866. Previously, it was accredited that the Due Diligence by Pöyry, the RE sector and the leading companies in Spain knew that the remuneration would be paid in order to guarantee reasonable profitability, without any commitment to freeze the regime of RD 661/2007 in favour of the investors.

867. The Claimant was aware of the possibility of the existence of future regulatory changes, as also accredited, pursuant to the regulatory Framework, to the Jurisprudence (which it omits in its memorials) and even to the NEC, which it partially cites and which point out the dynamic nature of the legal system and possible future reforms.

868. This section will accredit that the Claimant did not consider the existence of a stabilisation clause in Article 44(3) of RD 661/2007, contrary to that currently asserted in its memorials.

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[499] Ibid. Article 30 (4).
[500] Royal Decree 436/2004, of 12 March, establishing the method for the updating and systematisation of the legal and economic regime of the activity of electricity production under the special regime. C-0024 ESP R-0148 Bis.
[501] Royal Decree 436/2004, of 12 March, establishing the method for the updating and systematisation of the legal and economic regime of the activity of electricity production under the special regime. Article 40.3 C-0024 ESP R-0148 Bis.
[502] Counter-Memorial, paragraph 400 to 406.

869. The Claimant has not provided any report, communication or letter exchanged between Mr. Tassabehji and Dr. Sultán, asserting that no document has been identified. It should be noted that Procedural Order No. 4 established the obligation to furnish the reports, letters and communications exchanged between 2006 and 2009 to which Mr. Tassabehji, Dr. Sultán and Mr. Evans refer in their witness statements. This obligation referred to the requests for documents 3 and 4 of the Kingdom of Spain[503]. Through a letter dated 7 January 2016, the Claimant asserted that:

> *"The Claimant has complete reasonable searches in respect of Request 3 and 4 and we confirm that no responsive documents have been identified"*[504]

870. Therefore, the Claimant has not accredited other reports and assessments made in 2008 other than those already furnished with the Memorial on the Merits[505]. The provided Documents prove that the Claimant did not observe the existence of a stabilisation clause in Article 44(3) of RD 661/2007.

(i) Presentation of the Investment in Gemasolar to the Investment Committee in 2008 (C-0042)

871. The presentation made for Mubadala by ADFEC in January 2008 requests the Investment Committee's approval of the Joint Venture with SENER and the Gemasolar Project. This presentation of the Project that was to begin in Spain included an assessment of the financial risks. Among these financial risks, ADFEC expressly assessed the existence of a regulatory risk:

> *"Financial Risks –Opportunities.*
>
> *Risks. [...]*
>
> *Regulation: **Any** future negative evolution of regulation in the regions where we are assuming the launch of plants could have a large impact in the profitability of the*

[503] - Document request No. 3: "*Written submissions exchanged between SENER and MASDAR or MASDAR SOLAR, or among their representatives; between January 2007 and August 2009, in relation to the following issues:*
a. Minutes of the meetings held between SENER and MASDAR.
b. All the drafts agreements concluded by SENER and MASDAR, including the Joint venture or the Project Finance signed with Banks in 2008 and 2009."
- Document request No. 4: "*Reports or written submissions submitted between 2006 and 2009 between Mr. Tassabehji and Dr. Sultán Al Jaber on:*
a. "The statement of facts to understand the renewables energy markets".
b. The results of the exercise by Mr. Tassabehji for establishing facts.
c. The meetings of Mr. Tassabehji with SENER and others Spanish agents.
d. Discussions with SENER in order to form a joint venture.
e. Meetings with Latham &Watkins and Jones Day.
f) Key issues of the investment and the BNP report.
g. Debates of the proposal between Mr Sr. Tassabehji and Dr. Sultán"
[504] Letter from Allen&Overy to the Claimant of the Kingdom of Spain, dated 7 January 2016 R-0248
[505] C-0041, C-0042 and C-0043

projects. This is more acute in those countries with low regulatory tradition of the power generation market"[506]

872. The Claimant has never provided a simple Legal Due Diligence that mentions or assesses the possible existence of a stabilisation clause in Article 44(3) RD 661/2007. Neither did the Claimant assess or request a simple Legal Due Diligence on the elements they are currently explaining to the Arbitral Tribunal (Press releases, leaflets or PowerPoint Presentations). Neither did it request a Legal Due Diligence on the elements hidden from the Arbitral Tribunal, such as the regulatory Framework as a whole, the Jurisprudence of the SC since 2005 or PER 2005-2010 methodology.

873. The Claimant has only provided a Presentation from January 2008 which assesses the existence of regulatory risk in Spain, and which it admits could significantly impact the *"profitability"* of the Project:

*"**Any** future negative evolution of regulation in the regions where we are assuming the launch of plants could have a large impact in the profitability of the projects." (Emphasis added)*

874. Moreover, with respect to the alleged stabilisation clause, the Claimant agreed upon the Project finance, expressly envisaging the amendment or suppression of RD 661/2007. Thus, the legal consequences of said amendment or suppression were agreed upon.

(ii) Project finance date 5 November 2008, relative to Gemasolar 2006.

875. Specifically, the Claimant agreed upon the possible amendment or suppression of RD 661/2007 in the Project finance signed on 5 November 2008[507] in the following clauses:

a. Definition of "**Adverse Substantial Amendment**": *"it means any situation, occurrence, event, circumstance or condition that is substantially detrimental or could be substantially detrimental in the future to: • the financial situation, business or assets of the Accredited entity, the Accredited entity's to meet its payment obligations [...], **including any change in the regulations applicable to the remuneration of the energy generated** by the Plant that undermines the Accredited entity's capacity to meet the Debt Service payment.*"[508] (emphasis added). Clauses 11.1.8 and 11.2.5 impose the obligation of communicating this fact to the lending banks.

b. **Clause 13.1.l)** establishes the **causes of early termination of the contract**: "*Any of the following situations shall be considered causes for early termination: l) Adverse Substantial Change in the reasoned opinion of Most of the Accrediting Entities*."[509] This clause is not a prudent clause relative to a specific rule of RD 661/2007. It is the

[506] Section C-0042, page 27
[507] Loan Agreement GEMASOLAR 2006 SAU. 5 November 2008, entered into between Gemasolar 2006 and the Banks, R-0249.
[508] Ibid. Pages 34/478 PDF.
[509] Ibid. Pages 71/478 PDF.

express regulatory risk provision agreed upon between the parties and its legal consequence.

c. Definition of "**Commissioning**": "*...in Article 24.1 of Royal Decree 661/2007, for subgroup b.1.2* ["..."] *(or provisions contained in the regulations that could eventually replace the current regulations in the future and which shall govern the remuneration of the energy)"*[510]

d. Definition of "**Regulation Tariff**": "*means the current tariff stated in Article 25 of Royal Decree 661/2007, of 25 May, for electricity production facilities identical to the Plants, and the subsequent tariff or tariffs that replace the tariff in force at any given time*."[511] This clause is not a prudent clause, but rather the express provision of a regulatory risk in the applicable tariff.

e. **Clause 11.2.3.j):** "*...the revenue obtained under the different electricity sale remuneration options under the framework of Royal Decree 661/2007 or the applicable regulations at any given time*."[512]

f. **Clause 11.2.8**: *"...between the two alternatives established in Article 24 of Royal Decree 661/2007 (or those established in the regulations that **could eventually substitute** the current tariff and which shall govern the remuneration of the energy produced by the Plant*)."[513] (emphasis added)

g. **Clause 13.1.g)**: *"...In the event loss of the Accredited entity's status of Special Regime Facility pursuant to Royal Decree 661/2007, of 25 May* [...] *(and such that it **may be substituted, amended or replaced in the future**). "*[514] (emphasis added)

h. **Clause 27.5 of the "Contract for the engineering, supply and construction of a Solar Thermal Power Plant", signed on 21 October 2008 between Gemasolar and Sener:** "*with gas provided in RD 661/2007 and other legislation applicable at any one time*"[515].

876. The Claimant argues that the fact that the parties expressly agree upon the possible amendment of RD 661/2007 does not imply that said amendment will be accepted. It asserts that it is good drafting practice by the lending banks' lawyers[516]. It does not accredit, however, that the last contract mentioned, annexed to the Project finance, was drafted by the banks' lawyers.

[510] Ibid. Pages 41/478 PDF.
[511] Ibid. Pages 42/478 PDF.
[512] Ibid. Pages 67/478 PDF.
[513] Ibid. Pages 68/478 PDF.
[514] Ibid. Pages 70/478 PDF.
[515] Ibid. Pages 132/478 PDF.
[516] Reply on the Merits, paragraph. 161: "*Any experienced lawyer defining or referencing a current law or regulation will, as a matter of good drafting practice, include language which captures a future amendment to that law or regulation. That is a very different proposition to the suggestion made by Spain that the drafting demonstrates that the parties actively contemplated a change in the regulations.*"

877. This theory is unacceptable and surprising, since the same Loan Agreement cites other legal rules and does not envisage the amendment thereof. In fact, this Project finance cites (i) the Civil Procedure Law (Spanish Procedural Law) on three occasions in **Clauses 17.4 and 29** and (ii) the Spanish Bankruptcy Law on eight occasions in **Clauses 16.2 and 16.4**, making reference to articles of said laws. In none of these cases, neither the lawyers seem prudent, nor the signatories envisage the possibility that they may be amended or substituted.

878. In fact, the legal Advisor of the Banks, Jones Day, issued a legal Report relative to the Gemasolar Project in October 2008[517]. Said Report does not reflect the existence of any stabilisation clause nor does it mention a government guarantee or commitment in favour of the Claimant or the CSP Plant. Therefore, the reference to the possible amendment of RD 661/2007 is not "*a matter of good drafting practice.*" This wording is a diligent provision by the parties that regulation could be reformed or even suppressed. It was thus stated by the parties in the agreement and signed by the Claimant, without requesting any legal Due Diligence with respect to this possibility.

879. In addition, this theory of the "good drafting practice" by the banks' legal advisors is untenable when the possible reform of RD 661/2007 is introduced in another agreement entered into between Gemasolar and SENER, not by the banks.

880. Furthermore, the Claimant's theory is unacceptable because the regulatory risk was a risk expressly identified by the Insurance Advisor, with respect to the insurance contract of 30 October 2008, attached as Appendix IV of the Project finance. In said Report, the Insurance Advisor identifies this risk:

> *"Identification of Risks": [...]*
>
> *"Environmental Risks": "The projects, will carry out their activities in an **environment defined by a certain regulatory framework**, fulfilling all the legal and regulatory requirements currently established as necessary for said activities. However, **this environment is dynamic** and, therefore, **it is possible that the regulations may vary and that unforeseen investments may have to be addressed** in order to be able to continue carrying out its activity. This type of risks falls under the category of identified and unknown risks, i.e. they represent the **acknowledgement** of a situation that **may affect** the activity but the probability of occurring is not immediate or foreseeable."*[518] (emphasis added)

881. The Advisor recognises the existence of a regulatory risk as being possible but not predictable as to the date of occurrence. This is a category which in Roman law graphically expressed: "*certus an incertus quando*". It is evident that this Insurance Advisor does not make reference to any "Stabilization clause" of RD 661/2007 or to Government commitments in "clear and accurate terms" that annul or mitigate this risk.

882. Further, in order to accredit its expectations in 2008, the Claimant has limited itself to furnishing a financial Due Diligence by BNP that does not make reference to any stability

[517] Gemasolar Project Legal Report October 2008, issued by Jones Day, R-0250.
[518] Ibid. Pages 168 and 169/478 PDF.

commitment. Neither does this report carry out a legal examination of the SES, on being a financial Advisor, as expressly warned by BNP in the initial Disclaimer[519]. In fact, as regards the information it provides, it asserts:

> *"BNP Paribas (the 'Financial Advisor') [...] act as due diligence coordinator and **financial consultant** to MASDAR. [...] The information and opinions contained in this Due Diligence Report ("the Report") have been obtained from SENER and public sources believed to be reliable."*

883. With respect to the signed clauses and the report issued by the Insurance Advisor, it is unacceptable that the Claimant bases its expectations on the freezing of Article 44(3) RD 661/2007 in this BNP Report[520]. Furthermore, this BNP report (a) does not refer to the freezing or stabilisation of RD 661/2007 or of the regulatory framework (b) nor does it assume any responsibility for the information and opinions contained in this report:

> *"The **Financial Advisor** has not independently verified the information used for the purpose of this Report and does not accept any liability for, nor make any representation or give any warranty (expressed or implied) as to the accuracy, adequacy and completeness of the contents of the information provided by SENER."*[521]

(iii) Project finance signed with the European Investment Bank (EIB) on 13 November 2009, relative to Gemasolar 2006.

884. The Project finance signed with the European Investment Bank (EIB) on 13 November 2009[522] also includes the amendment of this rule in all its references to RD 661/2007:

a. "**Adverse Substantial Change**" "*In the case of an Adverse Substantial Change caused by a Hypothetical **Change in Legislation**, the mechanism envisaged in clause 4.03.A*(3) shall apply."[523] (emphasis added)

b. **Clause 4.03A(3) Change in Legislation** "*If the Accredited entity is aware that a Hypothetical Change in Legislation has occurred or could probably occur, it shall notify the BANK immediately. [...] For the purposes of this clause, "Hypothetical Change in Legislation" means an enactment, entry into force, execution or ratification, or a change or amendment, of a law, rule or regulation, or change in the official application or interpretation of a law, rule or regulation, that occurs subsequently to the date of this Agreement, that (i) negatively and substantially affects the Accredited entity's financial capacity".*"[524] This clause is not a prudent clause relative to a specific rule of RD 661/2007. It is the express regulatory risk provision agreed upon between the parties.

[519] C-0043 page 2.
[520] Reply on the Merits, paragraph. 155: "*The Claimant took comfort from advice that it received from BNP Paribas and Pöyry*"
[521] C-0043 page 2.
[522] EIB - Gemasolar Finance Agreement 2006. 13-11-2009. R-0251.
[523] Ibid. Pages 18/96 PDF.
[524] Ibid. Pages 39 and 40/96 PDF.

c. Definition of "**Commissioning**": "*...in Article 24.1 of Royal Decree 661/2007, for subgroup b.1.2* ["**...**"] *(or provisions contained in the regulations that could eventually replace the current regulations in the future and which shall govern the remuneration of the energy produced by the Project)"*[525]

d. Definition of "**Regulation Tariff**": "*means the current tariff stated in Article 25 of Royal Decree 661/2007, of 25 May, for electricity production facilities identical to the Plants, and the subsequent tariff or tariffs that replace the tariff in force at any given time*."[526]

e. **Clause 8.01.c):** "*...the revenue obtained under the different electricity sale remuneration options under the framework of Royal Decree 661/2007 or the applicable regulations at any given time*."[527]

f. **Clause 8.01.g)**: *"...between the two alternatives established in Article 24 of Royal Decree 661/2007 (or those established in the regulations that* ***could eventually substitute*** *the current tariff and which shall govern the remuneration of the energy produced by the Plant*)."[528] (emphasis added)

g. **Clause 10.01.g)**: *"...In the event loss of the Accredited entity's status of Special Regime Facility pursuant to Royal Decree 661/2007, of 25 May* [...] *(and such that it* ***may be substituted, amended or replaced in the future****)."*[529] *(emphasis added)*

885. The Claimant asserts that they are standard stipulations[530]. This reasoning is not upheld by any proof. Moreover, the definition of "Regulated tariff" is express with respect to the remunerations of RD 661/2007 and is expressly agreed that the current tariff of Article 25 of RD 661/2007 may be replaced by subsequent tariffs that substitute the tariff in force at any given time. It is an evident agreement of intent whereunder the tariffs may vary. That is, it is an evident agreement that entails acceptance by the signatories of a regulatory risk.

886. Also, the attention of the Arbitral Tribunal is drawn to another significant fact. The parties agreed upon its consideration as an "Adverse Substantial Change", not only a change or amendment of the applicable laws and regulations. They also agreed that this would also apply to a "*change in the application or* ***official interpretation of a law, rule or regulation****, that occurs subsequent to the date of this Agreement."* This means that the Claimant cannot plead ignorance of the legal interpretation criteria of Jurisprudence or of the irrelevance of the case law of the Spanish Supreme Court. Under this Agreement, the Claimant expressly undertook to inform the Banks of adverse substantial changes and, consequently, was obliged to monitor the applicable case law.

[525] Ibid. Pages 25/96 PDF.
[526] Ibid. Pages 27/96 PDF.
[527] Ibid. Pages 70/96PDF.
[528] Ibid. Pages 71/96PDF.
[529] Ibid. Pages 72/96PDF.
[530] Counter-Memorial, paragraph 160. "*this is a standard provision in project finance documentation required by a prudent and cautious lender. It is a general event of default provision, it does not expressly refer to any contemplated change in the RD 661/2007 Special Regime*."

887. It is surprising that, in view of this obligation, the Claimant has maintained a deafening silence on the applicable Jurisprudence, which is a clear and accurate declaration of the Kingdom of Spain on the legal interpretation of the applicable rule, made to any diligent investor since 2005.

(e) Neither did the Claimant observe the existence of a stabilisation clause in 2009 in the Termesol and Arcosol Plant Projects.

888. The Claimant provided, during the Document Production phase, the Presentation made to the Mubadala Investment Committee[531], the Agreement of the Mubadala Investment Committee of 19 June 2009[532] and the Project finance agreements entered into for the Termesol and Arcosol Projects. None of them assess or states the conclusion by the Claimant or Abu Dhabi Government officials of the existence of any stabilisation clause. Contrarily, they express the existence of a regulatory risk accepted by the Claimant and Abu Dhabi Government officials, on having approved the investment and signed the Project finance agreements.

(i) Presentation to the Mubadala Investment Committee and Agreement of the Mubadala Investment Committee of 19 June 2009.

889. The Presentation of 16 June 2009 refers to the investment made in 2009 in the Termesol and Arcosol Projects. In this Presentation, the existence of a regulatory risk was newly expounded:

> *"Risks and Key Success Factors. […]*
>
> *Regulation: **Any** future negative evolution of regulation in the regions where we are assuming the launch of plants could have a **large impact in the profitability** of the projects."*[533]

890. The Investment Committee Minutes do not include any mention of this risk. That is, the existence of any stabilisation clause in RD 661/2007 is not considered or mentioned to the Committee. However, the investment is approved. Additionally, the Investment Committee expressly considered the country risk in the presentation, as a factor that could affect the investment:

"Risk	*Level*	*IRR Impact*	*Comments […]*
Country Risk	*Low*	*0%*	*Spain currently at AA+"*[534]

[531] Request for Approval of Equity Investment. 16 June 2009 Document R-0252.
[532] Minutes of Mubadala Investment Committee 16 June 2009 Document R-0154.
[533] Request for Approval of Equity Investment. June 16 2009. R-0154, page 7 (page 8/27 of the PDF)
[534] Ibid., page 5/27 of the PDF and Minutes of the Mubadala Investment Committee 16 June 2009, page 7 Document R-0252.

891. It is, therefore, evident that the Investment Committee knew that the economic situation and evolution of the country could affect the investment.

(ii) Project finance signed for the Arcosol Project on 24 July 2009.

892. Specifically, the Claimant agreed upon and assumed the legal consequences of the possible amendment or suppression of RD 661/2007 in the following Clauses of the Project finance signed on 24 July 2009[535]:

a. Definition of "**Adverse Substantial Amendment**": *"it means any situation, occurrence, event, circumstance or condition that is substantially detrimental or could be substantially detrimental in the future to: • the financial situation, business or assets of the Accredited entity, the Accredited entity's to meet its payment obligations [...], **including any change in the regulations applicable to the remuneration of the energy generated** by the Plant that undermines the Accredited entity's capacity to meet the Debt Service payment.*"[536] (emphasis added). Clauses 11.1.8 and 11.2.5 impose the obligation of communicating this fact to the lending banks.

b. **Clause 13.1.l)** establishes the **causes of early termination of the contract**: "*Any of the following situations shall be considered causes for early termination: l) Adverse Substantial Change in the reasoned opinion of Most of the Accrediting Entities*."[537] This clause is not a prudent clause relative to a specific rule of RD 661/2007. It is the express regulatory risk provision agreed upon between the parties and its legal consequence.

c. Definition of "**Commissioning**": "*...in Article 24.1 of Royal Decree 661/2007, for subgroup b.1.2* ["..."] *(or provisions contained in the regulations that could eventually replace the current regulations in the future and which shall govern the remuneration of the energy)"*[538]

d. Definition of "**Regulation Tariff**": "*means the current tariff stated in Article 25 of Royal Decree 661/2007, of 25 May, for electricity production facilities identical to the Plants, and the subsequent tariff or tariffs that replace the tariff in force at any given time.*"[539] This clause is not a prudent clause, but rather the express provision of a regulatory risk in the applicable tariff.

e. **Clause 11.2.3.j):** "*...the revenue obtained under the different electricity sale remuneration options under the framework of Royal Decree 661/2007 or the applicable regulations at any given time.*"[540]

[535] ARCOSOL-50 Loan Agreement. 24 July 2009, entered into between Arcosol - 50 and the Banks, R-0253.
[536] Ibid. Pages 52 and 53/695 PDF.
[537] Ibid. Pages 96/695 PDF.
[538] Ibid. Pages 60/695 PDF.
[539] Ibid. Pages 61/695 PDF.
[540] Ibid. Pages 92/695 PDF.

f. **Clause 11.2.7**: *"...between the two alternatives established in Article 24 of Royal Decree 661/2007 (or <u>those established in the regulations that **could eventually substitute** the current tariff</u> and which shall govern the remuneration of the energy produced by the Plant)."*[541] (emphasis added)

g. **Clause 13.1.g)**: *"...In the event loss of the Accredited entity's status of Special Regime Facility pursuant to Royal Decree 661/2007, of 25 May* [...] *(and such that it **<u>may be substituted, amended or replaced in the future</u>**)."*[542] *(emphasis added)*

h. **Clause 27.5 of the "Contract for the engineering, supply and construction of a Solar Thermal Power Plant", signed on 24 July 2009 between Arcosol-50 and a group of companies:** "*with gas provided in RD 661/2007 and other legislation applicable at any one time*"[543]. This Works Contract is attached as **Appendix II** of the Project finance.

893. The Claimant agreed upon the existence of a regulatory risk with the Banks. The Claimant does not mention the existence of a stabilisation clause anywhere. Neither are the legal consequences relating to possible nonfulfilments of Government commitments in favour of the Claimant or of the plants agreed upon between the parties. The existence of a stabilisation commitment or clause is not inferred anywhere in the Project finance.

894. In fact, the Claimant did not even bother to ask about this issue in a legal Due Diligence. An alleged Due Diligence has been provided by the Claimant[544]. It is a document without a letterhead of any law firm, signature or date. This alleged Report does not identify the person or company that made the commission, nor the object of the Due Diligence. Therefore, it does not accredit having been requested by the Claimant. It is a six-page report that succinctly examines issues relating to licences and contracts of the Arcosol Project. In any case, it accredits that the legal Due Diligence of the Arcosol Project was not exhaustive or diligent, considering the regulatory risk clauses signed by the Claimant.

895. With respect to this alleged report, the regulatory risk was newly <u>identified by the Insurance Advisor.</u> It is attached to the Project finance as **Appendix IV** of the Project finance[545]. The Insurance Advisor identifies this risk in its Report:

"2. Risk identification and analysis: [...]

1.1.2. Environmental Risks

Environmental risks can be defined as those directly related to Government actions.

"Arcosol - 50, S.A. will carry on its activity in an environment defined by a certain regulatory framework, fulfilling all the legal and regulatory requirements currently

[541] Ibid. Pages 93/695 PDF.
[542] Ibid. Pages 95/695 PDF.
[543] Ibid. Pages 180/695 PDF.
[544] Executive Summary of the Due Diligence Report of Arcosol-50, R-0254.
[545] Ibid. Pages 395/695 PDF.

established as necessary for said activity. However, ***this environment is dynamic and, therefore, it is possible that the regulations may vary and that Arcosol - 50, S.A. must address unforeseen investments*** *in order to be able to continue carrying on its activity. This type of risk falls under the category of identified and unknown risks, i.e. they represent the* ***acknowledgement*** *of a situation that* ***may affect*** *the activity but the probability of occurring is not immediate or foreseeable."*[546]

896. The Advisor newly recognises the existence of a regulatory risk as being possible but not predictable as to the date of occurrence: "*certus an incertus quando*". It is evident that this Insurance Advisor does not make reference to any *"stabilisation Clause"* of RD 661/2007 or to Government commitments in "clear and accurate terms" that annul or mitigate this risk.

(iii) Project finance signed for the Termesol Project on 24 July 2009.

897. The Claimant equally agreed upon and assumed the legal consequences of the possible amendment or suppression of RD 661/2007 in the following Clauses of the Project finance signed on 24 July 2009[547] for the Termesol Project:

a. Definition of "**Adverse Substantial Amendment**": *"it means any situation, occurrence, event, circumstance or condition that is substantially detrimental or could be substantially detrimental in the future to: • the financial situation, business or assets of the Accredited entity, the Accredited entity's to meet its payment obligations [...],* ***including any change in the regulations applicable to the remuneration of the energy generated*** *by the Plant that undermines the Accredited entity's capacity to meet the Debt Service payment.*"[548] (Emphasis added). Clauses 11.1.8 and 11.2.5 impose the obligation of communicating this fact to the lending banks.

b. **Clause 13.1.l)** establishes the **causes of early termination of the contract**: "*Any of the following situations shall be considered causes for early termination: l) Adverse Substantial Change in the reasoned opinion of Most of the Accrediting Entities*."[549] This clause is not a prudent clause relative to a specific rule of RD 661/2007. It is the express regulatory risk provision agreed upon between the parties and its legal consequence.

c. Definition of "**Commissioning**": "*...in Article 24.1 of Royal Decree 661/2007, for subgroup b.1.2* ["..."] *(or provisions contained in the regulations that could eventually replace the current regulations in the future and which shall govern the remuneration of the energy)"*[550]

[546] Ibid. Pages 403/695 PDF.
[547] TERMESOL-50 Loan Agreement. 24 July 2009, entered into between TERMESOL-50 and the Banks, R-0255.
[548] Ibid. Pages 52/729 PDF.
[549] Ibid. Pages 96/729 PDF.
[550] Ibid. Pages 60/729 PDF.

d. Definition of "**Regulation Tariff**": "*means the current tariff envisaged in Article 25 of Royal Decree 661/2007, of 25 May, for electricity production facilities identical to the Plants, and the subsequent tariff or tariffs that replace the tariff in force at any given time*."[551] This clause is not a prudent clause, but rather the express provision of a regulatory risk in the applicable tariff.

e. **Clause 11.2.3.j):** "*...the revenue obtained under the different electricity sale remuneration options under the framework of Royal Decree 661/2007 or the applicable regulations at any given time*."[552]

f. **Clause 11.2.7**: *"...between the two alternatives established in Article 24 of Royal Decree 661/2007 (or those established in the regulations that **could eventually substitute** the current tariff and which shall govern the remuneration of the energy produced by the Plant*)."[553] (Emphasis added)

g. **Clause 13.1.g)**: *"...In the event loss of the Accredited entity's status of Special Regime Facility pursuant to Royal Decree 661/2007, of 25 May* [...] *(and such that it **may be substituted, amended or replaced in the future**). "*[554] *(Emphasis added)*

h. **Clause 27.5 of the "Agreement for the Engineering, Procurement and Construction of a Solar Thermal Power Plant", signed on 24 July 2009 between Termesol-50 and a group of companies:** "*with gas provided in RD 661/2007 and other legislation applicable at any one time*"[555]. This Works Contract is attached as **Appendix II** of the Project finance.

898. The Claimant newly agreed upon the existence of a regulatory risk with the Banks. Neither does the Claimant mention the existence of a stabilisation Clause. The legal consequences relating to possible nonfulfilments of Government commitments in favour of the Claimant or in favour of the plants are not agreed upon between the parties. Neither can the existence of stabilisation commitment or clause be inferred from this Project finance.

899. Neither did the Claimant bother to ask about this issue in a legal Due Diligence. An alleged Due Diligence provided by the Claimant is attached[556]. It is another document without a letterhead of any law firm, signature or date. This alleged Report does not identify the person that made the commission, nor the object of the Due Diligence. Therefore, neither does it accredit that the Claimant requested it. It is a six-page report that succinctly examines issues relating to licences and contracts of the Termesol Project. In any case, it accredits that the legal Due Diligence of the Termesol Project was not exhaustive or diligent, considering the regulatory risk clauses signed by the Claimant.

[551] Ibid. Pages 61/729 PDF.
[552] Ibid. Pages 92/729 PDF.
[553] Ibid. Pages 93/729 PDF.
[554] Ibid. Pages 95/729 PDF.
[555] Ibid. Pages 180/729 PDF.
[556] Executive Summary of the Due Diligence Report of Termesol-50, R-0256.

900. This became evident, once again, after the Insurance Advisor identified a regulatory risk. It appears as **Appendix IV** of the Project finance[557]. The Insurance Advisor identifies this risk in its Report:

> *"2. Risk identification and analysis: [...]*
>
> *1.1.2. Environmental Risks*
>
> *Environmental risks can be defined as those directly related to Government actions.*
>
> "Termesol - 50, S.A. *will carry on its activity in an environment defined by a certain regulatory framework*, fulfilling all the legal and regulatory requirements currently established as necessary for said activity. *However*, ***this environment is dynamic and, therefore, it is possible that the regulations may vary and that Termesol - 50, S.A. must address unforeseen investments*** *in order to be able to continue carrying on its activity. This type of risk falls under the category of identified and unknown risks, i.e. they represent the* ***acknowledgement*** *of a situation that* ***may affect*** *the activity but the probability of occurring is not immediate or foreseeable."*[558]

901. The Advisor newly recognises the existence of a regulatory risk as being possible but not predictable in terms of the date of occurrence: It is evident that this Insurance Advisor does not make reference to any *"stabilisation Clause"* of RD 661/2007 or to Government commitments in "clear and accurate terms" that annul or mitigate this risk.

(f) Arbitration scholars have held that Article 44(3) does not imply a stabilisation clause

902. The Claimant's theory on its subjective expectations is dismantled by that declared in an applicable Arbitral Precedent. The Final Arbitral Award issued in the case Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain, has established that:

> *"In the present case, the Claimants could not have the legitimate expectation that the regulatory framework established by RD 661/2007 and 1578/2008 would remain unchanged throughout the useful life of its plants. Admitting the existence of such an expectation would, in effect, be equivalent to freezing the regulatory framework applicable to the eligible plants even if circumstances change. Any change in the amount of the tariff or any limitation on the amount of eligible hours would then constitute a violation of international law. In practice, the situation would be equivalent to that resulting after the signing by the State of a stabilisation agreement, or the adoption of a commitment not to change the regulatory framework. The Arbitral Tribunal cannot support such a conclusion. The Claimants have stated very clearly that they do not claim to have had a legitimate expectation that the regulatory framework would be left unaltered"*[559] *(footnotes omitted and emphasis added)*

[557] Ibid. Pages 394/729 PDF.
[558] Ibid. Pages 403/695 PDF.
[559] Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain (SCC V 062/2012), Final Award, 21 January 2016, and dissenting vote, para. 503, RL-0071.

903. The Claimant's expectations are the same as those of Charanne BV and Construction Investments:

a. Both performed their investment up until 2009 on the basis of RD 661/2007.

b. Both assert that a specific commitment could be inferred from RD 661/2007 to freeze or maintain the regime in favour of the Plants installed during its validity[560].

c. Both assert that an advertising campaign launched in the Kingdom of Spain created expectations in investors.

d. Both assert that this right was blocked in favour of the investors in favour of the plants registered in the RAIPRE[561].

e. Both claim damages for the amendment of the regime established in RD 661/2007.

f. Both consider that the reforms of RD 661/2007 were retroactive.

904. Therefore, the conclusions of this Final Decision dismissing the subjective expectations of Charanne and Construction Investments are fully applicable to the subjective expectations of the Claimant.

905. The Claimants consider that the Decision rendered in the Charanne Case did not apply to them because it omitted the examination of one of the two sources of legitimate expectations cited in the report of the UNTAD, provided as document C-0217. Nothing could be further from the truth: the Decision rendered in the Charanne Case expressly cites the UNTAD's report in its paragraph 489.

906. Next, the Decision dismisses the existence of specific commitments acquired by the Kingdom of Spain toward the Claimants from a dual perspective: on the one hand, it argues that the Claimants have not invoked or proven the existence of specific commitments by way of a stabilisation clause expressly aimed at them (paragraph 490). On the other, the Decision reasons that Regulations 661/2007 and 1578/2008 did not represent specific commitments due to being aimed at a specific group of recipients (renewable energy producers) (paragraphs 491-494). In this manner, the Charanne Decision rules out the first source of legitimate expectations cited as letter a) in the UNTAD's report.

907. However, and very contrarily to that argued by the Claimants, the Decision of the Charanne case examines the advertising campaign that Charanne also confirms:

> *"Firstly, the arguments expounded by the Claimants to uphold that Spain carried out an "investment attraction campaign" should be analysed.*[562]

[560] Counter-Memorial, paragraphs 282 and 358.

[561] Counter-Memorial, paragraph 272: "*pursuant to the criteria laid down in RDL 6/2009, the relevant installations were pre-registered and then definitively registered with the RAIPRE, thus* ***locking in their rights*** *under RD 661/2007*." (emphasis added)

908. Therefore, after examining the alleged campaign, the Decision concludes the following:

> *"these documents are not sufficiently specific to give rise to any expectations regarding the fact that RD 661/2007 and RD 1578/2008 were not going to be amended."*

909. Therefore, the Decision rejects that "the regulatory framework existing at the time of the investment was capable of creating a legitimate expectation, protected by international law, that it was not going to be amended or altered by rules such as those adopted in 2010." (paragraphs 498 et seq.). In fact, it requires that an investor be exhaustive in the examination of the regulatory framework in a sector such as the energy sector:

> *"The Tribunal believes that the Claimants could have, **at the time they made their investment in 2009**, conducted an **analysis of the legal framework** of their investment under Spanish Law and **understood that there was a possibility** that the regulations adopted in 2007 and 2008 could be subject to change. At least, this is the **level of diligence** one would expect from a foreign investor in a highly regulated sector such as the energy sector, in which a **preliminary and comprehensive analysis of the legal framework applicable** to the sector is essential in order to make the investment".*[563] *(Emphasis added)*

910. Therefore, the Decision of the Charanne Case analyses the two sources of legitimate expectations cited in the UNTAD's report invoked by the Claimants.

(3.4) Article 4 of Royal Decree 1614/2010

911. In line with their partial and erroneous understanding of the Spanish Regulatory Framework, the Claimant presents Article 4 of Royal Decree 1614/2010 to the Honorable Tribunal as *"further strengthened Spain's commitments under Article 44.3 of RD 661/2007 that any future changes to the remuneration under RD 661/2007 would not affect existing installations."*[564] Said statement does not correspond to the reality of the facts, as already expounded in the Counter-Memorial.[565] And additionally, RD 1614/2010 could not have affected the Claimant's expectations in any way, since it invested in 2008 and 2009.

912. However, it should be reiterated that this RD 1614/2010 does not contains any stabilisation Clause. An examination of Article 4 requires analysing the following circumstances: (i) the reason for the introduction of Article 4; (ii) the literal wording of Article 4 does not constitute a stabilisation clause; (iii) the introduction of Article 4 resulted in a reduction in the profitability of solar thermal plants based on the necessary economic sustainability of the SES (iv) Following the entry into force of RD 1614/2010 and before the Claimants' investment, the Kingdom of Spain introduced measures that

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[562] Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain (SCC V 062/2012), Final Award, 21 January 2016, and dissenting vote, para. 496, RL-0071.
[563] Ibid. Para. 507.
[564] Statement of Counter-Memorial, paragraphs 129 to 138.
[565] Counter-Memorial, paragraphs 592 to 599.

resulted in a reduction in the profitability of solar thermal installations (iv) the Claimant did not assessed that article as a stabilisation clause.

(a) The reason for the introduction of Article 4 of Royal Decree 1614/2010

913. As already expounded in the Counter-Memorial,[566] Article 4 of RD 1614/2010 allowed the plants affected by RD-Law 6/2009 to be exonerated from the mandatory review envisaged in Article 44.3 RD 661/2007 which, pursuant to said article, should have been applied in 2010. However, in no way does said temporary extension guarantee or promise the immutability of freezing of the regime established by RD 661/2007. Much less, it neither implies a stabilisation clause, nor a Government commitment to freeze its regulatory framework.

914. The Agreement of the Council of Ministers of 19 November 2009[567] established the staged commissioning of the solar thermal plants registered in the Remuneration Pre-assignment Registry. This staging was introduced, among other measures, by RDL 6/2009[568]. Such staggering was configured in four phases:

- Phase 1 (850 MW): In progress.
- Phase 2 (1,350 MW): Between 1 January 2011 and 1 January 2013.
- Phase 3 (1,850 MW): Between 01 January 2012 and 1 January 2013.
- Phase 4 (Remaining power pursuant to fifth transitory provision of RDL 6/2009): between 1 January 2011 and 1 January 2013.

915. Such staged commissioning caused the plants in Phase 2, Phase 3 and Phase 4 to be affected by the mandatory periodic revision that was to take place in 2010. The literal wording of 44 (3) Royal Decree 661/2007 led to this result.

916. Given this circumstance, Article 4 of Royal Decree 1614/2010 was introduced. It did not involve giving greater protection to those plants, but rather simply to correct a result that was not intended by the regulator, by deferring beyond 2010 their entry into operation. Therefore, the Preamble of Royal Decree 1614/2010, after noting that the purpose of this Regulation is to safeguard the principle of Reasonable profitability, establishes that:

> *"Therefore, the present royal decree intends to resolve certain inefficiencies in the implementation of Royal Decree-Law 6/2009 of 30 April, for wind and solar thermal*

[566] Counter-Memorial, paragraph 593.3

[567] Administrative Resolution dated 19 November 2009, of the Secretariat of State for Energy, publishing the Spanish Cabinet Meeting Decision of 13 November 2009, proceeding to the management planning of the projects or facilities submitted to the Administrative Register for Pre-assignment of remuneration electric energy production Plants, specified in Royal Decree Law 6/2009, of 30 April, adopting certain measures in the Energy Sector and approving the Social Tariff. R-0088

[568] Royal Decree Law 6/2009, of 30 April, on certain measures in the Energy Sector and approving the Social Tariff. Fifth Transitional Provision. R-0231.

technologies. It was intended to ensure the economic regime in force in RD 661/2007, [...], for projects in an advanced state of maturity."[569] *(Emphasis added)*

917. Consequently, Article 4 merely extends the provisions of Article 44(3) 2nd paragraph of RD 661/2007 to Plants which, by application of Royal Decree Law 6/2009, could fall outside it. Nonetheless, it did not make any alteration to the principles and purposes of the SES. This extension was criticised by the NEC. Thus, in its report of 17 September 2010 it said:

"However, and without it being justified either technically or economically, extensions were granted for the application of the tariffs and premiums applicable to the new thermoelectric wind and solar installations implemented from 1 January 2012, which will have a significant impact on the cost borne by the consumer, besides contradicting the provisions of Article 44.3 of Royal Decree 661/2007 of 25 May, and being discriminatory to other technologies. In addition, the wording in the text of the proposed RD amends that article by introducing legal uncertainty and a lack of definition in other technologies. Therefore, the Commission understands, on the one hand, that it is not appropriate to grant unjustified extensions to wind or solar thermal technologies for the non-application of the new tariffs and premiums from 2012, and on the other, it believes that Article 44.3 should not be amended[570]*"*
(Original emphasis)

(b) The literal wording of Article 4 does not constitute a stabilisation clause.

918. A simple reading of Article 4 of RD 1614/2010 allows us to see that all said article does is to extend **the provisions of paragraph two of Article 44 (3)** of RD 661/2007 to plants not included within its scope of protection. The "*protection*" granted by this Article 4 is the same as that granted by RD 661/2007 to Plants whose commissioning certificate is subsequent to 1 January 2012. Therefore, these Plants would not be affected by the mandatory review that was to take place in 2010, maintaining the tariffs of RD 661/2007. Specifically:

"Article 4 of the project, to compensate the previous restriction, guarantees for the thermoelectric installations covered by Royal Decree 661/2007 affected thereby, that the future four-year reviews of tariffs, premiums and the upper and lower limit for this technology, provided under Article 44.3 thereof, shall not apply thereto"[571] *(Emphasis added)*

919. However, at no time is it stated that Article 4 of RD 1614/2010 should apply to revisions or modifications *other* than those set out in Article 44 (3) of RD 661/2007. Moreover, at no time is it stated that the solar thermal plants shall be left outside the scope of Act 54/1997 and that, therefore, the regulatory measures necessary to ensure the economic sustainability of the SES will not be applicable thereto, nor the regulatory

[569] Royal Decree 1614/2010, of 7 December, regulating and modifying certain aspects related to electric energy production using Thermoelectric, Solar and Wind power technologies. Preamble. C-0063 ESP R-0151 Bis.
[570] Report 24/2010 of the NEC on the Proposed Royal Decree which will regulate and amend certain aspects of the special regime. R-0257.
[571] Ministry of Industry, Trade and Tourism "Report of the SGT draft of Royal Decree 1614/2010 of 26 October 2010. Pages 10 and 11. R-0258.

measures aimed at avoiding situations of over-remuneration in the event they are detected.

920. Therefore, Article 4 of RD 1614/2010 does not protect the affected plants from "any" future tariff review:

> *"For the solar thermo-electric technology installations referred to in Royal Decree 661/2007, of 25 May, **the revisions** of tariffs, premiums and upper and lower limits **referred to in article 44.3 of the aforementioned Royal Decree** do not affect the installations enrolled definitively in the administrative register...."*

921. The literal meaning is evident, the revisions that will not affect the facilities are *"referred to in article 44.3 of the aforementioned Royal Decree "*, does not refer to *"any revision"* of tariffs or premiums. Also, neither does the literal wording of this article make reference to the possibility of opting between subsidies, nor to the possibility of producing by burning fossil fuels or updating the tariffs.

(c) The introduction of RD 1614/2010 led to a reduction in the profitability of solar thermal plants based on the necessary economic sustainability of the SES

922. As the Government expressly warned with the introduction of RD 1614/2010:

> *"However, it is precisely the premium under the special regime, financed by consumers, that has been one of the main factors in the increase in the tariff deficit in recent years, jeopardising the economic sustainability of the electricity system, which makes it essential to modify the economic regime, safeguarding legal certainty and the principle of Reasonable profitability on investment, reducing the tariff deficit of the electricity system and transferring to consumers the productivity gains of these technologies, which have seen a decrease in their relative costs in recent years.*
>
> *Consequently, the draft Royal Decree in question aims to amend the current regulation of the economic system of the activity of electricity production under the special regime of thermoelectric and onshore wind power technologies to ensure the economic and technical sustainability of the electricity system.*[572]

923. RD 1614/2010 accredits that no regulatory provision may prevent the adoption of measures to guarantee the economic sustainability of the SES and the principle of Reasonable profitability. Consequently, RD 1614/2010 shows that solar thermal technology is not an island within the SES alien to the basic principles of the SES.

(3.5) The Communications of December 2010

924. The Claimant holds that "the 2010 Resolutions set out an unambiguous statement to the effect that the CSP Plants were entitled to the remuneration under RD 661/2007 without any future changes affecting them. In other words, through these resolutions, Spain confirmed its previous clear and unambiguous representations contained in RD

[572] Ministry of Industry, Trade and Tourism "Report of the SGT draft of Royal Decree 1614/2010 of 26 October 2010. Page 8. R-0258.

661/2007"[573]. Section IV.A.1.3 sets out the translation mistakes that can give rise to an erroneous understanding of relevant facts of this procedure.

925. It is therefore stated that the Request of the Plants (not of the Claimant) included a waiver and a request for communication of the applicable remuneration[574]. Point Three of the request indicated the following: "*Three.- That it requests that it be notified about the remunerative conditions of the installation during its operational life*."[575]

926. It has likewise been expounded that the heading of the Reply of the Directorate-General for Energy Policy and Mining differentiates two parts of the communication:

> *"**R**esolution of the Directorate-General for Mining and Energy Policy accepting the waiver submitted [...] and **C**ommunication of the Directorate-General for Mining and Energy Policy of the remuneration conditions and the annual electrical energy discharge capacity of the installation."*[576] *(Emphasis added)*

927. In the Introduction, section II, it refers to this request:

> *"Finally, the party concerned asks to be informed about the remuneration conditions during the working life of the installation."*[577]

928. The Communication is contained in points Two and Three of the document. Point two of the document begins as follows:

> *" Two – It **communicates** that**, currently,** by dint of the stipulations of section 1, transitory provision five of Royal Decree 16 enacted on April 30th 2009, the remuneration applicable to the installation **is** made up of the tariffs, premiums, upper and lower limits and complements set out in Royal Decree 661 enacted on May 25th 2007..."*[578]

929. The reading of the Communications in their literal meaning leaves no doubt as to the non-existence of a future commitment for maintaining the tariffs throughout the useful life of the Plants. It is therefore denied that these Communications confer a right to immutability of the remuneration regime. Likewise, it is denied that the Communications include a commitment by the Government not to amend the regime of RD 661/2007. For such purposes, the mere reading (1) of the Heading of the Resolutions, (2) their content and (3) the appeals they grant is sufficient and applies to the three Resolutions.

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[573] Counter-Memorial, paragraph 166.

[574] "*Remuneration"*, in Spanish, does not have a connotation of *indemnity* or *compensation* in return for something. *"Remuneration"*, according to the Dictionary of the Royal Academy of the Spanish Language, means: "payment of something." It is synonymous with "*remuneration*", not "*indemnity*" or "*compensation*". The dictionary *Word reference* translates "*Retribución*" into English as "*payment*". "Compensation" would mean an indemnity as a result of the waiver to discharge energy for one year. However, it only requests communicating the "*remuneration conditions": "payment conditions"*.

[575] Section IV.A.1.3.b) of this Memorial

[576] Resolution of the Directorate-General for Energy Policy and Mining relative to Gemasolar, 28 December 2010 (R.0196), Resolution of the Directorate-General of Energy Policy and Mining relative to Arcosol, 28 December 2010 (R-0197) and Resolution of the Directorate-General of Energy Policy and Mining relative to Termesol, 28 December 2010 (R-0198)

[577] Ibid.

[578] Ibid.

a. Heading of the Documents:

930. In fact, as indicated, the Heading is identical in the three Documents and leaves no doubt as to its content, as states:

> *"**R**esolution of the DGPEM accepting the waiver formulated by [...] registered in the Remuneration Pre-assignment Register of the Ministry of Industry to being discharging electricity before a certain date within the already assigned Phase and acceptance of the classification of the installation made and Communication from the DGPEM relative to the remuneration conditions and annual electricity discharge capacity of the facility to start discharging electricity prior to a certain date within the already assigned Phase and the acceptance of the statement on the classification made of the facility and **C**ommunication of the DGPEM of the remuneration conditions and annual electricity discharge capacity of the facility."*[579] (Emphasis added)

931. A literal reading of the Heading reveals that it contains three different administrative actions:

- The first consists of an administrative "Resolution" whereby the Administration *accepts* the waiver presented. This Resolution is expounded in Section One, paragraph one.

- The second consists of the same administrative "Resolution" whereby the Administration *accepts* the petitioner's statements on the *classification* of the installations made. This Resolution is expounded in Section One, paragraphs two and three.

- The third consists of a "Communication" from the Directorate-General for Energy Policy and Mining on the remuneration conditions and the *annual* electricity discharge capacity of the facility. This communication is expounded in Sections Two and Three of the document, as we shall see below. This communication is not an administrative *Resolution*, neither due to its format or content.

932. Therefore, the Heading leaves no doubt as to the existence, on the one hand, of a ***R**esolution* and, on the other, of a mere informative ***Co**mmunication*. The content of the Documents is also clear, due to being structured in differentiated Sections.

b. Content of the Documents:

933. Point One of the three Documents begins with the term "*Resolves...*" and corresponds to the part of the Heading beginning with "*Resolution*". Therefore, in this Section One the Administration accepts the waiver requests and the classification of the facilities made by the petitioner.

[579] Ibid.

934. Since this acceptance affects the petitioners' rights, the Resolutions make it possible to challenge the content of this Point One. Thus, they include the so-called *notice of the right to appeal* on the last page thereof[580]:

> *"Against the resolution included in point one of this notification, an appeal for a higher Administrative review can be filed before the State Secretariat of Energy within a period of one month, pursuant to Law 30/1992, of 26 November, on the Legal Regime of Public Administrations and the Common Administrative Procedure. (Emphasis added)*

935. However, Points Two and Three begin with the expression "Informs that..." and correspond to the following part of the Heading: "Communication from the DGPEM on the remuneration conditions and annual electricity discharge capacity of the facility."

936. As opposed to that asserted by the Claimants, said Points Two and Three do not contain the word "*right"* or the word "*commitment",* or the word "*confirmation*", or the word "*promise"*, or the word "*guarantee"*, or the word "grants". They do not contain any similar term. That is, the Spanish Government does not promise, guarantee or confirm the facilities[581] that will be maintained "in the future" by the regime of RD 661/2007, throughout their useful life. The attention of the Arbitral Tribunal is drawn to the fact that neither do they contain any mention to the production of electricity by burning fossil fuels such as gas.

937. They are only informed of the *"current"* law -simultaneously to issuing the Documents-. And it does so in such a manner that it does not raise doubts as to what is being communicated: the regime in force, currently applicable to the CSP Plants. Therefore, the assertions made by the Claimants about the alleged "unequivocal declarations", "promises", "commitments", "confirmations" to the Claimants or to their investment are denied[582].

938. That is, in the documents provided by the Claimants, the Spanish Government does not *promise* or *guarantee* or *acquires a commitment* or *confirms* that it shall maintain the remuneration established in RD 661/2007 unchanged "*during the useful life of the facilities*". The Claimants have not accredited in what part of the Communication the Respondent acquires a future commitment with respect to the Plants. It does not indicate where these alleged promises, guarantees and commitments reiterated throughout its

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[580] In Spanish Administrative Law, the so-called administrative *notice of the right to appeal* is only envisaged for administrative Resolutions. Article 58 of Law 30/1992 of the Legal Regime of the Public Administrations and Common Administrative Procedure provides that: "*1. The interested parties shall be notified of the administrative resolutions and acts that affect their rights and interests, [...]. 2. All notifications [...] shall contain the full text of the resolution, indicating whether or not it is final in the administrative procedure, the expression of the relevant appeals, body with which they would have to be filed and filing deadline, notwithstanding any other they deem relevant."* R-0142

[581] Naturally, neither to the Claimants, to which the Resolution is not even addressed.

[582] In the Counter-Memorial it is concluded that "*This was an unambiguous statement to the effect that the Operating Plants were entitled to the RD 661/2007 FIT regime without any future changes affecting them. In other words, through these resolutions, Spain confirmed its previous clear and unambiguous representations contained in the general regulation (RD 661/2007) on which the Claimants legitimately relied in making their investments*" (emphasis added)

Memorials are included. There is no mention to the Government's alleged promises, commitments or confirmations.

939. The Directorate-General communicates the applicable regime on the remuneration conditions in force and *annual* electricity discharge capacity of the facilities, including the modifications made to date. But through said action it does not create or confirm any right, such as guaranteeing that this regime will not be modified in the future. Additionally, the reply of the Directorate-General is consistent with the request for information on its remuneration made by the interested party[583]. The Ministry clarifies, in the document's precedents, that it communicates the request for remuneration conditions made by the interested party[584].

940. As regards the wording of the Documents, the Communication of Section Two has an easily understandable content that leaves no room for doubt. In fact, it should be noted that it begins with a clear prevention:

> *"It informs that**, currently,** by dint of the stipulations of section 1, transitory provision five of Royal Decree 16 enacted on April 30th 2009, the remuneration applicable to the installation **is** made up of the tariffs, premiums, upper and lower limits and complements set out in Royal Decree 661 enacted on May 25th 2007[...]"*

941. It is evident that merely communicates the remuneration regime in force at that time. In fact, it is written in the present tense, not in the future tense. That is, it does make mention to the future or to the applicable regime during the life of the plants. Neither does it make any reference to the *useful life* of the plants or to the *useful life* of the facilities. In short, only the regime applicable "*at present*" is communicated at the time of issuance.

942. From the reading of this Section Two in its literal sense, a *confirmation* by the Government as to the future permanence of RD 661/2007 *"throughout the useful operating life of the facilities"* cannot be reasonably inferred.[585]. In fact, the Communication of Point Two does not make any mention to the confirmation of any "agreement" or to the conditions throughout the *useful* operating life of the facilities.

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[583] Precedent I of the Resolutions: "*Lastly, the interested party requests the communication of the remuneration conditions during the useful life of the facility*." R-0196, R-0197 y R-0198.

[584] Precedent IV of the three documents indicates that:

"*Pursuant to that indicated in section g of Article 35 of Law 30/1992, of 26 November, and Royal Decree 208/1996, of 9 February, regulating the Administrative Information Service and Citizen Attention, at the request of the interested party, the data whose information it requests is hereby communicated.* R-0196, R-0197 y R-0198.

[585] Memorial on the Merits, paragraphs 404 and 454. In fact, the Claimant grounds the claim regarding the breach of the protection Clause in the alleged "confirmation" request: *"they requested the Ministry to confirm that the regulated tariff would be applied throughout the useful life of the facilities."* The mere reading of the request in its original version (not the translation provided by the Claimants) makes it possible to conclude that it does not make any *confirmation*. Paragraph 165 of the Reply on the Merits reiterates that: "*the Ministry acknowledged and accepted the waivers and confirmed that the Operating Companies would be entitled to the FITs under RD 661/2007, as amended by RD 1614/2010."* Point Two of Documents R-0196, R-0197 and R-0198 evidences that it does not "*confirm*" anything or refers to the "*operating life*" of the petitioning CSP facilities.

943. Other evidence that reaffirms that upheld by the Kingdom of Spain is the content of Point Three. This Point completes the information on the applicable regime in force. Said Point Three expounds the legislative modifications subsequent to RD 661/2007. This Point also begins with the expression "Informs that" and at no point promises or guarantees or confirms that there will be no subsequent amendments to the regime of RD 661/2007 during the operating life of the facilities.

944. On the contrary, the communication of the amendments subsequent to RD 661/2007 demonstrates that the remuneration regime has been amended. On not guaranteeing or confirming anything else for the future, it may continue to be amended.

945. The Respondents consider that, on mentioning Article 4 of RD 1614/2010, this Communication was guaranteeing the maintenance of the conditions of RD 661/2007. However, said Section Three expounds the articles of the subsequent regulation that affected the economic regime of RD 661/2007. In this manner, the mention of Article 4 does not add or remove anything from the regulation contained therein, nor does it broaden its meaning nor interprets nor promises that it implies the intangibility of RD 661/2007 or of its tariffs in the future. It only communicates that already established in Article 4. That is, that "*the reviews of the tariffs, premiums and upper and lower limits referred to in Article 44.3 of said royal decree* [that is, the periodic four-year reviews] *shall not affect registered facilities."*

946. In short, the wording of the resolution does not exclude the possibility of other extraordinary revisions for economic circumstances or economic unsustainability of the SES. Also, it is surprising that the Claimant, in its explanation of legitimate Expectations, invoke these Communications of 2010[586] as if the request had been made by the Claimant[587] and as if it had invested trusting said resolutions[588]. This is contradictory to its own arguments regarding the fact that its investment was made in 2008 and 2009, due to which it is not affected by these documents. In fact, it is the Claimant itself which asserts the following a few paragraphs below: "*The timing of the assessment of the Claimant´s expectations is also of crucial importance*"[589]. For such purposes, it should also be recalled that the Resolutions of 2010 were not even addressed to the Claimants.

947. Consequently, the Claimant cannot reasonably infer a Government *promise* or *commitment* from this Point Three on the immutability of Regulation 661/2007 during the operating life of the facilities. Neither with regard to their investments, such as to permit grounding the application of the umbrella Clause of Article 10(1) ECT, as we shall see later.

948. A commitment of the type held by the Claimants (the immutability of the economic regime), for such a long period of time (throughout the entire operating life of the

[586] In the Reply on the Merits, paragraph 170, it asserts that: "*Host State representations may be a source of legitimate expectations under international investment law, regardless of their characterisation under domestic law, if investors reasonably rely on them in making their investment decisions*."
[587] Reply on the Merits, paragraph 174.b) "*the Claimant was obviously asking for information*…."
[588] Reply on the Merits, paragraphs. 170: "*...If investors reasonably rely on them in making their investment decisions*." Also in paragraphs 173 and 174
[589] Reply on the Merits, paragraph 179.

facilities) and with such relevant economic conditions, must be clear and obvious[590], without intending to infer it from subjective assumptions or interpretations, as it is in this case.

949. It is surprising that a diligent and exhaustive investor can infer a "clear and accurate" commitment to the future immutability of the regime of RD 661/2007 from a phrase written in the present tense and making reference to "currently". In fact, it should be highlighted that the Plants (addressee of these documents) have never upheld before the Courts that these communications are (1) neither a source of rights for the plants (2) nor a source of obligations for the Government.

c. Notice of the right to appeal of the documents.

950. In addition to the Heading and content of the Documents, further evidence against the alleged rights or promises upheld by the Claimants is that the Documents studied do not give rise to a notice of the right to appeal against the Communication of Points Two and Three.

951. The Claimant upholds that this impossibility of appealing against the Communication does not circumvent the commitment that these communications represent at the international level[591]. In this regard, it denies that the consequences of national Law are relevant to its Expectations. Mention has already been made to the fact its expectations are limited to 2009. Therefore, the communications would not affect such expectations in any way.

952. Furthermore, neither do these Communications generate an obligation for the Spanish Government with the Claimant´s investment. The existence of a Government´s enforceable obligation cannot be expected, if the instrument in which the alleged obligation is formalised lacks effectiveness in internal rights. That is, there cannot be an obligation of the Spanish Government if that obligation is not generated using the sources of the obligations of Spanish legislation.

953. The so-called umbrella clause, as we shall see, does not circumvent the obligation which, in any case, must comply with national laws. The umbrella clause protects the commitments acquired by the Government with the investor or its investment, but provided that those commitments really exist for the host Government of the investment. In this case, the non-existence of a notice of the right to appeal against the Communication evidences the non-existence of an Administrative act or a Resolution in Sections Two and Three enforceable before the Courts and which, therefore, this Communication does not contain any obligation enforceable before the Spanish Courts or before this Arbitral Tribunal.

d. Conclusion.

[590] Reply on the Merits, paragraph 173: "*could hardly have done so in so clear terms and the claimant legitimately understood…"*
[591] Reply on the Merits, paragraph 518.

954. The resolutions invoked by the Claimant, both based on their Heading and on the wording of their content and the indication of the appeal they include, accredit that the administrative action included in Section Two is a Communication of the regime applicable at that time to the Plants addresse of the Communication. The Kingdom of Spain could not anticipate the *future* regime of these Facilities, since the SES is, as mentioned earlier, dynamic and technically and economically sustainable.

955. Therefore, these Communications are not an *agreement* between the Government and the facilities, nor an administrative concession, nor a *commitment*, nor a *confirmation* of the future immutability of the remuneration regime of the facilities throughout their entire useful life. Such Communications inform the facilities (not the Claimant) of the remuneration regime in force and of its most recent amendments.

(3.6) Registration in the RAIPRE.

956. The Respondent adds another alleged confirmation through the registration of the Plants in the RAIPRE: "With the registration of each of the Claimants' installations in the RAIPRE, Spain confirmed that each installation was entitled to the benefit of those commitments."[592]

957. Registration in the RAIPRE is an administrative requirement (articles 6 et seq. of RD 661/2007) that the facilities that wish to form part of the Special Regime must fulfil in order to operate and participate in the SES. It is a formal requirement for producing energy. It has nothing to do with the fact that the facilities must acquire the ownership of an "acquired right" to receive future yield, indefinitely, sine die. Registration in the RAIPRE is a mandatory administrative requirement for participating in the SES.

958. The Arbitral Tribunal's attention is called to the fact that in the Administrative Registry, all the facilities, both Ordinary and Special Regime, were registered[593]. The RAIPRE is a mere Section of said Administrative Register (Section Two):

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[592] Reply on the Merits, paragraph 410.

[593] Act 54/1997, of 27 November, on the Electricity Sector. Article 31: "*Special regime electricity production facilities must be registered in the Administrative Register of Electricity Production Facilities to which reference is made in Section 4 of Article 21 of this Law.*"
This reference is to another Title of the Law:

TITLE IV
Electricity production.
CHAPTER I
Ordinary Regime.

Article 21: "[...] *4. An Administrative Register of Electricity Production Facilities is created in the Ministry of Industry and Energy, in which all authorised electricity production facilities must be registered, including the conditions of said facilities and particularly the capacity of the facility* [...]
5. Registration in the Administrative Registry of Electricity Production Facilities will be required to participate in the market for electricity production in any of the types of contracts with physical delivery. Autonomous Regions shall have access to the information contained in this Register.
6. [...] *Failure to comply with the conditions and requirements established in the authorizations or any substantial variation in the budgets that determined their award may lead to its revocation, under the terms provided for in the applicable penalty system.* [...]" R-0191.

*"Special regime electricity production facilities must be mandatorily registered in **Section Two of the Administrative Register of the electricity production facilities** referred to in Article 21.4 of Act 54/1997, of 27 November, dependent upon the Ministry of Industry, Tourism and Trade. Said **Section Two of the cited Administrative Register** shall be called, hereinafter, Administrative Register of Special Regime Electricity Production Facilities [RAIPRE]."*[594] *(Emphasis added)*

959. Registration in the RAIPRE is not, therefore, a State commitment to indefinitely and unalterably maintain the future profitability of the CSP sector, but rather an administrative register that makes it possible to control and know those involved in the SES. However, the Precedent of the case Charanne v Spain has dismissed that this registration could create the expectations claimed by the Claimants:

"The Claimants have alleged that, according to the existing regulatory framework, the registration in the RAIPRE gave generators an acquired right to receive the rate which would establish a legitimate expectation that it was not going to be subsequently amended. The Court does not accept this argument.

The respondent has convincingly demonstrated that, under Spanish law, the registration in the RAIPRE was simply an administrative requirement to be able to sell energy, and did not imply that the facilities registered had an acquired right to a particular remuneration".[595]

960. The Claimant wants to hide from the Arbitral Tribunal that Royal Decree 2818/1998 provided that all the special regime production facilities be registered in an Administrative Register. This Registry allowed the government to keep track of the rates and premiums, by type of energy, on the installed capacity and, where applicable, the date of commissioning. It also allowed it to know the evolution of the electricity produced, the energy transferred to the network and the primary energy used.[596] The aforementioned Register did not prevent the adoption of RD 436/2004 and that this regulation affected the plants registered therein.

961. As with the previous 2818/1998, RD 436/2004 maintained the obligation that all production facilities in the special regime register in an Administrative Register.

962. As with the preceding Royal Decrees, said Register was established in 2004 in order to allow the Government to keep track of the tariffs and premiums, by type of energy, on the installed capacity and, where applicable, the commissioning date. It also allowed it to know the evolution of the electricity produced, the energy transferred to the network and the primary energy used.[597] The creation of this Registry demonstrates the legislator's intention to verify, in any case, compliance with the targets set in the Plan for the Promotion of Renewable Energy in Spain 2000-2010.

[594] RD 661/2007, Article 9.1 C-0038 ESP R-0150 Bis.
[595] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain (SCC v. 062/2012), Final Award, 21 January 2016, and individual opinion, paragraphs 509 and 510, RL-0071.
[596] Royal Decree 2818/1998, of 23 December, on the production of electricity by facilities fed by renewable energy sources, waste and cogeneration. Article 9.1 R-0259
[597] RD 436/2004, Article 9.1. C-0024 ESP R-0148 Bis.

963. Furthermore, as in previous cases, the registration of the plants in said Administrative Register during enforcement of RD 436/2004 was not an obstacle for the remuneration model implemented by Royal Decree 661/2007 to be applied to the plants already registered in said Register.

964. Consequently, registration in this Register was not a Government commitment to indefinitely and unalterably maintain the future and immutable profitability of the facilities registered therein, but rather a way to control and know those involved in the SES.

(3.7) The expectations of other Spanish and foreign Claimants

965. Proof of the inconsistency of the Claimant's arguments is that it intends to base its expectations on other unknown expectations of other unknown investors. It is surprising that it asserts that the number of is proof of the violation of its expectations filed before the Kingdom of Spain at the national (it mentions some 380 claims) and international level (it mentions some 30 claims). This theory is surprising because:

(1) Is unaware of the claims filed and the actions carried out therein. The Claimant has not accredited anything.

(2) The numbers cited (some 400) are negligible compared to the tens of thousands of registered owners (over 44,600) and the tens of thousands of facilities registered in the RAIPRE (over 64,400)[598]. To these numbers we must add the changes in ownership which could also invoke damages. More than 5,200 changes in ownership have been accredited in the Register[599]. This notwithstanding changes in ownership due to the transfer of shares, which are not mentioned. Therefore, some 60,000 owners have been able to exercise their rights. And the Claimant bases its expectations on the fact that some 400 investors have sued the Government. That is, 0.6% of the total. This taking into account that the number of investors far exceeds 60,000 facility owners, since the investors which hold ownership interests in owner companies (such as the Claimant) are not registered in Section Two of the Administrative Register of Electricity Production Facilities (RAIPEE). Therefore, based on the Claimant's theory, it could be concluded that its expectations do not coincide with the objective expectations inferred from, at least, 99.4% of the investors registered in Section Two of the RAIPEE.

966. At the international level, only one action is accredited: that exercised by Charanne BV and Construction Investments Construction (Arb. SCC 62/2012). However, the Claimant has hastened to depart from this assumption in its Reply on the Merits. According to the Claimant, they are not the same case, due to which it is not applicable thereto[600].

[598] Report of 26 April 2016 on the number of owners registered in Section 2 of the RAIPEE, of the SubDirectorate-General of Electricity, MINETUR R-0260.
[599] Report of 26 April 2016 on the number of changes in owners registered in Section 2 of the RAIPEE, of the SubDirectorate-General of Electricity, MINETUR R-0261.
[600] Counter-Memorial, paragraph 313.

Therefore, it seems that it no longer invokes the expectations of Charanne to support its theory. It has not accredited those of the other claimants.

967. The Kingdom of Spain asserts that the Claimant's expectations are the same as those of Charanne BV and Construction Investments:

a. Both performed their investment up until 2009 on the basis of RD 661/2007.

b. Both assert that a specific commitment could be inferred from RD 661/2007 to freeze or maintain the regime in favour of the Plants installed during enforcement thereof.

c. Both assert that an advertising campaign launched in the Kingdom of Spain created expectations in investors.

d. Both assert that this right was blocked in favour of the investors in favour of the plants registered in the RAIPRE[601].

e. Both claim damages for the amendment of the regime established in RD 661/2007.

f. Both consider that the reforms of RD 661/2007 were retroactive.

968. Therefore, the conclusions of this Final Decision dismissing the subjective expectations of Charanne and Construction Investments are fully applicable to the subjective expectations of the Claimant.

969. Furthermore, at the national level, the Decisions handed down by the Supreme Court and Constitutional Court provided by the Kingdom of Spain have ratified the compliance of the regulatory measures analysed in this arbitration with Spanish Law.

(3.8) The expectations arising from a "major advertising campaign" launched by the Kingdom of Spain.

970. The Claimant argues about the subjective expectations created by a campaign for attracting foreign investors[602]. This theory is unacceptable, since the Claimant has not accredited: (a) that Spain has made "great efforts to entice foreign investors to invest in its RE Sector"; (b) that the Claimant was never aware of a major advertising campaign launched by Spain; and (c) that the Claimant invested in Spain based on the advertising campaign.

(a) The Claimant asserts that Spain made "*great efforts to entice foreign investors to invest in its RE Sector*"[603]. The only proof that it provides are two (2) PPT presentations by InvestinSpain, one from 2008 and another from 2009. The Claimant does not even

[601] Reply on the Merits, paragraph 272: "*pursuant to the criteria laid down in RDL 6/2009, the relevant installations were pre-registered and then definitively registered with the RAIPRE, thus **locking in their rights** under RD 661/2007*." (emphasis added)
[602] Reply on the Merits, paragraphs 56 to 60 and 307 to 311.
[603] Reply on the Merits, paragraph 56

accredit where, when and to whom they were made. Quite simply, the Claimant was aware of their existence because they are publicly accessible on the Internet[604]. The other Presentations provided of the NEC are educational, not advertising, in nature, as accredited by Spain[605]. They are accessible on the Internet. The proof of the alleged campaign is null, since there was no such "campaign".

(b) the Claimant has not even accredited its awareness of a "*major advertising campaign launched by Spain*." Moreover, Spain has accredited that the Claimant's investment in Spain is a consequence of Abu Dhabi's medium-term economic planning, due to its intention to diversify its energy sources and to obtain the necessary know-how to develop solar thermal energy production plants. Therefore, Abu Dhabi sought companies around the world with the appropriate knowledge and invested in the development of Spain's CSP industry. Other possibilities, based on the technological development of the companies, were Israel and USA. Therefore, it did not come to Spain as a result of a Spanish advertising campaign. Mr. Tassabehji sought the know-how of the Spanish companies and of other countries to achieve the economic development of Abu Dhabi in terms of renewable energy sources in the medium term.

(c) The Claimant did not invest in Spain on the basis of an advertising campaign. Document C-0042 provided by the Claimant evidences that ADFEC carried out a study comparing the regulatory frameworks of different countries, including various Government of the USA, Spain, Greece, Italy and Portugal. In this study, the Claimant does not make any reference whatsoever to Spanish advertising.

971. Therefore, the Claimant's alleged subjective expectations on the basis of an alleged "major advertising campaign", evidence of which is conspicuous by its absence, are fully unfounded.

(3.9) The alleged "Expectations of Spain itself in the implementation of RD 661/2007".

972. Surprisingly the Claimant bases its own legitimate expectations not on their internal documentation or documentary evidence. It bases them on the alleged "Spain's Expectations".

973. However, in the absence of consistent evidence, the Claimants seek to rely on totally irrelevant external evidence. In this way, they are trying to give some consistency to the inconsistent statements regarding their trust in Article 44.3 RD 661/2007. Through this external evidence, they wish to demonstrate that their belief in the Government's promise is accredited since that was the belief of the Spanish Government itself. For this purpose,

[604] Publicly accessible on the website www.investinspain.org

[605] The presentation it provided as C-0157 and which it calls: "*NEC presentation, "Renewable Energy Regulation in Spain*", February 2010, was made by Mr. Fernando Marti Scharfhausen, not by the NEC, at an Educational seminar: This presentation is publicly accessible on the following link: http://www.fep.up.pt/conferencias/energia2010/Apresentacoes/ApresentacaoFernando%20Marti%20Scharfhausen%20[Compatibility%20Mode].pdf
The Programme of the "III Seminário Mercados de Electricidade e Gás Natural of Universidad de Oporto, February 2010, is also attached. R-0195.

they mention a Press Release, Power Point presentations they never saw and a speech by the Minister of Industry they never heard.

974. However, it should be newly recalled that the Claimant hides the most relevant declarations of the Kingdom of Spain that a diligent investor should know from the Arbitral Tribunal.

(1) That expressed by the Law, by the planning Documents which serve as a basis for the Law and regulations, such as the PER 2005-2010, which establishes the governing principles of the regulatory framework. No diligent investor cannot be aware of these legal rules and give greater relevance to a PowerPoint presentation or a press release.

(2) The official and legal interpretation of this regulation, arising from the Case law of the Supreme Court since 2005. It has remained fixed, clear and undoubted. So undoubted that the Claimant has hidden it from the Arbitral Tribunal to offer a cherry-picking of loose sentences from press releases and PowerPoint presentations.

(3) That the NEC only plays a "consultative" role with respect to the Government, which does not decide on or legally interpret the Law or its regulations. Furthermore, the Claimant itself is fully aware of this fact[606]. However, it provides parts of Reports as though these were the unequivocal will of the Kingdom of Spain, omitting (a) parts of Reports that do not uphold its theory, as shall see now, and (b) the large number of Declarations on the Law, Planning and Legal Interpretation of Jurisprudence since 2005 that a diligent investor should have evaluated to invest in the Spanish energy sector.

975. Notwithstanding the foregoing, mention must be made of the inconsistency of the arguments of the Claimants on the alleged *"Declarations of the Kingdom of Spain"* which it mentions in its Statement of Counter-Memorial.

976. Moreover, as the first of the declarations it cites the NEC Report 3/2007 of 14 February, including a paragraph thereof[607]. A significant part of said Report, omitted by the Claimant party, indicates:

> *"As expressed both by scientific and **jurisprudential** doctrine, [...] the principle of legal security [...] does not imply that the legal system is resistant or immune to reform. In this regard, these principles do not prevent the **dynamic** innovation of such system nor do they **prevent new regulatory provisions from being applied in the future to pre-existing situations, but which continue upon enforcement of the new regulations**"[608] (Emphasis added)*

977. The attention of the Arbitral Tribunal is called to this last phrase. This is the case affecting the contested measures. As expounded earlier, the reform has respected all the

[606] Document C-0052, page 37 of 49: Masdar internal Due Diligence: "*NEC (Regulator) and IDAE **advise** the Government on economic and technical viability of the different technologies and **helps** the Government to set the tariffs in order to provide the promoters with an acceptable IRR*".
[607] Reply on the Merits, paragraph 264
[608] Document C-0135, page 17.

rights acquired prior to the reform. Further, NEC Report 3/2007 states that Regulation 661/2007 is retroactive in nature:

> *"The **proposed Royal Decree** subject to this report, which will be in force until the end of 2010, **is equipped with retroactivity,** as it **aims to be applied** not only to the productive assets to be installed from its entry into force, but also **to those already installed** since the promulgation of Royal Decree 436/2004."*

978. It is a matter on which the Claimants insist: the retroactivity of the contested measures. A diligent investor that would have examined the interpretation of the Spanish Constitutional Court and Supreme Court (to which the NEC expressly refers) would have known that "*the new regulatory provisions may be applied in the future to pre-existing situations, but that continue upon enforcement of the new rules."* This was thus expounded by the NEC in 2007 and 2008[609].

979. On the other hand, the Claimants cite the Press Release of RD 661/2007[610]. Notwithstanding the fact that the release has no further value than that of a public communication, the Claimants highlight that it indicates *"the establishment of a subsidies system to ensure an attractive return."* In the existing economic reality since 2013, the subsidies system established by the new regime also ensures an attractive return. Nothing has been contradicted by that statement.

980. In addition, this press release includes the periodic adjustment of tariffs every four years, reiterating what is stated in Article 44.3 RD 661/2007. But this note does not exclude other NON-periodic reviews of tariffs (due to unforeseen economic circumstances), nor does it preclude the review of the RD 661 itself, due to *"change of position of Government"*, or the imbalance of the SES. Clearly it does not promise what the Claimant asserts. The Press Release refers to the *"stability of the regime"*, but does not guarantee the *"inalterability"* of the RD 661/2007 regime for new installations throughout their entire lifetime, without any changes to the remunerative or productive regimes.

981. The Arbitral Tribunal's attention is also drawn to this issue, as the Claimants requests the maintenance of measures not included in Article 44 RD 661/2007, such as the possibility of choosing annually between two remunerations or the possibility of producing energy by burning gas throughout the entire lifetime of the plants. The press release says nothing about its maintenance, but the Claimants believe that "*It is hard to imagine a clearer promise*"[611]. The press release does not promise or guarantee the possibility of opting in the future for the two remunerations contained in RD 661/2007. Nor does it even refer to the possibility of producing energy by burning gas. Moreover, according to the release, the use of gas is not allowed:

[609] Documents C-0135 and C-0142.
[610] Reply on the Merits, paragraph 326.
[611] Counter-Memorial, paragraph 329.

"hybridisation is allowed, i.e. solar thermal technology installations using biomass as fuel in those periods when there is no solar radiation"[612]

982. Therefore, the Claimant's assertions are totally unfounded in the sense that this press release promised (1) *blocking* the tariffs in all future circumstances, (2) opting between two remunerations or (3) burning gas to produce electricity.

983. As regards the scarce PowerPoint presentations accessible on the Internet found by the Claimant[613], it has already been expounded that the Claimant party does not accredit that it was ever aware of the promotional presentations or activities it mentions. Evidence of a "major advertising campaign" asserted by the Claimant is conspicuous for its absence, as expounded earlier.

984. Additionally, these presentations cannot configure the expectations of a diligent investor, since it cannot be inferred that the Government promised to "*freeze*" the regime of RD 661/2007 in its favour from any of the sentences it mentions. The Claimant insists on the "non-retroactivity" to which some of these presentations refer. A diligent investor would have known in 2007 and 2008 that *"new regulatory provisions could be applied in the future to pre-existing situations, but that continue upon enforcement of the new rules."*

985. Consequently, the following it not inferred from these presentations:

1) Neither the *blocking* of the tariffs in favour of the existing plants, throughout their operating life, on registering within the deadline.

2) Nor the possibility of opting in the future and annually between two types of remuneration.

3) Nor the possibility of producing RE by burning gas during the lifetime of the plant.

986. As another different Declaration of the Government, the Claimant refers to the Speech by Mr. Sebastian before the IRENA[614]. The Claimant has described a relevant part of the content thereof, which refers to two issues highlighted by the Kingdom of Spain: (a) The need to establish an appropriate regulatory regime, providing the necessary stability in the long term. (b) The establishment of mechanisms to ensure compliance with the Plans.

987. In addition, the part described by Claimants omits another essential characteristic:

"Encouraging energy savings and efficiency and promoting the use of renewable energies are, from our point of view, key and complementary tools for achieving the

[612] C-0138. The Claimant has **mistranslated "allowed"**, which means "It is allowed" or "It is permitted". But it does not mean "it provides", as reflected in the Claimants' translation of Document C-0138. The press release mentions the fact that the use of biomass is "allowed", but its use is not "guaranteed". As is known, this is not the fuel that RD 661/2007 finally allowed to be burnt. Therefore, the Claimants could not even have the expectation of burning gas, according to the press release.
[613] Reply on the Merits, paragraphs. 330 to 338.
[614] Reply on the Merits, paragraph 339.

*objectives of our energy policy: competitiveness, security of supply and **sustainability."** (Emphasis added)*

988. Where are the promises to keep the tariffs unchanged in situations of destabilisation or unsustainability of the SES in the long term? It is clear that the speech refers to the need to establish *mechanisms to guarantee this stability*, which connects with the *dynamic* nature of the regulatory regime referred to by the NEC in its Report 3/2007. Minister Sebastian also refers to *sustainability* as an objective of Spanish energy policy. It is clear that the alleged promises of *blocking* tariffs for 40 years, held by the Claimant, are not in this speech either.

989. The Claimants draw 6 conclusions from Mr. Sebastian's speech[615], the conclusions described are distorted and, therefore, unacceptable. The Claimant simply applies to RD 661/2007 the terms that Mr. Sebastian uses for the general regulatory framework, obviating the applicable legislation and Case law[616]. In addition, they omit the mentions described above, which shape the regulatory framework as dynamic and necessarily sustainable.

990. The cherry picking carried out by the Claimant to attempt to attribute alleged "legitimate expectations" to the Kingdom of Spain are fully unjustified. The forcefulness of the Supreme Court with respect to the appeals filed internally suffices. This constant Case law has been newly resumed by the Supreme Court in the Judgments handed down in relation to RD 413/2014 and Order IET/1045/2014:

*"**this Court has been insisting**, in view of the successive regulatory reforms, that it was not possible to recognise pro futuro an "unalterable right" to the owners of special regime electricity production facilities to the maintenance of the remuneration framework approved by the holder of regulatory power unaltered, provided that the requirements of the LSE are fulfilled as regards the Reasonable profitability of the investments."*

*[...] **the jurisprudence of this Court has been constant over the years** on indicating, in the interpretation and application of the regulatory rules of the legal and economic regime of electricity production from renewable energy sources, that they guarantee the Reasonable profitability of the investments made by the owners of these facilities, but do not recognise their unalterable right to an unaltered remuneration framework approved by the holder of regulatory power (...)"[617] (Emphasis added)*

991. It is inexcusable for the Claimant to have been unaware and ignorant of this constant Case law since 2005 to configure its expectations. And it is inexcusable to use decontextualised sentences from speeches, PowerPoint presentations and press releases to attempt to accredit the will of the Kingdom of Spain before an international Arbitral

[615] Reply on the Merits, paragraph 340.

[616] They use terms and expressions from the speech to attribute them exclusively to RD 661/2007: *"commitment", "appropriate regulation", "careful planning" "long-term stability"* "its goal was to *achieve the maximum contribution of renewable energies."*

[617] Among many others, the Decision handed down by the Supreme Court on 1 June 2016, 1260/2016 (Rec. 649/2014). R-0242.

Tribunal. Greater diligence is requested of all investors in a sector such as the energy sector to become familiarised with the decision-making bodies or legal interpreters of the Spanish legal system.

(3.10) Exchange of letters between Dr. Sultán Al Jaber and the Ministry of Industry.

992. The Claimant has alluded to PowerPoint presentations and Documents subsequent to its investment in 2009, which it asserts "confirmed their legitimate expectations." However, there are Documents subsequent to its investment which have not been provided by the Claimant but that were directly sent to the company ADFEC by the Government of Spain at the beginning of 2010, clarifying the regulatory situation in Spain.

993. In a Letter dated 28 November 2009[618], Dr. Sultán Al Jaber addresses the Ministry of Industry in the context of cordial relations between the two countries. In this letter, he alludes to the trade relations between the two countries and raises the question of the possible delay in the commissioning of the plants until 2013.

994. In its Letter of reply, dated 21 January 2010, the Ministry informed him that:

> *"In the future,* ***the Spanish Government will adopt a new regulatory scheme*** *to adapt the renewable energy legislation to market necessities and technology evolution. In that sense, we are ready to work with the industry in the design of this new regulatory framework and look forward to further contributing to the promotion of renewable energy and develop the necessary infrastructure, with the help of businesses and other stakeholders Government. We also encourage foreign investors to stay tuned for this new piece of regulation. We are aware of companies' important efforts and* ***wish to provide proper regulatory reforms that may allow them to obtain reasonable benefits whilst not jeopardizing the system stability****. Please, do not hesitate to contact me should you require any further information"*

995. This Letter confirmed the theory expounded by the Kingdom of Spain to Dr. Sultán Al Jaber. The regulatory reforms "*may allow* [the investors] *to obtain* ***reasonable benefits*** *whilst not* ***jeopardizing the system stability***". It is an evident direct declaration to the entity actually managed by the Claimant which confirms the dynamic nature of the remunerations, providing reasonable profitability that does not compromise the economic sustainability of the SES.

996. The Ministry's response to Dr. Sultán Al Jaber, through the Secretary of State in January 2010, constitutes an evidently more consistent declaration than the Documents to which the Claimant refers to as "Expectations of the Kingdom of Spain" and which have already been treated.

(4) Conflicting actions

[618] Exchange of letters between the CEO of Masdar and the Ministry of Industry of the Kingdom of Spain, dated 25 November 2009 and 14 January 2010, page 2. R-0158.

997. The measures at issue are the foreseeable result of the operation of the SES, in accordance with its principles and purposes. An objective understanding of the Spanish Regulatory Framework leads to the conclusion that all the measures under analysis are consistent with the accredited principles and aims of the SES. This system was where the Claimants made their investment.

998. When providing the analysis of the measures subject to this arbitration we can make a distinction between the measures prior to the comprehensive reform of the SES and subsequent to it. Among the previous measures we find the following measures: (i) the introduction of the tax on the value of energy; (ii) limiting the use of gas by solar thermal installations; (iii) the updating of remunerations, tariffs and premiums of electricity sector activities to reflect the Consumer Prices Index at constant tax rates, excluding unprocessed food and energy products; and (iv) reducing to zero euros the premium on the electricity put option at production market price plus premium.

999. The measures prior to the comprehensive reform of the SES will be analysed separately. However, we must remember that these measures have been absorbed by the new regulation.

(4.1) Tax on the value of the production of electrical energy (TVPEE)

1000. As already stated, the TVPEE, created by Act 15/2012, is a tax levied on the activities of production and incorporation of electrical energy into the Spanish electricity system. The TVPEE is a measure of general application, that is, it applies to both conventional and renewable electricity producers.

1001. As also discussed, the TVPEE is an income of the Spanish State that is included in the General State Budgets[619]. In addition, it is worth recalling that the Fifth Additional Provision of Act 17/2012, of 27 December, on the General State Budget for 2013, provides that an amount equivalent to the estimated annual revenue arising from the taxes included in Act 15/2012, among them the TVPEE, will be allocated each year to financing the electricity system costs related to the promotion of renewable energies[620].

1002. The economic impact -or rather, the absence of economic impact- of the TVPEE on renewable producers has been analysed on various occasions[621]. In this sense, we should

[619] Excerpts from the General Spanish State Budgets for 2013, R-0053; 2014, R-0054; 2015, R-0052; and 2016, R-0188.

[620] Fifth Additional Provision of Act 17/2012, of 27 December, on the General State Budget for 2013:
"Fifth. Contributions to the Financing of the Electricity Sector
*1. In the Laws of General State Budgets of each year an amount equivalent to the sum of the following will be used to finance the costs of the Electricity Sector relating to the **promotion of renewable energies**, provided for in the Electricity Sector Law:*
a) The estimate of the annual collection derived from taxes included in the Act on tax measures for energy sustainability [Act 15/2012].
b) 90% of the estimated income from auctioning greenhouse gas emission rights, with a maximum of EUR 450 million.
2. 10% of the estimated income from auctioning greenhouse gas emission rights, with a maximum of EUR 50 million, is earmarked to the policy of combating climate change." (emphasis added). R-0118

[621] Counter-Memorial, paragraphs 815 to 827. See also this Memorial, Preliminary Objection E (3.2)(b).

recall that the impact of the TVPEE on renewable producers, as those involved in this arbitration, is neutralised through the regulated remuneration system applicable to them. Specifically, the TVPEE is a cost that is remunerated to renewable producers through the specific remuneration that they receive.

1003. The specific remuneration that renewable receive enables them, as well as obtaining a reasonable return, to recover certain costs that, unlike with conventional technologies, cannot be recovered on the market. This way, renewable producers are allowed to compete in the market on an equal footing with the rest of the technologies. One of the costs that are remunerated to these producers of renewables is precisely the TVPEE.

1004. This neutralisation of the effect of the TVPEE on renewable producers such as those in this arbitration has been recognised by the Claimants themselves, who have expressly stated that "*the effect of the 7 % Levy is neutral in the Actual scenario*".[622]

(4.2) Limitations on the use of gas by thermosolar installations

1005. The Claimants submit that they made their investment with the expectation that the facilities "would have the right to produce a certain amount of electricity using natural gas (12 % under the Fixed Tariff and 15 % under the Premium option)"[623].

1006. However, the Claimant does not reply to the arguments upheld by the Kingdom of Spain. The Claimant's thesis contains significant errors: (i) It ignores the link between Spanish legislation and the related Community directives; (ii) it ignores the evolution of the use of gas within the Spanish regulatory framework; and (iii) it ignores the manner in which the use of the gas is envisaged in the current remuneration model.

(a) The Claimants ignore the link between Spanish legislation and the related Community directives.

1007. Spain is an EU Member State and, therefore, is subject to its Directives, inter alia, those relating to the promotion of renewable energy sources. As pointed out by the Claimants, an assertion which we share, the system of support for renewable energy sources implemented by Spain must comply with the related EU Directives.[624]

1008. The system of public support for the deployment of renewable energy sources, as admitted by the Claimants[625], is linked to the achievement of the implementation objectives established in Community Regulations. Consequently, the activity of producing renewable energy can only be subsidised if it contributes to meeting the implementation objectives laid-down in the applicable regulations.

1009. The Claimants cannot be unaware that, for the purposes of calculating the achievement of the objectives of the implementation of renewable energies within the framework of the European Union, the EU regulations of 2009 expressly state:

[622] Reply on the Merits, para. 357.
[623] Reply on the Merits, para. 361-365
[624] Reply on the Merits, para. 59.
[625] Reply on the Merits, para. 59.

"In Multi fuel plants using renewable and conventional sources, only the part of the electricity produced from renewable energy sources shall be taken into account. For the purposes for this calculation, the contribution of this calculation, the contribution of each energy source shall be calculated on the basis of its energy content"[626].

1010. As opposed to that indicated by the Claimant, said EU Directive was not issued in relation to State aids. Said Directive was issued in relation to the promotion of renewable energies. Its title is as follows:

"DIRECTIVE 2009/28/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC"[627]

1011. Consequently, in facilities such as those of the Claimant, the portion of electricity generation that can be attributed to conventional energy cannot be taken into account for the purposes of evaluating the implementation objectives laid down in EU regulations. This leads to the inevitable conclusion that the Claimants cannot harbour any expectation that the production of electricity from fossil fuels will be subsidised indiscriminately up to a given percentage. This has not prevented the production of energy using gas from being remunerated at pool prices.

1012. In addition to the foregoing, the Claimants cannot forget that Directive 2001/77/EC expressly indicates that renewable energy support systems are subject to Community regulations in terms of Government subsidies. It is thus indicated in Article 4[628] of the aforementioned Directive 2001/77.

1013. From this perspective, the Claimant cannot be unaware of the Community Guidelines on Government subsidies in favour of the environment. In said Directives, in compliance with Directive 2009/28, energy from gas flaring is excluded since it is not considered energy from renewable sources.

1014. The COMMUNITY GUIDELINES ON GOVERNMENT SUBSIDIES IN FAVOUR OF THE ENVIRONMENT of 2008 indicate that:

"energy from renewable energy sources: the energy produced by facilities using only renewable energy sources, as well as the portion in terms of calorific power, of the energy produced using renewable energy sources at hybrid facilities that also use conventional energy sources. It includes the renewable electricity used to fill storage systems, but excludes the electricity produced using said systems"[629]

1015. The Communication of the Commission of 2014 states the following in the same terms:

[626] Directive 2009/28 EC Article 5 (3) (2)-. C-50
[627] Directive 2009/28/EC. C-50
[628] Directive 2001/77/EC. C- 0022.
[629] Guidelines on State Aid for Environmental Protection(2008/C/82/01). Chapter 2.2. Definitions Paragraph 70 subsection 9. R-0063.

"energy from renewable sources»: energy generated by facilities that exclusively use renewable energy sources, as well as the percentage, in terms of calorific value, of the energy produced using renewable energy sources at hybrid facilities that also use conventional energy sources; it includes renewable electricity used to fill storage systems, but excludes the electricity generated using said systems;"[630]

1016. From the viewpoint of Community Law, the Claimants' expectations are unfounded.

(b) The Claimants ignore the evolution of the use of gas under the regulatory framework

1017. The Claimant seems to forget that the use of gas in solar thermal facilities was introduced in the SES by Royal Decree 436/2004[631], modified by Royal Decree 2351/2004.[632]. This last wording was definitively included on Royal Decree 661/2007[633].

1018. The Claimant fails to indicate that solar thermal power plants (group b.1) must use only solar energy as a primary energy for electricity production, which does not include any fossil fuel. Due to being grouped under subgroup b.1.2, RD 661/2007 authorises them to use a single fossil fuel, **within certain limits and for a specific use** "maintenance of the temperature of the heat transfer fluid to *compensate the lack of solar radiation",* and also **under a certain circumstance,** only if that lack of solar radiation "can affect the envisaged delivery of energy".

1019. In none of these wordings was the indiscriminate use of gas to produce electrical energy permitted. In any case, its use was restricted "*solely to maintaining the temperature of the heat accumulator*" in the words of Royal Decree 436/2004 or "*to compensate for a lack of solar irradiation that might affect the planned supply of energy*".

1020. Moreover, at no point did neither RD 436/2004 nor RD 661/661/2007 allow the use of gas to produce electricity separately from the aforementioned uses.

1021. The NEC did not endorse the indiscriminated use of gas in solar thermal plants. The reading of the evaluation carried out by the NEC leads us to a different conclusion to that reached by the Claimants. The NEC indicated:

"The NEC considers positive the possibility of hybridisation of solar thermal facilities in the manner established in the Royal Decree proposal"[634]*. (Emphasis added)*

[630] Guidelines on State Aid for Environmental Protection and Energy 2014-2020 (2014/C 200/01). Subchapter 1.3 Definitions Paragraph 19 point 11. R-0064.
[631] Counter-Memorial, paragraph
[632] Royal Decree 2351/2004, of 23 December, amending the procedure for resolving technical restrictions and other regulatory rules of the electricity market. R- 0119
[633] Royal Decree 661/2007. C-0038_ESP R-150 Bis.
[634] NEC Report 3/2007, of 14 February 2007, regarding the Royal Decree proposal, regulating the activity of electricity production under the special regime. R-0203.

1022. That is, the NEC does not endorse the Claimants thesis. The NEC does not merely point out that it is positive the hybridisation of solar thermal plants. It indicates that the hybridisation of said plants is positive "in the manner" indicated in the draft. As we have observed, the use of gas in RD 661/2007 is allowed in a certain "manner": for certain uses. Beyond those uses it is not possible to take into account the use of gas to configure the premium payment system of solar thermal plants.

1023. At the time of implementation of these regulations, the technical regulations that would define the necessary minimum technical requirements for the use of this support fuel had not yet been approved. That is to say, what minimum support percentage is necessary for the uses indicated for the purposes of making the plant operational. Therefore, the NEC, in its report of 3/2007, endorsed the hybridisation of solar thermal plants.

1024. In line with the foregoing, in its Report dated 7 March 2012, the National Energy Commission indicated that:

> *"Until the necessary minimum technical requirements for the use of conventional fuel for each of the technologies have been established, it is proposed that the establishment a transitional period be established with a single general limitation for all of them that is equal to 5 % of the primary energy.*[635]

1025. In line with Community regulations and that indicated by the NEC, the determination of the amount of gas usable for essential technical uses that do not generate electricity, neither directly nor indirectly, is included in Order IET/1882/2014, of 16 June[636]. The aforementioned Order fixes this amount of usable gas at 300 MWht/MW, which for 50 MW power plants implies reaching 15,000 MWht.

(c) The Claimant ignores the manner in which the use of the gas is envisaged in the new regulation

1026. In the new regulatory framework, as we shall analyse later, the subsudy received by the plants is articulated through two items: Remuneration for investment and Remuneration for operation.

1027. Remuneration for investment covers the investment costs of an installation type that cannot be recovered through the sale of energy"[637] and (ii) the Remuneration for operation covers, where applicable, the difference between operating costs and revenues from the market share of said installation type." Remuneration items that allow all efficient investors to recover their investment and operating costs while also obtaining Reasonable profitability.

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[635] Report on the Spanish Energy Sector, Introduction and Executive Summary, Part I. Measures to guarantee the financial-economic sustainability of the electricity sector, National Energy Commission, 7 March 2012. Pages 23 and 24. R-0098.

[636] Order IET/1882/2014, of 14 October, establishing the methodology for calculating the electricity attributable to the use of fuels in solar thermal power plants. R-0262

[637] Royal Decree-Law 9/2013 of 12 July, establishing urgent measures to ensure the financial stability of the electricity system. Article 1 (2).C-0086 ESP R-0146 Bis.

1028. Operating costs include costs arising from the consumption of gas for essential technical uses. Therefore, Order IET/1045/2014,[638] in line with Order 1882/2014, establishes the consumption of gas that will be covered by Remuneration for operation at 15,000 MWht for 50 MW power plants.

1029. The new remuneration model covers, by means of the corresponding subsudy, (Ro), the costs incurred by plants in the consumption of gas. However, only the consumption of gas technically essential for the operation of a plant. This does not mean that the plants will only be allowed to produce a limited amount of energy using gas. Plants can produce the energy they deem convenient using gas. However, electricity production using gas flaring will not be subsidized which is fully consistent with the purpose of the subsidy system for renewable energies. A minimum understanding of the support system for renewable energies cannot give rise to the expectation that the production of energy using fossil fuels can be subsidised.

1030. Consequently, the measure is based on the fact that the use of gas is technically necessary for the operation of these renewable energy plants. Therefore, the consumption of gas technically indispensable for operating said plants is determined and, on that basis, the technically indispensable gas consumption is subsidised. Envisaging the use of gas beyond that provided in Spanish regulations would give rise to a serious conflict with Community Directives in this regard, since electricity production using fossil fuels would be subsidized as renewable energy. A possibility for which there can be no expectation whatsoever.

1031. The Claimants do not mention in their Memorials how this measure affects their plants. The examination of the documentation provided by the Claimants reveals that the measure analysed has not affected the correct operation of the plants. The annual gas consumption data are obtained from the DISPEROSA[639] reports. Here we can observe that in 2013 and 2014 the power plants have operated correctly and have even exceeded the operating hours envisaged in Order IET 1045/2014 (question to which we will return later) with a gas consumption of less than 15,000 MWht:

	ARCOSOL 50		TERMESOL 50	
	2013	**2014**	**2013**	**2014**
Gas consumption (MWht PCI) *(page 22)*	13,467	7,886	12,820	9,127
Gas consumption (MWht PCS)	**14,963**	**8,762**	**14,244**	**10,141**
Estimated consumption in Order 1882 and Order 1045	**15,000**			

SOURCE: *DISEPROSA reports, Order 1882/2014 and Order IET/1045/2014*

TABLE 6: *Comparison of gas consumption DISEPROSA reports vs Order IET/1045/2014*

[638] Order IET/1882/2014, of 14 October, establishing the methodology for calculating the electricity attributable to the use of fuels in solar thermal power plants. - R-0262
[639] Witness statement by Carlos Montoya of 10 June 2016. Par 45 RW-0002.

1032. Consequently, the measure does not impact the correct operation of the plants. These, with the related measure, have improved electricity production using renewable energy sources.

1033. In the new regulation, the higher investment costs incurred by the developer, in order to allow the use of gas in its facility, were taken into consideration when establishing the *investment cost* of the corresponding installation type[640]. Consequently, the Claimants will obtain the return of the amounts invested in equipping the plants with the necessary tools for the use of gas and will also obtain a profitability of 7.398% on installation type.

1034. Consequently, the measure is based on the fact that the use of gas is technically necessary for the operation of these renewable energy plants. Therefore, the consumption of gas technically indispensable for operating said plants is determined and, on that basis, the technically indispensable gas consumption is subsidised.

(4.3) Revision of remunerations in line with the Consumer Price Index at constant tax rates, excluding unprocessed foods and energy products

1035. This measure did not eliminate the updating of remunerations, tariffs and premiums. It simply replaced one updating index with another more in keeping with the normal calculation standards of the consumer price indices in the international economy with the objective of avoiding distortions in the consumer price index, as was noted in the Counter-Memorial[641].

1036. Furthermore, the Claimants omit to mention that the updating mechanism set out in article 44 (1) was generated in favour of producers and to the detriment of the Spanish Energy System, an over-remuneration that it was necessary to correct. This was stated in the National Energy Commission report of 7 March 2012[642]. We will return to this question later.

1037. However, this measure has been absorbed by the new regulations under the terms that we shall analyse later. As demonstrated in our Counter-Memorial, during the time in which the new measure was in force, it did not cause any adverse effect for the Claimants. Moreover, they were favoured by the measure due to the better performance of the CPI at constant taxes without unprocessed foodstuffs or energy products than the CPI.[643]

(4.4) Reduction to zero euros of the premium in the option of selling electrical energy at production market price plus the premium.

[640] Witness statement of Mr. Carlos Montoya of 15 September 2015. Paragraph 34. RW-0001.
[641] Counter-Memorial, paragraphs 732 to 754
[642] *Report on the Spanish Energy Sector Part I. Measures to guarantee the economic-financial sustainability of the electricity system,* National Energy Commission, 7 March 2012, page 22. R-0098.
[643] Counter-Memorial, paragraph 711

1038. The introduction of this measure made it possible to eliminate a situation of over-payment that derived from this option. This was stated in the Preamble to Royal Decree Law 2/2013[644]and the National Energy Commission made it clear on 7 March 2012[645]. However, the Claimant Party has made no statement in this regard.

1039. Likewise, the Claimants ignore the relationship that exists in the Spanish regulatory system between the regulated tariff option and the pool plus premium option. Likewise, it is unaware of the purpose for which the pool plus premium option was established. Likewise, it is unaware of the evolution of this option in the different remuneration models.

(a) Relationship between regulated tariff and pool plus premium.

1040. The Claimants are unaware of the connection between the two options. The pool plus premium option as remuneration option separated from the regulated tariff arose from RD 436/2004.

1041. Through said distinction, a remuneration option was established in which the producers assumed the market risk.

> *"The new regulatory and remuneration model that introduces the Royal Decree proposal improves the transparency of the special regime system, since it clearly separates in into two activity modalities:*
>
> *- Activity without risk, in which a stable remuneration is guaranteed, and in addition, for renewable energies it fulfils the legal provision that its remuneration be situated within the "range of 80%-90% of the average price of electricity."*
>
> *- Activity with risk, since apart from the premium and incentive, the rest of the remuneration is completely fee."*[646]

1042. In this environment, the regulated tariff remunerated the activity without risk:

> *"The regulated tariff establishes a remuneration that is always equal to or greater than the average market price, due to which it is remunerated in all cases, considering the rest as a (variable) premium"*[647]

1043. The pool plus premium option was the remuneration of the activity with risk. In this option, the producer received the market price, with its fluctuations, and a premium, also assuming the costs of participating in the market. Therefore, in this remuneration option RD 436/2004 also included the payment of an *"incentive"* aimed at promoting participation in the market.

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[644] Counter-Memorial, paragraph 716

[645] *Report on the Spanish Energy Sector Part I. Measures to guarantee the economic-financial sustainability of the electricity system,* National Energy Commission, 7 March 2012, page 23. R-0098.

[646] NEC Report 4/2004, of 22 January, regarding the Royal Decree proposal, which establishes the methodology for the updating and systematisation of the legal and economic regime for electricity production in the special regime. Page 17. R-0221.

[647] Ibid. page 18.

1044. The reason for implementing this second remuneration option was the need to increase the efficiency of the SES.

> *"The proposed Royal Decree incentivises the participation of the special regime in the market as the main mechanism for contributing efficiency to the system as a whole With this, in addition to the increase in the number of market players and their consequences on the competition, the operation of the system benefits from considering that special regime facilities contribute their energy under better conditions for operating the system as a whole.*
>
> *In this regard, the intention is not to discriminate the granting of the incentive among the technologies that participate in the market. If this incentive is granted in the proposed Royal Decree to cogeneration, it should also be granted to the other technologies. Also, the proposed premium seems insufficient, since its design is due to a complement of market remuneration, due to which in the best of cases the remuneration would be equated to the tariff-based remuneration (at least during the first years). The result of this, as we shall see later, is that there is no apparent incentive for the participation of the special regime in the market. The NEC understands that the premium, together with the market remuneration, must remunerate the facilities in order to obtain Reasonable profitability - parameter A - and to achieve the planned objectives - parameter B -, while the incentive must precisely constitute an additional remuneration when the owner of a facility increases the rating of its energy, endowing it with a short-term warranty and participates in the market. This action must be remunerated by means of parameter C, which precisely constitutes the differential remuneration with respect to the regulated tariff option."*[648]

1045. The two remuneration items are closely related. The amount of the premium is derived from the regulated tariff. In this regard, the Statement of Regulatory Impact of RD 436/2004 establishes the following link:

> *"Premium: this will be a percentage of the average or reference electricity tariff each year, equal to the percentage of the regulated tariff (hypothesis 9) discounting the percentage corresponding to the estimated market price (50%, hypothesis 7)."*[649]

1046. Consequently, there cannot be differences between one remuneration option and another in terms of calculation of project profitability. The difference lies only in that the produces who opt for the option with risk would receive an incentive. Exclusively created to stimulate market participation and also to offset the costs of the aforementioned participation for producers:

> *Incentive: Self-generators are entitled to receive an additional sum or incentive for participating in the market when they sell their surplus on the market. This will be a percentage of the average or reference electricity tariff each year, depending on the technology, the life of the plant and the installed capacity.*[650]

[648] Ibid. pages 20 and 21
[649] Report RD 436/2004. Page 7/10. R-0220.
[650] Ibid. Page 7/10.

1047. RD 661/2007 maintains the regulated tariff and pool plus premium option, but not for all technologies. Said option was eliminated, inter alia, from photovoltaic technology, which could only access the regulated tariff.

1048. The impossibility of photovoltaic technology accessing this option did not pose a problem for the Sector. With the regulated tariff option, photovoltaic producers could achieve Reasonable profitability guaranteed by Act 54/1997. At this point, Pöyry warned the Claimants that:

> *"Solar PV projects will not however be exposed to the pool Price, it is simply a way of integrating the energy into the market for reasons of grid dimensioning and ensuring grid stability and not as a means of setting remuneration"*[651]

1049. Notwithstanding the foregoing, RD 661/2007 maintains the essence of the distinction between pool plus premium and regulated tariff as established by RD 436/2004, although with the incentive that existed in the pool plus premium option in the premium:

> *"The incentive to participate in the market, which is united with the premium and is even included therein, disappears"*[652]

1050. However, the reason for the existence of the pool plus premium option was not to grant greater profitability. The purpose of this option, as in RD 436/2004, was to incentivise participation in the market to increase the efficiency of the SES[653].

(b) The Claimant party is unaware of the reasons for adopting this measure

1051. Due to its unawareness of the relationship between regulated tariff and pool plus premium, in addition to the purpose of the second option, the Claimants reject the reasons for adopting the measure being examined.

1052. The reasons for the measure were expounded by the NEC in its report where it indicates that the internal consistency between the regulated tariff and pool plus premium option had been lost, giving rise to over-remuneration situations in this second option. It therefore indicated that:

> *"Current regulation is not consistent with respect the relative values of the thermoelectric solar premium and tariff (the current tariff is worth 298.96 euros/MWh while the premium is worth 281.89 euros/MWh, representing a theoretical market price of 17.1 euros/MWh). Since the economic and financial study of the facilities is carried out with the regulated tariff, for an average market price of 50 euros/MWh, the premium should have a value of 249 euros/MWh, which is 12% lower than the current premium. In a first approximation, the premium*

[651] "Current and Future Trends in the Spanish Solar System". Pöyry March 2009 Edition. Page: 40 C-0049

[652] Report RD 661/2007. R-0229.

[653] NEC Report 3/2007, of 14 February 2007, regarding the Royal Decree proposal, regulating the activity of electricity production under the special regime. Page: 35. R-0203.

corresponding to the solar thermal power plants would have to be reduced by 12%"[654]

1053. Consequently, the pool plus premium option was generating considerable over-remuneration, since it was based on an excessively low market price.

1054. At this point we must remember that the measure analysed was not a novelty in the Spanish regulatory market. RD 661/2007 deprived photovoltaic technologies, among other technologies, from the market option. The Claimants were aware of this, as pointed out by "Pöyry". The consulting firm had already warned that the "pool plus premium" option *"is simply a way of integrating the energy into the market for reasons of grid dimensioning and ensuring grid stability and not as a means of setting remuneration"* (Emphasis added)

1055. Furthermore, we must take into account that its sole effect was to stop promoting the participation of the plants in the market. Reason for which the pool plus premium option was created.

1056. Consequently, the measure did not affect the commitment arising from the legal mandate of granting the plants Reasonable profitability. The aforementioned plants continued to receive the regulated tariff. It should also be noted that the financial models were built upon the regulated tariff option and not the pool plus premium option.

(4.5) New remuneration model for energy production based on renewable sources

1057. The Claimant asserts that the report is not justified and that the new remuneration model entails a complete revision of the previous remuneration framework. Nonetheless, these assertions derive from an erroneous understanding of the remuneration framework in which the Claimants made their investment. As we shall explain below, a large part of the elements that define the new remuneration system were already included in Act 54/1997.

(a) The new remuneration model maintains the priority of access and dispatch.

1058. The regulation maintains the principles of priority of access and dispatch of electrical energy generated by the installations using renewable energy sources and high-efficiency cogeneration. The new regulation even extends beyond what is set out in the EU regulations[655] and adds explicit recognition of this privilege, as it was not included in the previous regulations in the same way.

1059. With regards to priority of dispatch, Article 26 of Act 24/2013, states that:

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[654] *Report on the Spanish Energy Sector Part I. Measures to guarantee the financial-economic sustainability of the electricity sector*, National Energy Commission, 7 March 2012. Page 23. R-0098.

[655] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. Article 16(2) (c): "*Member States shall ensure that when dispatching electricity generating installations, transmission system operators shall give priority to generating installations using renewable energy sources in so far as the secure operation of the national electricity system permits and based on transparent and non-discriminatory criteria.*" R-0263.

"Electrical energy from installations that use renewable energy sources and, after that, energy from high efficiency cogeneration installations, will have priority of dispatch under equal economic conditions in the market, without prejudice to the requirements that are necessary to maintain the reliability and security of the system in the terms defined by the Government.

Without prejudice to the security of supply and the efficient operation of the system, producers of electrical energy from renewable energy sources and high-efficiency cogeneration will have priority of access and connection to the network, under the terms that are determined by the regulations, based on objective, transparent and non-discriminatory criteria."[656]

1060. From a simple reading of this regulation it is apparent that priority of dispatch and access and connection to the network are rights that producers of energy from renewable sources have. This right can only be limited for reasons of reliability and security of the Spanish Energy System. Furthermore, in contrast with what was laid-down by the previous Regime, this priority of dispatch even takes precedence over high-efficiency cogeneration installations.

(b) The remuneration system maintains the objective of endowing the investor with Reasonable profitability from a project

1061. Both the previous model and the current one share as an objective the idea that the system of subsidised support for renewable energy should allow investors to obtain "a Reasonable profitability" from a project. A Reasonable profitability is understood as the investor recovering the investment costs it has made to construct a plant, its operating costs and also make an adequate profit.

1062. An initial element that might imply a significant difference is that under the previous system the reasonableness or not of the profitability was determined "*in accordance with cost of money in the capital market*"[657]. The Law now requires that the principle of reasonable profitability shall be based on a specific capital market: namely the *secondary market of the State's ten-year bonds plus the adequate differential*". It is specifically stated that:

"This Reasonable profitability will be based, before tax, on the mean return in the secondary market of the State's ten-year bonds plus the adequate differential"[658].

1063. The new system, like the previous one, is built upon the principle of Reasonable profitability. However, the Claimants indicate that the new system is not built upon said principle because the new wording of Article 30 (4) indicates that the facilities "*may receive"*[659] the subsudy which, together with the market price, will allow them to achieve

[656] Act 24/2013, of 26 December 2013, on the Electricity Sector, published in the Official State Gazette of 27 December 2013. Article 26 (2). R-0192.
[657] Act 54/1997, of 27 November, on the Electricity Sector. Article 30 (4). R-0191
[658] Royal Decree-Law 9/2013 of 12 July, establishing urgent measures to ensure the financial stability of the electricity system. Article 1 (2).). C-0086 ESP R-0146 Bis.
[659] Counter-Memorial, paragraph 385 (a)

Reasonable profitability. The Claimants indicate that prior, the subsudy was not a possibility, but rather an obligation[660]. Said argument is incorrect.

1064. As expounded previously in Section IV.A.1.6(e), the previous system established a specific mechanism for remunerating the production activity using renewable energy sources based on market price plus a subsudy, for the purpose of granting Reasonable profitability on investment.

1065. The subsidies, like now, were a supplementary remuneration that, together with the market price, were aimed at achieving Reasonable profitability. It should be recalled that Article 30 (4) used the expression "*shall supplement each other*" and that said supplement is established "*for the purpose of achieving Reasonable profitability rates with reference to the price of money on the capital market"*

1066. Consequently, the perception of subsidies in the previous remuneration model, like this one, was linked to the Reasonable profitability objective. Therefore, in the previous model when the plants achieved the aforementioned profitability objective they would not be creditors of any subsudy. Upon achieving the profitability objective, the plants would have reached the "level playing field" to compete on equal terms with conventional energy.

1067. In line with the foregoing, the Claimant forgets that Article 16 of Act 54/1997 indicated that:

> *" The remuneration of the production in plant busbars of the special regime producers shall be that corresponding to electricity production, in accordance with section 1 of this Article* ***and, where applicable****, a premium that will be determined by the Government, upon consultation with the Autonomous Regions, pursuant to Article 30.4."*[661] *(Emphasis added)*

1068. The Claimant party also forgets that the Supreme Court of the Kingdom of Spain clearly defined the scope of the concept of Reasonable profitability with regard to the duration of subsidies:

> *"the principle of Reasonable profitability must be applied [...] to the whole lifespan of the la installation, but not [...] in the sense that it this principle guarantees the generation of profits for all of this lifespan, but rather in the sense that it is ensured that the investments used in the installation obtain a Reasonable profitability over its lifespan as a whole. This [...] does not entail the continuance of a given premium during all of the lifespan of the installation, as it can it could well be the case that said investments have already been amortised and have produced a Reasonable profitability long before the end of their period of operation."*[662].

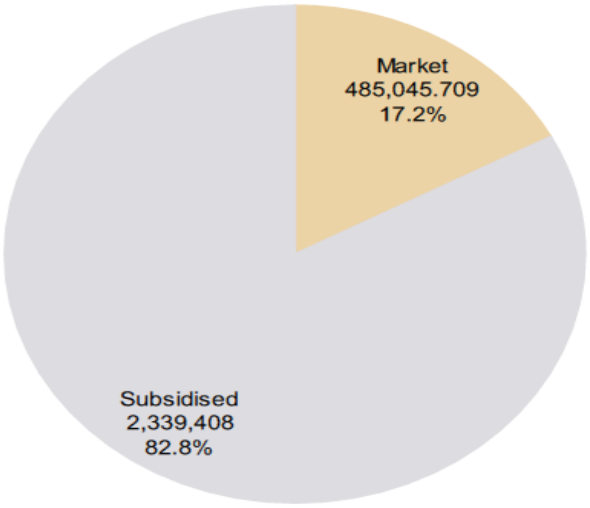
[660] Counter-Memorial, paragraph 385 (a)
[661] Act 54/1997, of 27 November, on the Electricity Sector. Article 16 (7) R-0191.
[662] Judgement of the Spanish Supreme Court of 12 April 2012, app. 40/2011 (R-0080)

1069. Consequently, the previous model did not guarantee any subsidy "per se". The previous model guaranteed the subsidies until the plants achieved the Reasonable profitability objective.

1070. It should be noted that in the first regulatory period this differential was 300 basis points[663]. This assumes a pre-tax profitability of 7.398 for a efficiency. In the previous one, the formula for calculating profitability was not set out in the Law. The Law referred their establishment to the so-called Renewable Energy Plans. So, in the 2005-2010 Renewable Energy Plan, profitability was set at "*approximately 7 % for a efficiency after taxes and without external financing*[664]".

1071. However, as regards the argument raised by the Claimants, following is a table showing the total revenue of the plants to be received during their useful life until achieving the profitability objective. Said table expresses that the plants, for carrying out their activity, producing energy, will receive 17.2% of their revenue and 82.8% of their revenue by way of subsidies. With these data, can it really be upheld that the Kingdom of Spain has withdrawn its support to the renewable energy industry?[665]:

Figure 4.3 - Total revenues of the plants of the Claimant during their lifetime



Source: Exhibit BQR-60, Exhibit BQR-61, Exhibit BQR-62, Exhibit BQR-64, Exhibit BQR-65, OMEL and Accuracy analysis

[663] Royal Decree-Law 9/2013 of 12 July, establishing urgent measures to ensure the financial stability of the electricity system. First additional provision. C-0086_ESP R-0146 Bis.
[664] Spain Renewable Energy Plan. 2005-2010. Institute for Diversification and Energy Saving of the Ministry of Industry, Tourism and Trade. Pages 274.R-0201.
[665] Accuracy, First "Economic report on the Claimant and its claim". Paragraph 440.

1072. In this point the new System not only maintains continuity with the previous System, but also gives investors greater security, because (1) it passes into law the profitability that must be conferred upon the investors (objective pursued by the sector for a long time); and (2) it identifies the specific capital market that must be used to establish profitability.

(c) The two remuneration frameworks maintain the same structure to meet this objective

1073. As we have already explained, in the previous model the Reasonable profitability objective should have been the result of the sum of two elements: the market price and a subsidy[666]. At present, the new model maintains the same Reasonable profitability structure that must be attained through the sum of two components: market price and a subsidy that can be broken down into two elements: Remuneration on investment and Remuneration on operation.

1074. Specifically: (i) Remuneration for the investment: "Composed of an amount per unit of installed capacity, shall cover, as appropriate, the investment costs of a standard installation that cannot be recovered through the sale of energy"[667] and (ii) the Remuneration for operation: is an "amount for the operation of the installation to cover, as the case may be, the difference between exploitation costs and the revenues obtained from the participation of such a standard installation in the market"[668].

1075. The difference lies in the fact that the previous model grouped the three elements that must be remunerated into a single item (regulated tariff or pool plus premium): (i) recovery of the cost of investment; (ii) recovery of the operating cost; and (iii) obtainment of Reasonable profitability. Once these three elements have been considered, we can obtain the subsidy paid per unit of energy produced. In this manner, market price plus the subsidy made it possible to achieve the Reasonable profitability required by Law.

1076. The current model, like the former, is established for the purpose of remunerating the three same aforementioned elements. Likewise, in the new model the same means are used to remunerate those elements: market price and the subsidy.

1077. However, the subsidies are paid in a disaggregated manner. One portion with respect to the rated power and another portion with respect to the energy produced. In general, market revenue and, where applicable, the Remuneration on the operation (Ro) remunerates operating costs. Secondly, surplus market revenue, after covering operating costs, if any, together with the Remuneration on investment (Ri) remunerate the investment costs and the obtainment of a Reasonable profitability.

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[666] Act 54/1997, of 27 November, on the Electricity Sector. Articles 16 and 30 (4). R-0191.

[667] Royal Decree-Law 9/2013 of 12 July, establishing urgent measures to ensure the financial stability of the electricity system. Article 1 (2). C-0086_ESP R-0146 Bis.

[668] Royal Decree-Law 9/2013 of 12 July, establishing urgent measures to ensure the financial stability of the electricity system. Article 1 (2). C-0086_ESP R-0146 Bis.

1078. This does not mean that the production of the plants is ignored. The aforementioned production is also taken into account to calculate the subsidies.

1079. As regards that formerly expounded, we must make a substantial correction. In the former model, the paid production hours were not unlimited. As already expounded in Section IV.A.1.6(e), the subsidies established in RD 661/2007 were based on the PER 2005-2007. Important regulatory tool omitted by the Claimants.

1080. In said PER it was clear that the subsidy was not attributed to all electricity production. In said PER, the subsidy was attributed to a certain number of productions hours. Specifically to those production hours that allowed the plant to obtain the Reasonable profitability established in said planning tool. Until achieving a profitability objective of 7% on a installation type. Which did not preclude that if the standard number of production hours was exceeded, the plants could obtain the market price for that additional production.

1081. The circumstance that we have just expounded gave rise to the determination by RD 1614/2010 for solar thermal facilities and wind farms and RD-Law 14/2010 of the maximum number of production hours paid in line with that established in the PER 2005-2010. Specifically, the Statement of Regulatory Impact of RD 1614/2010 indicated the following:

> *"The remuneration values of Royal Decree 661/2007 were calculated in order to obtain Reasonable profitability rates and taking as a starting hypothesis the average number of operating hours of the facilities of these three technologies.*
>
> *These operating hours are found in the Renewable Energy Plan 2005-2010, for all technologies.*
>
> *Subsequently, in the real operation of the system, it has been demonstrated that the operating hours of the facilities, in some cases, exceed those initially envisaged, for different reasons: technological improvement, over-installation, etc. In any case, this meant that, for them, the remuneration being obtained is greater than the reasonable remuneration.*
>
> *This royal decree envisages that the facilities will receive an equivalent premium or premium, as applicable, until exhausting the number of reference hours each year and may subsequently continue to operate, being remunerated for their energy at market price. In this manner, the over-remuneration received by the facility is returned to society."*[669]

1082. In this point it should be recalled that Act 54/1997 never froze a specific formula or mechanisms where through Reasonable profitability could be obtained. Moreover, Act 54/1997 did not link the receipt of the subsidies to the energy produced. Consequently, since 2006 the Spanish Supreme Court has interpreted article 30.4 of Act 54/1997, stating that:

[669] Report on the Analysis of the Regulatory Impact of the Draft Royal Decree 1614/2010 regulating and modifying certain aspects related to electricity production using solar thermal and wind power technologies. R-0239.

"the remuneration system that we examined does not guarantee (...) the owners of special regime facilities the intangibility of a certain level of profit or revenue in relation to those obtained in previous years, nor the indefinite continuance of the formulas used to set the premiums"[670]*. (Emphasis added).*

1083. Along this same line, this jurisprudential case law of 2006 was subsequently reiterated in a Decision handed down on 3 December 2009[671] and in two Decisions on 9 December 2009.[672] . In this regard, we must highlight that pointed out by the Supreme Court in the last of the aforementioned Decisions.

"It should be noted that the establishment of the economic regime for facilities operating under the special electricity production regime, proposed by Royal Decree 661/2007, of 25 March, cannot be rated ***en abstracto de arbitrario****, since it is conditional upon the objective of ensuring Reasonable profitability throughout the useful life of these facilities, such that the Government, pursuant to Article 15.2 of Act 54/1997, of 27 November, of the Electricity Sector, is authorised to approve the methodology for calculating and updating the remuneration of said activity with objective, transparent and non-discriminatory objectives (...)" (Emphasis added)*[673]

1084. In any case, both remuneration schemes share the same purpose: to endow the plants with Reasonable profitability on investment costs. Also, in the two models the same components are taken into account to achieve said purpose: market price and the subsidy that supplements the former. The essence of the remuneration model envisaged in Act 54/1997 is currently maintained.

1085. Moreover, the current model, like the former and with the aim of exceeding the established standards for installation types, incentivises electricity production. Proof of this is the Claimant's behaviour.

1086. As pointed out by Mr. Carlos Montoya, the Claimant has carried out technical improvements in the plants to increase their production. This investment implies:

"This decision to carry out improvements that imply a certain investment cost is therefore taken to exceed the number of production hours with right to receive Ro, when the remuneration is exclusively market remuneration. As can be observed in the table below, this production with right to premium remuneration had already been exceeded in 2013, which proves that it is economically feasible to exceed said limitation, to the point that for the Claimants it is worth investing to exceed it."[674]

1087. In this same line, Mr. Carlos Montoya expresses that the Claimant's action has been aimed at increasing the production of the plants: :

"(...) that the owner of the plants ARCOSOL and TERMESOL considers it profitable to maximise the production of the plants within the framework of RD 413/2014 and

[670] Judgement from the Third Chamber of the Supreme Court dated 25 October 2006, Appeal 12/2005, reference El Derecho EDJ 2006/282164 (Spanish). Third Legal Basis. R-0071.
[671] Judgement of the Supreme Court, of 3 December 2009, Third Point of Law. R-0076.
[672] Judgement from the Third Chamber of the Supreme Court, of 9 December 2009 R-0077
[673] Judgement of the Supreme Court, of 3 December 2009, Fourth Point of Law. R-0076.
[674] Second statement by Mr. Carlos Montoya on 6 June 2016. Paragraph 49.

Order IET/1045/2014, since it is willing to pay if the operator achieves productions superior to those guaranteed in the contract (as reflected in the DISEPROSA reports, pages 62-64), proving that above the Ro remuneration limits it is still profitable to continue production."[675]

(d) Both models correspond to the same concept of efficiency

1088. The current Remuneration System corresponds to the same efficiency model on which the former was based. The Spanish Regulatory Framework has always maintained the same concept of efficacy and efficiency when designing the system for supporting the growth of renewables.

1089. Effectiveness has always been judged by achieving certain objectives and efficiency by achieving said objectives at the lowest possible cost for the benefit of the SES, end consumers and producers. Furthermore, this concept of efficiency should not only be conceived as a standard for correct regulation, but that it has always been an imposition established by the Spanish regulatory framework since Act 54/1997 and it is now maintained in the remuneration framework.

1090. In this sense, we should recall that Act 54/1997 stated specifically that the purpose of the Spanish Energy System, just like the new regulatory framework, was:

"to guarantee that all consumers have equal and quality access to electricity, ensuring that this is done at the lowest possible cost, without neglecting environmental protection"[676] *(Emphasis added).*

1091. In this way, aid or subsidies for renewables, as a cost of the Spanish Energy System, cannot differ from that aim. This concept of efficiency was also included in the 2005-2010 Renewable Energy Plan when it stated that:

"The analysis conducted aims to balance the application of resources so that levels of return on investment are obtained that make it attractive relative to other alternatives in an equivalent sector in terms of profitability, risk and liquidity, always aiming to optimise available public resources."[677] *(Emphasis added).*

1092. Furthermore, the 2005-2010 Renewable Energy Plan makes clear the enormous quantity of resources that were to be necessary to set in motion the launch of renewables. Costs that the Spanish consumer would defray. When analysing this piece of information, could anyone think that the investment and operation costs that will be paid by the consumer were not going to be those referring to an efficient and well managed business? That is to say, could any sophisticated investor think that the costs would be paid by the consumers at any price, whatever it might be?

[675] Second statement by Mr. Carlos Montoya on 6 June 2016. Paragraph 53.
[676] Act 54/1997, of 27 November, on the Electricity Sector. Preamble and Article 10. R-0191.
[677] Spain Renewable Energy Plan. 2005-2010. Institute for Diversification and Energy Saving of the Ministry of Industry, Tourism and Trade. R-0201.

1093. Consequently, the new model of remuneration, like the previous one is based on the same concept of efficiency. Although it is now expressly included in the law as it establishes that:

> *"To calculate said specific remuneration, they shall be taken into consideration, for a efficiency throughout its regulatory lifespan and in reference to the activity performed by an efficient and well-managed company"*[678]

1094. The aforementioned efficiency model was reflected in the articulation of different installation types that included the corresponding standards. The referred criteria is followed in the new remuneration model, as we expound in the following point.

(e) Both models establish the subsidies based on the standards set for the different standar installations.

1095. The subsidies that derived from Royal Decree 661/2007 were not laid-down in contemplation of each investor's individual plants. Said subsidies were intended to achieve certain profitability on the investment costs established at standard installation.

1096. As required by Act 54/1997, the subsidies set by Royal Decree 661/2007 were based on the corresponding Renewable Energy Plan[679]. In particular, Renewable Energy Plan 2005-2010. In this Renewable Energy Plan, the methodology used to determine profitability of around 7 % was set out, where it stated that:

> *"Taking as a baseline the proposed energy objectives, the financing requirements have been determined for each technology according to its profitability, defining a range of standard projects for the calculation model.*
>
> *These standard projects have been characterised by technical parameters relating to their size, equivalent operating hours, unit costs, periods of implementation, lifespan, operating and maintenance costs and sale prices per final unit of energy. Likewise, financial assumptions and a series of financial or support measures designed in accordance with the requirements of each technology have been applied" 680*

1097. Consequently, the concepts of efficiency, standards and parameters are not a novelty introduced by the current regulatory framework. These concepts, as examined previously in Section IV.A.1.6(e) of this document, already existed as a basic element for setting the subsidies in the previous model. Therefore, the only thing that the new regulatory framework does, is that, instead of referring to a Renewable Energies Plan to set them, the concept is expressly included in the Law. Once the concept is established in the law,

[678] Royal Decree-Law 9/2013 of 12 July, establishing urgent measures to ensure the financial stability of the electricity system. Article 1 (2). C-0086 ESP R-0146 Bis

[679] Act 54/1997, of 27 November, on the Electricity Sector. 25th additional provision. R-0191.

[680] Spain Renewable Energy Plan. 2005-2010. Institute for Diversification and Energy Saving of the Ministry of Industry, Tourism and Trade. pp. 273, 274 and 280. R-0201.

these parameters and standards are introduced in a Regulation[681] and a Ministerial Order[682].

1098. However, multiple standard installations are now included to match the different existing investment options[683]. The regulatory framework in force differentiates between the different CSP technologies (parabolic cylinder, steam tower, salt tower, Fresnel reflectors or hybrid) to determine specific remuneration parameters for each of them based on the standard value of the initial investment and on their standard exploitation costs, all of this for an efficient and well-managed company.

1099. In this point the Respondent, following Brattle's opinion, considers that the use of standard installations and standards is aimed at establishing a reasonable profitability *"on top of an implicit cost target".*

1100. Both the Claimant and Brattle ignore that, in the previous remuneration model, the subsidies were based on the PER 2005-2010. In said PER 2005-2010, as in the case of PFER 2000-2010, the subsidies arose from a specific methodology:

a) Recognising and reconstructing an economic operating structure (installation type), identifying the standard investment costs (CAPEX) and their operating and maintenance costs (OPEX), according to the actions of a "diligent investor". installation types;

b) Set a balanced and proportional economic return objective, in terms of Reasonable profitability on an standard installation.

1101. Consequently, if the plants adjusted or improved the established standards for a standard installation (investment costs, operating costs, etc.), they would achieve or improve the profitability considered reasonable. In this regard, the Economic Report of RD 436/2004 indicated:

> *"The A parameter (investment, operation and maintenance costs for each technology) has great weight in setting the amount of the regulated fee sold to the distributor. Thus, any plant in the special regime installed in Spain will get Reasonable profitability, provided that it is equal or better than that of the group (standard plant type)"*[684].

1102. The Claimant indicates that said methodology had never been expressed by the Regulator[685]. However, we must remind the Claimant that Pöyry expressly pointed out that:

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[681] Royal Decree 413/2014, of 6 June, which regulates the activity of the production of electric energy from renewable energy sources, cogeneration and waste. R-0112.
[682] Order IET/1045/2014, dated 16 June, approving those compensation parameters for standard energy facilities applicable to certain electric power production facilities from renewable energy sources, cogeneration and waste. R-0113.
[683] Statement by Carlos Montoya of 15 September 2015. Paragraphs 15 to 28. RW-0001.
[684] Financial Report of RD 436/2004 R-0220.
[685] Counter-Memorial, paragraph 385 (b)

"The PER sets out the specific growth projections for each technology and breaks it down by autonomous region. Using the PER´s the Government then sets a tariff (published in the form of a Royal Decree) for each technology depending on the level of growth that is required

The PER´s are the best indication of the future development of the different renewable technologies."[686]

1103. That is, if the Claimant had followed Pöyry's advice, it would have known the methodology used to set the subsidies of RD 661/2007. However, taking into account the Claimant's statements in its Memorials, it seems that it did not follow the advice included in the Due Diligence contracted for such purpose.

1104. The Claimant also points out that the standard installations used in the new remuneration model do not reflect the real investment and operating costs[687]. This assertion is completely unfounded.

1105. The object of this arbitration is not to analyse the calculations made for the more than 1,000 standard installations. However, the Claimants do not provide a single piece of evidence that justifies that the standards applicable to the investment and operating costs of the standard installations do not correspond to real costs.

1106. However, the Claimant could have easily demonstrated to the Arbitral Tribunal that the costs of standard installations where its plants are included do not correspond to their investment and operating costs. However, the Claimants do not dedicate a single paragraph to this question.

1107. Against this silence, we will expound to the Arbitral Tribunal the comparison between the plants related to this arbitration and the standards included in the installation types where the Claimants' plants are located:

1108. In relation to the investment costs in the Arcosol 50 Plant, the technical advisor who prepared the technical evaluation report for the refinancing of the plant reflects the following in its report:[688]

"The investment ratio amounted to €6.2/W installed, a figure in line with the standard value data from the initial investment considered in Annex VIII (Parameters considered for calculating the remuneration parameters for standard installation type) of the aforementioned Order. As stated in the report drawn up by ALATEC in 2009 for project financing, this ratio fell within the usual investment range for parabolic trough installations with a similar storage capacity."

1109. Likewise, in relation to the cost of the investment in the Arcosol 50 Plant, the technical advisor who prepared the technical evaluation report for the refinancing of the plant reflects the following in its report: [689]

[686] "Current and Future Trends in the Spanish Solar System". Pöyry March 2009 Edition. Page 37 C-0049
[687] Counter-Memorial, paragraph 385 (b)
[688] "Technical assessment report for the refinancing of the ARCOSOL 50 solar thermal plant located in San José del Valle (Cádiz)." Page 42.-R-0265.

"The investment ratio amounted to €6.2/W installed, a figure in line with the standard value data from the initial investment considered in Annex VIII (Parameters considered for calculating the remuneration parameters for standard installation type) of the aforementioned Order. As stated in the report drawn up by ALATEC in 2009 for project financing, this ratio fell within the usual investment range for parabolic trough installations with a similar storage capacity."

1110. As regards the investment cost corresponding to the Gemasolar Plant, its standar installation reflects an investment costs higher than those actually made by the Claimant in its construction. Specifically, a difference of 11.7% in the Claimant's favour[690]

1111. From the foregoing it can be inferred that the investment costs included in the Order have not been fixed retroactively nor are detached from the costs actually incurred by the Claimant. Even for the Gemasolar Plant, its standard investment cost is very advantageous. However, the Claimants, faced with the forcefulness of the facts that we have just expounded, have nothing to say in this regard.

1112. As regards operating costs, in accordance with that reflected by the aforementioned technical advisors and the comparison prepared by Mr. Carlos Montoya, it appears that:

"Based on the foregoing, it can be concluded that the investment costs corresponding to the claimant plants are lower than those considered in the Order. Likewise, it can be concluded that the operating costs corresponding to the claimant plants are lower than those considered in the Order, except the item relating to the lease of the plot of land, which is completely disproportionate compared to average market values"[691]

1113. In this point we must reproduce that pointed out by Mr. Carlos Montoya, where he indicates that:

"The cost of the properties envisaged in Order IET/1045/2014 is compatible with that considered in the "Due Diligence Report" prepared by BNP PARIBAS on 24 January 2008 and provided by the Claimants with reference C-0043. Page 56 of the aforementioned report includes a plot lease cost at TERMESOL 50 of EUR 645,000 per year, far below the cost of EUR 1,969,004 reflected in the DISEPROSA report"[692]

1114. Consequently, in terms of operating costs, Order IET/1045/2014 is not vitiated by any arbitrariness or retroactivity. The operating costs adapt correctly to the Claimant's plants.

(f) Both models have the dynamic character that is typical of a System based on Reasonable profitability.

1115. One of the features of the Spanish Energy System, based on the Reasonable profitability mandate, was its dynamic character. The remuneration model arising from

[689] "Technical assessment report for the refinancing of the TERMESOL 50 solar thermal plant located in San José del Valle (Cádiz)." Page 42. R- 0266.
[690] Accuracy, First "Economic report on the Claimant and its claim". Paragraph 422.
[691] Second Statement by Mr. Carlos Montoya on 6 June 2016. Paragraph 38 RW-0002.
[692] Second Statement by Mr. Carlos Montoya on 6 June 2016. Paragraph 37. RW-0002.

Act 54/1997 guaranteed its dynamism through the principle of regulatory hierarchy. However, the manner in which said dynamism was expressed was through regulatory amendments implementing the necessary means for guaranteeing the fulfilment of the Law. That is, from a formal point of view, the mean by which such dynamism was expressed it was inelastic. It required constant regulatory reforms of the implementing regulations.

1116. In order to avoid said situation in the current remuneration model, both the different cases in which amendments can be introduced and the time in which said amendments can be enforced are legally established. That dynamism is endowed with greater flexibility and predictability.

1117. In any case, we must point out that all of these amendments are envisaged to guarantee the two essential principles on which the new remuneration model is built: the economic sustainability of the SES and respect for the principle of Reasonable profitability.

1118. The Claimants criticis this review system with unfounded arguments. The Claimants ignore that both in the model of RD 436/2004 and of RD 661/2007, the subsidies granted by said regulations were subject to updates: RD 436/2004 in accordance with the evolution of ARET and RD 661/2007 in accordance with the evolution of the CPI. Updates that must be made annually.

1119. The Claimant likewise ignores that RD 436/2004 was repealed, as expounded in section IV.A.2.2(a) of this document, (i) due to the adverse effect that the association between the subsidies and the ARET had on the economic sustainability of the SES and (ii) due to the unjustified increase in profitability caused by said association.

1120. The Claimant ignores that Royal Decree 661/2007 replaced the update of the subsidies pursuant to the ARET with an update based on the CPI less the corresponding differential.

1121. The Claimant intends to hide that the mechanism for updating the subsidy in accordance with the CPI had similar effects to those of the ARET. The NEC, in its report of 7 March 2012, diagnosed the problem on pointing out:

> *"The indexation to the inflation indicator is justified because, in the absence of a fossil fuel, the variable cost of these technologies depends mainly on the rendering of various services (operation, maintenance, insurance...). However, also for these technologies, a large part of their annual revenue was assigned to hedging their investment costs (approximately 85% in the case of wind and photovoltaic facilities), due to which updating the entire premium was disproportionate (only 15% should be updated).*

1122. The explanation of that expounded by the NEC has its rationale in that the remuneration regime of renewable energy sources is aimed at enabling investors to recover their investment costs and operating costs while obtaining Reasonable profitability. Consequently, when establishing the subsidy it must be taken into account that this subsidy, together with market price, must cover the three items: recovery of investment costs, recovery of operating costs and provide Reasonable profitability.

1123. However, as opposed to the operating costs, which are variable and their amount varies in the market, the investment costs are stranded costs. Once made they are not subject to any factor that alters their value. In view of this circumstance, the NEC expresses that the updates of the subsidies must exclusively affect the portion thereof that cover the variable costs. That is, the operating costs. The portion of the tariff destined for hedging the investment costs must not be updated because they are stranded costs. The update of the part of the subsidy destined for recovering the investment costs gives rise to additional unjustified profitability.

1124. In this line, the NEC proposes that only 15% of the subsidies be updated. The portion of the subsidies destined for hedging the operating costs. Moreover, we must not forget another important reflection made by the NEC:

> *"Given that the values of the tariffs and premiums are calculated each year (or quarter) in reference to the values of the previous period, this measure has an accumulative economic impact: it would mean annually reducing the global amount of the equivalent premium of the special regime by approximately EUR 200 million (cumulative) from 2013 onwards"*[693]

1125. Consequently, the update of the total subsidies in accordance with the CPI gave rise to unjustified remunerations. Moreover, as a result of the cumulative effect of this measure, the update was performed every year on the amount of subsidies updated in the previous year and so on, the aforementioned updates placed the economic sustainability of the SES at risk.

1126. The current remuneration model gives an answer to the previous situation, in terms of logic with the essence of the remuneration model and as indicated by the NEC.

1127. Firstly, we must differentiate the portion of the subsidy destined to recovering the investment and the portion of the subsidy destined to recovering the operating costs. Upon determining the investment costs by installation type, it is indicated that said value cannot be subject to review. Neither said value nor the regulatory useful life shall be subject to any update[694]. This avoids the distortions generated by the previous system.

1128. In relation to the operating costs that give rise to the subsidy (Ro), these are subjected to update at an annual rate of 1%. Furthermore, the market revenue pool can be reviewed every three years.

1129. As regards the portion of the subsidies destined to providing Reasonable profitability, it may also be updated. This update can be performed at the end of every regulatory period: that is, every six years. With regard to this possibility, the Claimant considers said

[693] *Report on the Spanish Energy Sector Part I. Measures to guarantee the financial-economic sustainability of the electricity sector,* National Energy Commission, 7 March 2012. Page 23. R-0098.
[694] Act 24/2013, of 26 December 2013, on the Electricity Sector, published in the Official State Gazette of 27 December 2013 Article 14 (4). R-0192.

measure one of the main novelties of the new regulatory framework which have given rise to a radical change with respect to the previous model[695]

1130. The Claimant does not consider the previous model. As mentioned earlier, the subsidies with the market price hedged the investment costs, operating costs and provided Reasonable profitability on the investment cost of approximately 7%. However, the part of the subsidy destined to providing Reasonable profitability was also subject to updates in accordance with an index that was the CPI.

1131. The CPI is a variable index whose fluctuation gave rise to alterations in plant profitability. Therefore, if the CPI increased, the portion of the subsidy destined to providing said profitability increased proportionally, obtaining higher profitability. On the contrary, if the CPI fell, the portion of the subsidy destined to providing said profitability fell proportionally, obtaining lower profitability. This last scenario was aggravated if we take into account that, in addition to the fall in the CPI, a negative corrective factor of -0.5 had to be added.

1132. As in the previous model, in the current model the portion of the subsidy aimed at granting Reasonable profitability (Remuneration on Investment -Ri-) was also variable. What happens is that instead of indexing profitability to the CPI, it is indexed to an equally robust index such as the ten-year-plus Spanish bond. Moreover, the update is not annual but rather can be made only every six years. At the end of each regulatory period.

1133. For the first regulatory period (six years), the Reasonable profitability was established at 7.398, which is the result of increasing the average performance in the secondary market of the ten years prior to the enforcement of the current Royal Decree-Law on Ten-Year Government Bonds by 300 basis points[696].

1134. In future regulatory periods, the Reasonable profitability of the installation types will be calculated as the average performance of ten-year Government bonds on the secondary market of the 24 months prior to the month of May of the year before that of the start of the regulatory period increased by a spread[697].

1135. In any case, as in the case of the previous model, the aforementioned profitability must be fixed in any case respecting two essential elements: the economic sustainability of the SES and guarantee of Reasonable profitability of the investors. Specifically, the Explanatory Memorandum to Act 24/2013 states:

> *"The parameters for establishing the remunerations will have a validity of six years and in the review thereof, which will be performed before the start of the regulatory*

[695] Counter-Memorial, paragraph. 386.
[696] Royal Decree-Law 9/2013 of 12 July, establishing urgent measures to ensure the financial stability of the electricity system. First additional provision. C-0086 R-0146 Bis.
[697] Royal Decree 413/2014, of 6th June, on the regulation of the production of electricity from renewable energy sources, cogeneration and waste. Article 19. R-112

period, the cyclical situation of the economy, electricity demand and adequate profitability for these activities shall be taken into account."[698]

1136. The indexation of profitability to the ten-year Spanish bond is not a novelty in our regulatory framework. Specifically, the NEC already admitted said possibility in 2007[699].

1137. The indexation of profitability to the ten-year-plus Spanish bond is that established by the regulator for other regulated activities such as transport and distribution. Note that the profitability of transport and distribution, activities which are also regulated, is established by Law for the first regulatory period, in the profitability of the ten-year Spanish bond plus 200 basis points[700]. That is, 100 basis points less than the production activity using renewable energy sources.

1138. In this point we must recall that, as expounded in Section IV.A.2.2(c), the Sector itself in 2009 proposed a reform of the regulatory framework based on the idea of linking Reasonable profitability to the profitability of the ten-year Spanish bond plus 300 basis points.

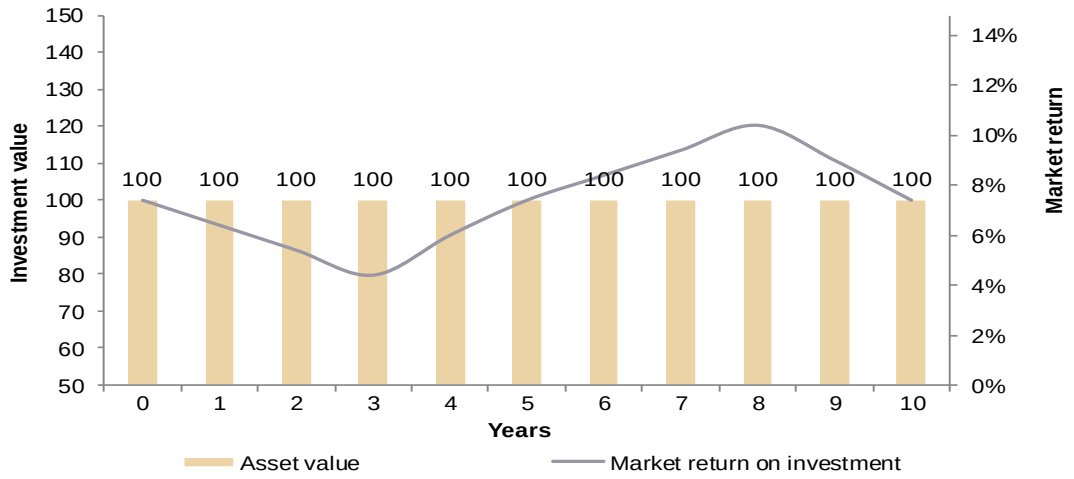
1139. Lastly, we cannot ignore that this dynamism makes it possible to protect the value of the investment over time:

"Notwithstanding what Brattle seems to deliberately ignore is that the real advantage of the dynamism of the new device is that it protects the value of the investment over time, and this applies both to new and existing investments. This is due to the fact that at all times the value of the asset depends on the profitability offered by alternative investments and if the profitability was fixed in the past and in accordance with the evolution of the market and macroeconomic variables, it is now very low compared to other investments, the asset will be depreciated and even lose all its value"[701]

1140. The foregoing assertion can be corroborated by examining the graphs provided by Accuracy[702]:

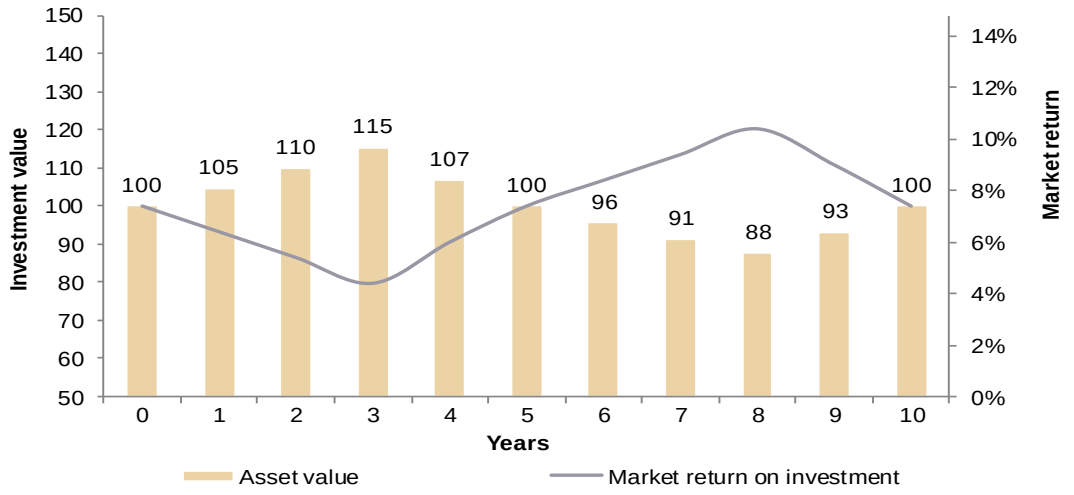
[698] Act 24/2013, of 26 December, on the Electricity Sector. Preamble and Article 14 (4). R- 0192.
[699] NEC Report 3/2007, of 14 February 2007, regarding the Royal Decree proposal, regulating the activity of electricity production under the special regime. 16. R-0203.
[700] Act 24/2013, of 26 December, on the Electricity Sector. Additional Provision Ten. R-0192.
[701] Accuracy, Report on the incentives of the solar thermal sector in Spain of 9 June 2016. Par. 631.
[702] Ibid

Figure 6.1 - Evolution of the value of an investment with dynamic return



Source: Accuracy Analysis

Figure 6.2 - Evolution of the value of an investment with static return



Source: Accuracy Analysis

1141. Upon examining these tables, it can be concluded that, in the new model it guarantees the value of the investment over time. From the viewpoint of the investor it is more stable and predictable.

1142. Upon expounding the foregoing, the revisions system envisaged in the current remuneration model combines the need for stability and predictability of the economic rules and criteria with the requirement of adapting the remuneration systems in order to achieve their objectives and comply with the legal system. They follow a regulatory technique that is accepted in many countries and allows the predictability of the modifications and adaptations in order to comply with the objective of the economic regimes. Therefore, they allow for the full recovery of costs and obtaining a Reasonable profitability from investments.

(g) The new remuneration model has been approved transparently.

1143. The Claimants maintain that the implementation of the contested measures has not been transparent.

1144. The announcement of a structural reform of the Spanish Energy System as part of these macroeconomic control measures, was made more than a year ahead of its effective adoption, that is to say, from December 2011[703]. These macroeconomic control measures were in turn undertaken as an international commitment, through a Memorandum of Understanding signed with the EU[704].

1145. All of the challenged regulations have been enacted pursuant to the procedure set out by the Law of Spain. During their processing, various public hearing procedures were offered where all parties with an interest in the Spanish Energy System could participate[705].

1146. Furthermore, the Government accepted a significant part of the observations that the interested parties presented, as we shall accredit. Nonetheless, it is appropriate to distinguish the different public hearing procedures that the Government held before successive proposals for regulation: (i) Before the National Energy Commission in February 2012, with the purpose of formulating pleadings about the "*Measures to Ensure the Economical-Financial Stability of the Electricity System.*"; (ii) during the processing of Royal Decree 413/2014 and (iii) during the procedures of Order IET 1045/2014.

(i) Public consultation held by the National Energy Commission in February 2012

1147. In order to prepare report 2/2012 "About the Spanish Energy Sector" of 7 March 2012, the NEC opened a public consultation period at the start of February 2012 during which it received 477 allegations from the affected companies and sectors[706].

1148. The Protermosolar Association, which defends the interests of the solar thermal sector, presented pleadings on 10 February 2012, proposing regulatory measures to be adopted in the electricity sector in view of the imbalanced situation. In said proposals, it previously

[703] Counter-Memorial paragraph 634 and seq.

[704] This was reflected in the Memorandum of Understanding on Financial Sector Policy Conditionality in Spain, 20 July 2012, pages 14 and 15. RL-0091.
This Memorandum has been signed to give effect to "*Council Recommendation of 10 July 2012 on the National Reform Programme 2012 and delivering a Council opinion on the Stability Programme for Spain, 2012-2015*", of 10 July 2012.

[705] *Administrative* appeal relating to the draft Royal Decree which regulates the activity of the production of electric energy from renewable energy sources, cogeneration and waste (Royal Decree 413/2014); Opinion from the Council of State of 6 February 2014: *"Restarting the procedure allowed new participation by the Electricity Advisory Council and by the National Commission on Markets and Competition (NMCC), the hearing procedure for the interested parties must be considered to have been completed, insofar as all of the sectors affected by the project have had the opportunity to participate in the preparation of the regulation -in this case, also, on two occasions- through the Electricity Advisory Council."* (emphasis added) R-0133. doc. 11.01

[706] Information on the public consultation on measures for regulatory adjustment in the energy sector of 2 February and 9 March 2012, published at the National Energy Commission website: www.cne.es. On this website you can access the 477 submissions presented by the interested sectors, including those relating to renewable energies. R-0097.

stated that it was aware of the *Principle of Reasonable profitability* and it expressly requested that this principle be applied to other producers[707].

(ii) Public hearing during the procedures of Royal Decree 413/2014, of 6 June.

1149. Following the entry into force of Royal decree Law 9/2013 of 14 July, the draft of this Regulation was circulated after 4 months. Specifically, Protermosolar, the Association of the Thermosolar Sector saw the drafts of Royal Decree on 26 November 2013 and presented pleadings before the National Commission on Markets and Competition (NMCC) on 12 December 2013 regarding the draft Royal Decree[708]. This fact is expressly stated in the heading of this document:

> *"through the Electricity Advisory Council (CCE), the National Commission on Markets and Competition ("NMCC") have granted us urgent hearing procedures regarding the "draft Royal Decree […] sent to this body on 26 November 2013 (the "Royal Decree proposal"). Within the time period granted, by means of this document we make the following Pleadings…"*

1150. The entry stamp of the National Commission on Markets and Competition (NMCC) appears on this same document, with the date 11/12/2013. Said document comprises 31 pages of pleadings on all aspects of the draft Royal Decree.

1151. Furthermore, numerous other pleadings were presented to this draft Royal Decree. The pleadings submitted during the proceedings are attached[709].

1152. A detailed examination (1) of the process carried out, (2) of the pleadings presented and (3) of them being taken into consideration by the National Commission on Markets and Competition (NMCC) appears in the Report by the Council of State of 6 February 2014, issued in the processing of this draft Royal Decree[710]. On its pages 17 and 18 it mentions many pleadings presented.

1153. It has been proven, therefore, that 4 months after Royal Decree-Law 8/2013 took effect, the operators in the renewable energy sector already knew of the draft Royal Decree and were able to make pleadings, that were assessed by the regulator, the National Commission on Markets and Competition (NMCC). Furthermore, the report of the Council of State

(iii) Public hearing during the procedures of Order IET 1045/2014, of 16 June.

[707] PROTERMOSOLAR pleadings to the Public Consultation of the NEC, R-0083.
[708] Pleadings dated 12 December 2013, urgent hearing procedure on the "Proposed Royal Decree regulating the activity of electricity production from renewable, cogeneration and waste energy sources" R-0267.
[709] Processing of Royal Decree 413/2014, Pleadings before the National Energy Commission (NEC), National Commission on Markets and Competition (NMCC) and Council of State R-0268
[710] Ibid

1154. In the processing of the Order of parameters more than 600 pleadings were presented from all parties with an interest in the Spanish Energy System. These pleadings were explained and answered in the processing files of the regulatory standards[711].

1155. Firstly, it should be emphasised that the draft of the Order of Parameters was circulated to interested parties in the electrical sector on 3 February 2014. That is to say, the draft was circulated three months after the draft of the Royal Decree was published and just two months after the publication of Act 24/2013, of 27 December, on the Electricity Sector. a fact that was gathered by the CSP sector operators. Elecnor, the owner of other CSP Plants, publicly stated in its 2013 Annual Accounts that it knew of the drafts of parameters and the amounts it could receive:

> *"Later events: As has been described in Notes 6.b, 7 and 10, dated 3 February 2014 the Ministry of Industry has submitted to the NMCC the order proposal approving "restorative parameters of facilities" applicable [...] for its report. The text has, also been sent to the members of the Electric Advisory Council of this agency (affected companies, consumer associations and autonomous communities).*
>
> *These parameters have cleared the uncertainties raised in Act 9/2013, of 12 July, with regard to the practical application of "Reasonable profitability for the installation type", and although this ministerial order is in a period for comment, significant changes are not expected."*[712] *(Emphasis added)*

1156. On the other hand, the claims submitted by Protermosolar to this draft on 25 February 2014 should be mentioned, which refer over the course of 17 folios to the different standards and parameters that make up the Order of parameters.[713]

1157. The Claimants claim that they were completely in the dark during 11 months. It has already been established that pleadings could have been filed before the reform and after the reform the Regulation draft was circulated on 26 November 2013 and the draft for the Order of parameters on 3 February 2014. That is to say, 4 months from the publication of RDL 9/2013 of 12 July, the Claimants were already familiar with the implementing rules in the drafts.

1158. The Kingdom of Spain has accredited that the Claimant was aware of the drafts of the rules being processed through the monthly reports issued by Torresol Energy[714], due to which it could have presented pleadings. System operators such as Elecnor and Torresol were able to do so and did so. As a result, the duties of transparency demanded were fulfilled, without having violated the alleged rights of the Claimants.

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[711] Document /Exp_orden 1045/2014/01.02 and /02 Alegaciones NMCC [4 numbered files with 638 pleadings that were presented] R-0269

[712] Annual accounts for Elecnor, 2013, page 90, R-0264.
Available in full on http://www.elecnor.es/Common/pdf/informes-anuales/Cuentas-anuales-e-informe-de-Gestion-2013-ES.pdf

[713] Pleadings dated 25 February 2014 of the PROTERMOSOLAR Association, in the hearing procedure on the "Order Proposal approving the compensation parameters of the standard installations applicable to certain facilities producing electricity from renewable energy, cogeneration and waste sources". R-0271.

[714] Counter-Memorial, paragraphs 971 and its footnote no. 550

1159. On the other hand, the Claimants insistently refer to the report by Roland Berger and the Report not issued by Boston Consulting The disclosure or not of these Reports in the preparation phase of the measures does not affect the obligation of transparency contained in the ECT with regards to the Claimants, as the Claimants have not established that they ever requested their disclosure.

1160. The first of these reports was received after the publication of the Order of parameters. The report was incorporated into the administrative dossier to prepare the Regulations and has been provided in this procedure.

1161. The second of the reports was not issued because the contract with Boston Consulting was terminated. Consequently, they did not have to be circulated or handed over to those concerned. The Claimant´s arguments on the lack of transparency due to these reports not being published, which it reiterate in its Reply on the Merits, therefore makes no sense.

1162. In conclusion, in the processing of the measures challenged, the Kingdom of Spain has carried out these proceedings transparently, circulating the drafts of the regulations in the Sector. The interested parties were able to submit their claims, many of which were welcomed in the Projects. Proof of this transparency is the following table, which shows the evolution of the remuneration parameters of Gemasolar from the beginning to the end of the procedure[715]:

Standards	Item	v. NMCC		v. FINAL	
All	Land	1,500	€/Ha	2,000	€/Ha
TOA	Investment	12.53	M€/MW	12.67	M€/MW
(GEMASOLAR)	Total Investment	213,010	M€	215,390	M€
	OandM	4,500,000	€/year	5,400,000	€/year
	Electricity consumption	9,000	€/MW	24,000	€/MW
	Occupation of Land	6	Ha/MW	12	Ha/MW
	Insurance	0.20	% of the inv	0.30	% of the inv
	Rated power production	4,879	Hours	4,565	Hours
CCPA 7h	OandM	5,500,000	€/year	5,800,000	€/year
(ARCOSOL and TERMESOL, among others)	Rated power production	3,066	Hours	2,720	Hours
CCP	Rated power production	2,167	Hours	2,040	Hours
TO	Rated power production	1,939	Hours	1,870	Hours
FR	Rated power production	1,615	Hours	1,500	Hours
CCPA 9h	OandM	5,500,000	€/year	5,800,000	€/year
(TERMOSOL 1 and 2)	Rated power production	3,230	Hours	3,060	Hours

SOURCE: *Draft Order (v. NMCC) and Order IET/1045/2014*

TABLE 1: *Summary of differences in STE area between Draft Order (v. NMCC) and Order IET/1045/2014 (v. FINAL)*

[715] Second Witness Statement of Mr Carlos Montoya, paragraph 23 RW-0002.

1163. As stated by Mr. Montoya, "the application of these changes in some remuneration parameters implied the modification of the specific remuneration (Rinv and Ro) published in the draft Order sent to the NMCC." The specific remuneration for the IT of the Claimants in the draft Order and in the final version of the Order is shown in the table below[716]:

		GEMASOLAR		ARCOSOL AND TERMESOL	
		Order v. NMCC	Order IET/1045/2014	Order v. NMCC	Order IET/1045/2014
		IT-01011	IT-00614	IT-01006	IT-00609
Rinv	€/MW	1,161,599	1,193,641	558,056	557,683
Ro	€/MWh	38,877	76,440	24,859	38,000

SOURCE: *Draft Order to NMCC and Order IET/1045/2014*

TABLE 2: *Comparison of Rinv and Ro in Draft Order to NMCC and Order IET/1045/2014*

1164. These tables evidence the absolute transparency of the rule drafting process.

(h) The new System provides a Reasonable profitability

1165. The Claimants allege that the profitability that the current system provides of 7,398% before tax is not a Reasonable profitability[717]. The Claimants point out that Reasonable profitability must be the same as that provided by the premiums arising from the application of RD 661/2007, i.e.: *"a Reasonable profitability after tax of 9.5% (after tax (under the premium option)*"[718].

1166. The thesis set forth by the Claimants comes from an incorrect understanding of the Regulatory Framework in which they invested. Article 30 (4) of Act 54/1997 does not guarantee maintaining certain rates of profitability indefinitely. What is more, allowing the Claimants' thesis means ignoring that the premiums laid down in Royal Decree of the 661/2007 were based on a particular economic scenario that has radically changed. Such a change of the base data on which the subsidies of 661/2007 were based deprived the Claimants of any characteristics of rationale.

1167. The Claimants point out that the profitability of 7.398% after tax gives rise to net profitability (after tax "Therefore, at it is outset the New Regulatory Regime promises investors an after-tax return of less than 6% or a Premium of only 1.6% over 10-year Spanish bond"[719]. However, such a conclusion has two serious errors.

[716] Second Witness Statement of Mr Carlos Montoya, paragraph 24 RW-0002.
[717] Statement of Counter-Memorial, paragraphs 388 to 398.
[718] Statement of Counter-Memorial, paragraph 389.
[719] Counter-Memorial. Paragraph 389.

1168. However, these calculations cannot be accepted. Specifically as indicated by Accuracy. They do not take into account the leverage of the project or the tax shield arising from the deductibility of the financial expenses. Neither do they take into account the use of negative tax bases (BINS) generated during the construction phase, which influence the calculation of profitability after tax. Likewise, the Claimant did not take into account that the tax rate currently in force in Spain is not 30%, but rather 25%[720].

1169. After correctly calculating the tax impact on profitability of 7.398, we can affirm that profitability after tax is an after-tax IRR between 6.3% and 6.8% (with a tax rate of 30%) and an after-tax IRR between 6.5% and 6.9% (with a tax rate such as that currently in force of 25%)[721].

1170. Consequently, we can conclude that the pre-tax profitability included in Ministry Order IET 1045/2014 (7.398%) is equivalent to an after-tax profitability between 6.5% and 6.9%.

1171. After having correctly calculated the impact of the tax on the profitability provided by Ministry Order IET 1045/2014, its reasonability must be determined. Firstly if we start from this profitability rate and compare it with the WACC in the Sector[722] in which the Claimants are included we can affirm that this profitability is reasonable.

1172. As pointed out by Accuracy, the discount rate (opportunity cost) that the Sector expects to obtain after the measures ranges between 6.38% and 6.86%. That is, values below 7.398 granted by the Spanish remuneration model.

1173. Moreover, if we compare the profitability of 7.398 with the opportunity cost of 6.4% stated by Brattle, we can similarly affirm that the profitability offered by the Spanish system is reasonable at least for the Claimant.

1174. Another criterion that we can use to determine whether the profitability offered by the Spanish system is reasonable consists of comparing it with the profitability offered by the Spanish system to activities subject to the same risk level. Specifically, compare said profitability with other regulated activities such as transport and distribution.

1175. In this point we must recall that, in order to evaluate the reasonability of the profitability of production activities based on renewable energy sources, the NEC has used the profitability of regulated activities such as transport and distribution as a comparative parameter. In this point we must recall that indicated by the NEC:

> *"Parameter A is the production cost that must be considered for the investments made to reach a Reasonable profitability, taking into account the characteristics of each type of technology. The necessary revenue for the investment considered in*

[720] Accuracy, Report on the incentives of the solar thermal sector in Spain of 9 June 2016. Appendix 5.
[721] Ibid.
[722] Idem. Section 5.4 and Appendix 6.

each project to obtain an internal profitability rate of unrestricted cash flows after tax similar to that of a regulated activity"[723]

1176. In this regard, we must recall that the profitability of transport and distribution activities, which are also regulated, is established by Law for the first regulatory period, in the profitability of the ten-year Spanish bond plus 200 basis points[724]. That is, 100 basis points less than the production activity using renewable energy sources. From this viewpoint, profitability is also reasonable.

1177. Last but not least. The profitability of 7.398 is the result of increasing the average performance of the Spanish bond of the ten years prior to RDL 9/2013 by 300 basis points is the profitability that the Sector requested from the Spanish Government in 2009. As expounded in Section IV.A.2.2(c), the sector presented a new regulatory framework proposal in which it indicated the Reasonable profitability for this activity:

"The Government shall set the amounts for regulated tariffs, premiums and supplements, in all cases assessing the operation and maintenance costs and the investment costs incurred by facility operators in order to reach Reasonable profitability with reference to the cost of money on the capital market. As for the capital remuneration tariff, an annual percentage equal to the average of the previous year's remuneration average of Treasury obligations to 10 years will be taken, plus a spread of 300 basis points."[725] *(Emphasis added)*

(5) The Measures in dispute have been recognised as necessary Macroeconomic control measures, stabilising the economy and reasonable

1178. The Claimants question the measures taken (i) due to the number of appeals of unconstitutionality raised against RDL 9/2013 before the Constitutional Court of the Kingdom of Spain; (ii) due to the number of claims filed with the Supreme Court which has led to the implementation of the new system; (iii) due to the criticism of the European Commission.

1179. However, such a review would be biased if we do not see the appraisal that other International Organisations have made of the new measures and how, these measures have been valued by the Market.

(5.1) Appraisal of the measures by the Domestic Courts of the Kingdom of Spain

1180. The Claimants maintain that the fact that proceedings have been instituted before the Constitutional Court against the TVPEE shows the doubts of regional Governments and political parties on the reasonableness and fairness of the Tax. Certainly, the Claimants miss the point of what is a *doubt* with this argument. These *doubts*, have already been decided by the Constitutional Court to dismiss these appeals. The attitude of the

[723] NEC Report 4/2004, of 22 January, regarding the Royal Decree proposal, which establishes the methodology for the updating and systematisation of the legal and economic regime for electricity production in the special regime. Page 8. R-0221.
[724] Act 24/2013, of 26 December, on the Electricity Sector. Additional Provision Ten. R-0192.
[725] AREP-Greenpeace Press Release concerning the Draft Bill for the Promotion of Renewable Energy of the Draft Bill presented by AREP-Greenpeace in May 2009. Article 23.4 R-0212.

Claimants is surprising, who in the absence of solid arguments, try to substantiate their thesis "*by weight"*, according to the number of appeals lodged against a regulation. *Mutatis Mutandis*, according to this very poor "legal" argument, an appeal lodged by 1 or by 30 people against a Government act, will be less founded that another filed by 5,000. This argument, in addition to being unfounded is, with all due respect, legal nonsense. In fact, after more than a hundred appeals against the reforms introduced in the energy sector, the Supreme Court has issued more than 100 judgements, establishing a consolidated Jurisprudence from 2005 until today. The same Jurisprudence since the first petitioner appealed, to more than 100 appeals later. And the number of appeals has not been something relevant for the Supreme Court to have always maintained the same Jurisprudence since 2005.

(a) Position of the Constitutional Court of the Kingdom of Spain

1181. The Constitutional Court of the Kingdom of Spain has already issued a number of pronouncements about whether the new system violates the Spanish Constitution. In particular it has already decided on the appeals of unconstitutionality submitted by the Autonomous Community of Murcia, the Foral Community of Navarre and the Socialist Parliamentary Group against Royal Decree Law 9/2013.[726] The first pronouncement[727] has been ratified by a another pronouncement that rejects the appeal of unconstitutionality submitted by the Foral Community of Navarre.[728] The Constitutional Court has also issued a new Judgement of the same date dismissing the appeal of unconstitutionality submitted by the Socialist Parliamentary Group.[729]

1182. The Constitutional Court,[730] the highest interpreter of the Spanish Legal System in matters for protection of fundamental rights, in its recent Judgement of 17 December

[726] Counter-Memorial. Paragraph 458.

[727] Constitutional Court ruling of 17 December 2015, delivered in an appeal of unconstitutionality 5347/2013.R-0193.

[728] Constitutional Court ruling of 18 February 2016, delivered in an appeal of unconstitutionality 5852/2013. R-0241.

[729] Constitutional Court ruling of 18 February 2016, delivered in an appeal of unconstitutionality 6031/2013. R-0272.

[730] The functions of the Constitutional Court are included, expressly, in Article 161 of the Spanish Constitution, which provides that: "*1. The Constitutional Court has jurisdiction throughout the Spanish territory and is competent to try:*

a) The appeal of unconstitutionality against laws and regulatory provisions with the force of law. The declaration of unconstitutionality of a legal regulation with the rank of law as interpreted by jurisprudence, shall affect this, although the judgement or judgements handed down shall not lose the value of res judicata.

b) The appeal for protection due to violation of the rights and freedoms referred to in Article 53, 2, of this Constitution, in the cases and ways established by law.

c) The conflicts of jurisdiction between the State and the Autonomous Communities or of these among themselves.

d) Other matters assigned to it in the Constitution or the organic laws.

2. The Government may appeal to the Constitutional Court against provisions and resolutions adopted by the bodies of the Autonomous Communities. The Government may contest before the Constitutional Court the provisions and resolutions adopted by the agencies of the Autonomous Communities, which shall bring about the suspension of the contested provisions within a period not exceeding five months". R-0038.

2015, [731]ratified and consolidated the jurisprudential line marked by the Supreme Court, regarding the conformity of the reforms introduced in the SES for the principles of legal certainty and its corollary of legitimate expectations, to that of normative hierarchy and non-retroactivity of sanctioning or restrictive regulations of individual rights.

1183. In fact, on deciding on the appeal of unconstitutionality No. 5347-2013 filed by the Governing Council of the Autonomous Community of the Region of Murcia, against Article 1, paragraphs 2 and 3 and first additional provision, third transitional provision and second final provision of Royal Decree Law 9/2013, of 12 July, adopting urgent measures to ensure the financial stability of the electrical system, it examines successively, the alleged breaches of the principles of the normative hierarchy, legal certainty, legitimate expectation and non-retroactivity of the unfavourable or restrictive penalty provisions of individual rights, which the petitioners invoked with regards to said provisions.

1184. Thus, as has already been advanced, the Constitutional Court reproduces the same criteria sustained by the Supreme Court.

1185. With regard to the alleged infringement of the principles of legal certainty and protection of legitimate expectations, the Constitutional Court establishes that:

> "The respect for this principle *[*de legal security], and its corollary, the principle of legitimate expectations, is compatible with the modifications in the remuneration system of renewable energies made by Royal Decree-Law 9/2013, furthermore - as in this case-, in an area subject to a high administrative intervention due to its incidence in general interests, and a complex regulatory system that makes it impossible to claim that the more favourable elements are invested of permanence or immutability [...] which obliges the public authorities to adapt this regulation to a changing economic reality*"*[732] *(Emphasis added).*

1186. Furthermore, it added regarding both principles that:

> *"The unexpected modification produced should not be rated, because the evolution of the circumstances affecting that sector of the economy, made it necessary to undertake adjustments of this regulatory framework, as a result of the difficult circumstances of the sector as a whole and the need to ensure the necessary economic balance and the proper management of the system. It must not therefore be argued that the amendment of the remuneration system examined was unpredictable for a "diligent and prudent economic operator", in response to economic circumstances and to the inadequacy of the measures taken to reduce a persistent deficit continuously on the increase in the electrical system which had not been properly tackled with previous provisions.*

[731] Constitutional Court ruling of 17 December 2015, delivered in an appeal of unconstitutionality 5347/2013. R-0193.
[732] Constitutional Court ruling of 17 December 2015, delivered in an appeal of unconstitutionality 5347/2013, seventh legal basis (a) R-0193.

The preamble to Royal Decree-law determines that its purpose is to avoid the "over-payment" of certain installations under the special regime".[733] *(Emphasis added).*

1187. Finally, regarding the claimed violation of the principle of non-retroactivity, it concludes by stating that:

"The operators of the installations for the production of electrical energy under premium regime are subject to this new remuneration system from the date of entry into force of Royal Decree-Law 9/2013, [...] without this subjection entailing an unfavourable effect on rights acquired, from a constitutional perspective, this is does not affect property rights previously consolidated and incorporated definitively to the assets of the recipient, or in legal situations that have already been depleted or consumed[734]*".*

1188. This clarity and forcefulness have been reinforced by the concurring individual opinion made by the Judge Mr Juan Antonio Xiol Ríos regarding the Judgement itself, joined by Judge Ms Adela Asua Batarrita and Judge Mr Fernando Valdés Dal-Ré.[735] This individual opinion far from rectifying or disagreeing with the ruling of the Judgement, reaffirms it, providing it with greater legal precision and argumentative foundation.

1189. Although the clarity and accuracy of this individual opinion may well justify its complete reproduction, those pronouncements that most faithfully reflect the reality of the SES and its regulations shall be extracted, which, moreover, all prudent investor should know well. In this regard, the aforementioned individual opinion contextualises the reason for its issuance, to say that *there are three important elements to examine in more detail the legal arguments set out in the Judgement. These reasons are:*

(i) the regulatory development of the regulation and dispute that has come about among the legal operators;

(ii) that up to this moment, the Constitutional Court has not decided on the expectations of the legal and economic operators on this issue; and

(iii) the existence of a large number of disputes brought before international Courts of Arbitration, regarding a "a more founded decision by the Constitutional Court seems particularly necessary[736]".

1190. Starting from this contextualization, this individual opinion focuses on specifying the concept of *legitimate expectation.* It is defined as the principle that protects the legitimate

[733] Ibid.
[734] Ibid.
[735] Constitutional Court ruling of 17 December 2015, delivered in an appeal of unconstitutionality 5347/2013. Concurring individual opinion made by Judge Mr Juan Antonio Xiol Ríos regarding the Judgement issued for the appeal of unconstitutionality No. 5347-2013, joined by Judge Ms Adela Asua Batarrita and Judge Mr Fernando Valdés Dal-Ré. R-0193.
[736] Judgement of the Constitutional Court of 17 December 2015, issued in the appeal of unconstitutionality 5347/2013. Concurring individual opinion made by Judge Mr Juan Antonio Xiol Ríos regarding the Judgement issued for the appeal of unconstitutionality No. 5347-2013, joined by Judge Ms Adela Asua Batarrita and Judge Mr Fernando Valdés Dal-Ré. Legal basis II (6). R-0193.

expectations of citizens that adjust their economic behaviour to the legislation in force against regulatory changes that are not reasonably foreseeable, by reference to the criteria used by the Court of Justice of the European Union for their weighting. In this regard, it states that:

> *"(b) the amendment made by Royal Decree-Law 9/2013 meant a new incentive system characterised by (i) the existence of an additional remuneration to that of participation in the market that covers the costs of investment that an efficient and well managed company shall not recover in the market; (ii) that this remuneration system shall not exceed the minimum level necessary to cover the costs that allow them to compete with facilities equally with the rest of technologies on the market and which allow them to obtain a Reasonable profitability by reference to the installation type in each applicable case; and (iii) that the Reasonable profitability shall rotate, before tax, on the average yield in the secondary market of the Government Bonds to ten years by applying the appropriate differential.*
>
> *In addition, and as was also justified extensively in the explanatory statement of Royal Decree-Law 9/2013 itself, this change of law brings about the need to meet urgent and higher public interests that were reflected in the need to reduce a tariff deficit that, with the passage of time, had become structural, due to the actual associated costs, among others, so that the regulated activities were higher than the collection from tolls fixed by the Administration and that consumers pay".*[737] *(Emphasis added)*

1191. On this basis, the individual opinion concludes categorically:

> *"the legitimate expectations generated by the reformed legal regulations have been maintained in essence, both in the sense of giving continuity to an incentives system and in subordinating it to obtain a Reasonable profitability with reference to the cost of money in the capital market. On the contrary, it cannot be qualified as a legitimate expectation [...]the maintenance of a situation involving some extremely high levels of profitability outside the market and that may be contrary to higher public interest.*
>
> *(c) This regulatory change, moreover, **should also not be considered as unpredictable for a prudent economic operator** regarding the different concurring circumstances, including the evolution of the general economic situation and the electricity sector.(...)*
>
> *the controversial amendment **was not unpredictable**. Some of those that were already widely set out in the aforementioned STS of 12 April 2012 can be stated, in connection with other previous amendments, as would be (i) the uniqueness of an economic sector that is strategic in nature, which implies a broad regulation density, the presence of underlying public interests and, consistent with this, the need for regulatory amendments that adapt the regulatory framework to the eventualities of the sector and to variations that may occur in the economic data; (ii) the nature of the incentives in the form of a regulated tariff, which means an exceptional and*

[737] Judgement of the Constitutional Court of 17 December 2015, issued in the appeal of unconstitutionality 5347/2013. Concurring individual opinion made by Judge Mr Juan Antonio Xiol Ríos regarding the Judgement issued for the appeal of unconstitutionality No. 5347-2013, joined by Judge Ms Adela Asua Batarrita and Judge Mr Fernando Valdés Dal-Ré. Legal basis II. (7.ii). R-.0193.

atypical situation in a free market regime on eliminating the business risk from investments resulting from the system of free competition; and (iii) the implicit conditionality to any incentive measure ***whose unchanged permanence cannot be ensured*** *and the explicit understanding that it this linked to the achievement of a series of objectives. To these should be added, in the specific case referred to in this appeal of unconstitutionality,* ***that successive reforms operated in the administrative regulations of development, already anticipated*** *a change in the remuneration system that might affect at least the quantification of the levels of profitability"*[738]*. (Emphasis added).*

1192. The forcefulness, clarity and continuity of the applicable Jurisprudence leaves no doubt about the scope, content and legal limits of the Reasonable profitability to which the investors had a right to. And therefore, there is no doubt to be able to see the real legitimate expectations that the Kingdom of Spain offered to all national or foreign investors This is therefore essential to specify the legitimate objective expectations that the Claimant was able to form when making his investment.

(b) Position of the Supreme Court of the Kingdom of Spain

1193. The Supreme Court, through the Judgement 63/2013 of 21 January 2016, of the Supreme Court,[739] has dismissed the claim for the liability of the State legislator for the damage caused:

- By Royal Decree 1565/2010, of 19 November, which regulates and modifies certain aspects of the electricity production activities in the Special Regime.

- By Royal Decree-Law 14/2010 of 23 December, establishing urgent measures to correct the deficit in the electricity industry.

1194. In fact, in line with its jurisprudential doctrine that began in 2005 the Supreme Court again insist on it by pointing out that RD 661/2007 has not resulted in any petrification of the current economic regime by expressly stipulating that:

> *"And it would also require starting from a budget which, in the opinion of the Chamber, does not coincide (or did not coincide when these same facilities began their operation): that the legal regime laid down in Royal Decree 661/2007 would be prolonged indefinitely and that it would, moreover, do so under the identical terms that were expressly provided for at that time. We do not understand, in fact, that the aforementioned Royal Decree envisages a tariff regime forever, nor that the Government, in the exercise of regulatory authority that it holds, or that the legislator, in use of its legislative power, cannot adapt or modify that regime to meet the new circumstances (economic, productive, technological or of any other nature) that might occur in such a very lengthy period of time.*
>
> *In short, not only do we not appreciate (as already pointed out in the Third Section of Chamber in the aforementioned judgement) that the temporary modification that we are examining violates the principles of legal certainty and legitimate*

[738] Ibid.
[739] Judgement 63/2013, of 21 January 2016, of the Supreme Court handed down in cassation appeal 627/2012. R-0273.

expectations, but that, from the point of view of the institute of the financial responsibility, it cannot be confirmed in any way that the damage that it is claimed meets the characteristics of effectiveness and of the present day that would rate it as compensable".[740]

(5.2) Appraisal of the measures by the European Commission

1195. The new remuneration model has been analysed by the European Union. The European Commission has issued various reports on the development of the macroeconomic measures adopted by Spain. In these reports, has recognised the compliance by Spain of the agreements entered into with the EU to adopt macroeconomic control measures since March 2012.[741]

1196. The European Union, after having examined the evolution of the economy of the Kingdom of Spain since 2012, has given a favourable judgement of macroeconomic control measures taken. This review refers to the Macroeconomic measures taken in different sectors: financial, public administration, labour market, education, insolvency, Energy and infrastructures. The European Union has confirmed in its Report of 2014, regarding the Energy Sector, that:

> *"The reform of the electricity sector is being completed [...] The reforms in the gas and electricity sectors are helping to contain the tariff deficits [...] On the basis of the analysis in this report, repayment risks for the ESM loan are very low at present. This assumes that the authorities continue to improve the state of public finances and keep reforming the economy to address the challenges. The Spanish state can now borrow cheaper* ***thanks to policy actions at national and European level,*** *restored confidence in the Spanish economy and its public finances."*[742] *(Emphasis added)*

1197. These measures are developed in the most comprehensive review of the "*Progress on Policy measures relevant for the correction of Macroeconomic Imbalances.*" In 2014 the European Commission stated:

> *"The 2013 reform of the electricity sector helped to contain the tariff deficit, and the 2014 deficit should be considerably smaller or the system should be in balance. The 'electricity tariff deficit' reached [...] EUR 28.5 bn at the end of 2013, almost 3% of GDP. The increase in access tariffs and the reduction in various costs of the electricity system applied with the 2013 reform help to balance the system in 2014. The authorities consider that the measures taken up to date should be sufficient to close the deficit structurally."743 (Emphasis added)*

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[740] Ibid. Sixth Point of Law.

[741] Every year the European Commission draws up a report *"Country report"* undertaking a comprehensive review of the economic situation of each State. These reports are part of the so-called *"Macroeconomic imbalance procedure"* which is a monitoring mechanism to correct the existing *Macroeconomic imbalances.* The result of the comprehensive reviews serves as the basis for the Council to issue *Recommendations to the Member States of the EU*, on the measures to be taken to correct these Macroeconomic imbalances.

[742] Spain – Post Programme Surveillance Autumn 2014 Summary Report, page 3. (R-0274) Available at the web address:
http://ec.europa.eu/economy_finance/publications/occasional_paper/2014/pdf/ocp206_summary_en.pdf

[743] Spain — Post Programme Surveillance Autumn 2014 Report. page 27, available at:

1198. In the subsequent review of 2015, the European Commission stated that the costs of the tariff deficit of the previous regulatory regime was being excessively passed on to consumers:

> *"The 2013 reform of the electricity sector helped to contain the tariff deficit, and the 2014 deficit should be smaller than in previous years. Energy policy choices in Spain over the last decade have resulted in an increase in regulated costs of the electricity system (Graph 3.4.1) and have been, to a large extent, passed on to electricity consumers."[...] The energy regulator, NMCC, expects that, in 2014, the system was closer to equilibrium in structural terms than in previous years."*[744] *(Emphasis added)*

1199. The Measures taken in the Electricity Sector by the Kingdom of Spain have meant that the Recommendations of the Council in 2015 have considered the macroeconomic problem arising from the tariff deficit as resolved[745]. Therefore, it does not include any Recommendations for the Kingdom of Spain to take measures in 2015 and in 2016 in this area.

1200. In 2014 the National Association of Producers and Investors in Renewable Energies presented a petition to the Commission requesting that the situation be investigated that had been created for the photovoltaic industry by the various regulatory changes that, in turn, are the object of this arbitration. In view of this situation, the Commission in its response dated 29 February 2009 stated:

> *"In previous 'EU semester' recommendations to Spain, the Council emphasised the need for Spain to make the structural and comprehensive reforms to the electricity sector necessary to address this tariff deficit.(…)*
>
> *The Commission has considered the petition carefully and does not believe that under Directive 2009/28/EC there are grounds for the Commission to take legal action against Spain with regard to the changes in their legislation affecting the level of support given to investors in renewable energy projects. In particular, pursuant to Article 3(3) of Directive 2009/28/EC, support schemes are but one instrument that can be chosen by Member States to achieve the binding national targets established by the Directive for the share of renewable energy in gross final energy consumption as well as in transport in 2020. Member States retain full discretion over whether they use support schemes or not and, should they use them, over their design, including both the structure and the level of support. This comprises the right for Member States to enact changes to their support schemes, for example to avoid overcompensation or to address unforeseen developments such as a particularly rapid expansion of a precise renewables technology in a given sector.*

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http://ec.europa.eu/economy_finance/publications/occasional_paper/2014/pdf/ocp206_en.pdf R-0275

[744] Macroeconomic imbalances Country Report – Spain 2015, page 62. available at: http://ec.europa.eu/economy_finance/publications/occasional_paper/2015/pdf/ocp216_en.pdf R-0276

[745] Council Recommendation on the 2015 National Reform Programme of Spain and delivering a Council opinion on the 2015 Stability Programme of Spain: "(9) [...] *The deficit in the electricity system has been effectively eliminated as of 2014*".(R-0277) available at: http://ec.europa.eu/europe2020/pdf/csr2015/csr2015_spain_en.pdf

Therefore, in cases of changes to a support scheme as such, there is no breach of Directive 2009/28/EC" (Emphasis added)[746]

(5.3) Appraisal of the Measures by other International Organisations

1201. The measures implemented in the Spanish electricity sector in 2013 were recognised by the International Monetary Fund (IMF) in its report on Spain of July 2014 stating:

> *"While there is encouraging progress, especially the important market unity law (Box 2) there should be no slippage on the planned reforms. For example, it will be important to move ahead with an ambitious liberalization of professional services, improve training for the unemployed, and fully implement an energy reform that eliminates the electricity tariff deficit and contains costs, while promoting a stable business environment and appropriate levels of investment. Given the many regulations at all levels of governments, regions have a critical role to play in improving the business environment—the planned introduction of regional World Bank's "Doing Business" indicators is a positive initiative"*[747].

1202. As for the International Energy Agency (IEA), this has emphasised the relevance of the measures taken and has stressed the importance of keeping them to preserve the sustainability of the financing for the electrical system in the future:

> *"The IEA welcomes the government's actions, which have eliminated the annual deficit from 2014 on. The accumulated tariff deficit has thus stopped from growing and will gradually be eliminated. The government must maintain a strong long-term commitment to balancing the costs and revenues in the natural gas system."*[748]

1203. In its 2015 report the International Energy Agency makes the following comments regarding the reform submitted to the present arbitration:

> *"The tariff deficit, which had been accumulating since 2001, began to spiral out of control after 2005. From 2005 to 2013, the costs in the electricity system grew by 221% while revenues increased by only 100%. Subsidies for renewable electricity are the single largest cost element. By 2012, the accumulated debt in the system had reached more than EUR 20 billion and was set to expand by billions every year unless action was taken. In 2012, the government temporarily eliminated subsidies for new installations. It also reduced remuneration for transmission and distribution network activities, increased access tariffs, and introduced a 7% tax on electricity generation (22% for hydropower). Nevertheless, the deficit grew to EUR 26 billion by the end of 2012.*
>
> *In July 2013, the government introduced a broader electricity market reform package. The reform reduced the remuneration and compensation for the activities in the electricity system by several billion euros per year. It also introduced the principle of "no new cost without a revenue increase". Importantly, the reform introduced a new way of calculating compensation for renewable energy, waste, and co-generation (combined production of heat and power). With some exceptions, by*

[746] Response by the European Commission on 29 February 2009. R-0278.
[747] IMF Country Report 14/192 Spain, July 2014, pages 6 and 23. R-0279.
[748] Energy Policies of IEA Countries - Spain 2015 Review, Executive summary and key recommendations, published by the International Energy Agency, page 10. R-0280.

mid-2015 the comprehensive reform had been implemented. The reform has reached its aim: the sector's costs and revenues are back in balance, and the accumulated deficit, which peaked at the end of 2013 at EUR 29 billion or 3% of GDP, should gradually disappear over the next 15 years.

Electricity market reform has been complex but necessary. The electricity system's future financial sustainability depends both on macroeconomic developments and on a sustained commitment to the reform by the country´s politicians. To overcome any perceived risks for investing in electricity infrastructure in Spain, the government should closely follow the principles of transparency, predictability, and certainty when revising the parameters for defining reasonable profitability. More generally, to avoid any political interference in the future, the principle of "no new cost without a revenue increase" should be strictly enforced."[749]

1204. This report goes to state:

"Spain underwent an electricity market reform from early 2012 to 2015, with the aim of ensuring the sustainability of the system, balancing costs and revenues and protecting electricity consumers. The reform was developed to give predictability and transparency to the Spanish electricity system, to put an end to a burgeoning tariff deficit that had become a financial liability for the government and to bring the electricity system back to financial stability.

Since the last in-depth review in 2009, also the Electricity Directive (Directive 2009/72/EC) was approved. The new Electricity Law approved in December 2013 revised the Spanish legal framework in accordance with the new European regulations and directives (the Third Package), but taking account of the Spanish situation regarding the integration of renewable energy sources and the low level of interconnections with other EU member states."[750]

(5.4) Appraisal of the Measures by the Markets

1205. The favourable reception that the Macroeconomic control measures taken by Spain since 2012 should also be stressed. The Expert Report provided with this Memorial of Rejoinder has studied the evolution of the ratings made by the Agencies which is mentioned by Brattle in his Expert Report. These Ratings have improved since November 2014.[751] This change is explained partly by the macroeconomic measures taken by the Spanish State in recent years, which have enabled the rebalancing of the tariff deficit of the electricity sector.

1206. Furthermore, in 2015, with the reform of the electricity system already completed, the regulatory uncertainty has disappeared and investment in renewable energy is recovering. The attention of the Arbitral Tribunal is drawn to the many Press reports that have echoed (1) the stability of the system created by the Reform and (2) of the so-called *"renewable boom"* that is taking place in Spain due to the confidence of investors, national and foreign, in the profitability and stability of this system:

[749] IEA_IDR_Spain2015 Report, Page 10 R-0281.
[750] Ibid. paragraph 21.
[751] Accuracy, Second Economic report on the Claimant and its claim. Appendix 7

a. *"Soria envisages a surplus of the electrical system for 2015"*[752]: *"The Minister of Industry has pointed out that "it is good news that there is a surplus", but has insisted that, "whatever that amount is, it shall be destined to reduce the total amount of the deficit accumulated in this system".*

b. *"Wind operators in Spain and Portugal attract investor interest."*[753] *"What attracts these investors is the stable profitability that renewable energy companies generally generate. The context of low interest rates globally requires managers to search for yields beyond the equities and fixed income PROFITABILITY: And while the profitability offered by renewable energies are less now than before the reduction of the remuneration, Spain still guarantees an annual yield of 7.5% for the electricity sold by most of the wind farms in the country".*

c. *'"Boom' of operations in the renewable sector after the reform"*[754]: *"The purchase of solar and wind power plants so far this year already exceeds 1,000 million. Experts agree that there will be new operations in the coming months in the sector."*

d. *"What the disappearance of the premiums has caused is a race to rationalise the industry [Wind], through mergers taking advantage, in addition the abundance of liquidity and the legislative stability which the aforementioned energy reform has provided the sector with."* [755]

e. *"The renewable 'Boom' attracts investments of 5,000 million"*[756]*: "The renewable Energy Sector accumulates so far this year almost 5,000 million euros in buying and selling transactions [...]"*

f. *"Renewable energies resume their momentum in Spain"* [757]*"Renewable energies come into a maelstrom of millionaire buying and selling transactions. [...] For months, not a week passes without there being a corporate operation in the renewable energy sector.* [...] *The renewable energy business map is changing at the stroke of a pen"*

1207. It is clear that the reform is not as unstable and unreasonable as the Claimants claim. If it were so there would be no interest by national and foreign investors in making investments or purchases in the Spanish Energy Sector. This investor *Boom* discredits the Claimants' arguments. It is evident that for the Press and for investors a profitability of

[752] "Soria envisages a surplus of the electrical system for 2015." Article from El Pais, 16 June 2015, R-0282.
[753] "Wind operators in Spain and Portugal attract investor interest". Article from Agencia EFE Article from Agencia EFE, 9 June 2015, R-0283.
[754] "Operations boom in the renewable energies sector after the Reform", Article from the newspaper "El Mundo",
dated 22 July 2015. R-0284.
[755] "Wind energy comes of age". Editorial from financial newspaper El Economista, of 24 July 2015 R-0285.
[756] The renewable energies boom attracts 5,000 million in investment of funds". Article from the financial newspaper "El Economista", dated 17 October 2015. R-.0286.
[757] "Renewable energies take the lead in Spain". Article from the financial newspaper "Expansión" dated 17 October 2015 R-0287.

7.398% is reasonable, particularly in the current international economic context, after the worldwide financial crisis suffered between 2010 and 2013.

1208. It is also worth noting that in 2015 a tendering process was opened for renewable energy producers of 500 megawatts (MW) of wind power and 200 MW from biomass. In this tender, the offers received from domestic and foreign companies exceeded the power finally awarded in January 2016 by a factor of 5[758]. This corroborates the interest from domestic and foreign markets in the system resulting from the measures challenged.

1209. Recently Diario Expansión, one of the economic newspapers with the largest circulation in Spain, published the opinions of various company directors and expert analysts from the sector, according to whom the measures have given the regulatory framework the stability that is demanded:

> *"The electricity reform, that started in July 2013, is already bearing fruit in the market in the form of stability. Marta Méndez Villaamil, legal director of mergers and acquisitions of EDP Renovaveis explained that the market has become more professional, is much more sophisticated and investors are more qualified".*[759]

1210. This news, the positive ratings of the Rating Agencies and the favourable reports from the European Commission, is more evidence of the reasonableness and proportionality of the Macroeconomic control measures taken in the Energy Sector by the Kingdom of Spain between 2013 and 2014.

B. Legal grounds of the Kingdom of Spain

(1) Objective and purpose of the ECT: National or non-discriminatory treatment.

1211. The Claimants claim that it is undisputed that:

> *"the ECT shall be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in the light of the ECT's object and purpose in particular the facilitation of transactions in the energy sector by reducing political and regulatory risks".* [760]

1212. This affirmation is true. But the same cannot be said of the conclusion which the Claimant then reaches in his Memorial on the Merits when they say that the limitation of regulatory risks by the ECT is translated in a "*blocking*" of the State's regulatory power in the control of the Macroeconomy. The Claimant affirms that: *"the latitude of regulatory action accorde to the States under the ECT is extremely limited*"[761]. [A]yes,

[758] Decision of 17 March 2016 from the Directorate General for Energy Policy and Mines, which records awarded auction applications in the specific remuneration regime register with the status of advance allocation, in order to allocate the specific remuneration regime to new electricity production facilities based on biomass located in the peninsular electricity system and for wind technology facilities, R-0288.
[759] Story from Diario Expansión of 03 May 2016, "Spain creates a secure legal framework to prevent another energy bubble". R-0289.
[760] Memorial on the Merits, paragraph. 309, reiterated in the Counter-Memorial, paragraph 344.
[761] Memorial on the Merits, paragraph. 320.

concludes: "*In summary, the scope for a host State's regulatory freedoms is much narrower under the ECT and various controls are placed on it within the text of the ECT itself*"[762].

1213. In order to reach this conclusion, the Claimant makes a biased and self-serving reading not only of the ECT and the European Energy Charter, but also of the scientific doctrine that he provides as the foundation to their thesis. As we will demonstrate below, a literal and consistent reading of these elements converts the Claimant's theory into a partial and biased preamble of the objective and purpose of the ECT.

1214. The Claimant admits that the objective of the ECT is, according to its Article 2, to establish "a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, *in accordance with the objectives and principles of the Charter*" (Emphasis added). Article 2 of the ECT is, therefore, substantive law that is applicable according to Article 26(6) ECT.

1215. The Claimants cites some alleged objectives of the European Energy Charter and conclude that "*the fundamental objective of the ECT is to facilitate transactions and investments in the energy sector by reducing the threat of political and regulatory risks."763The Claimant seems to claim that protection for the Investor becomes an absolute value, above the needs of the general interest of the State and, even, above domestic investors*[764]. However, this theory is inadmissible.

1216. The protection for investments must be understood in the *context* of the ECT. The European Community (now the EU) promoted the signing of the ECT, as Professor Wälde notes[765]. The ECT aimed to lay the foundations for liberalising the energy market between Western Europe and the countries in the so-called "Eastern Block" after the fall of the Berlin Wall. The ECT is therefore, "*the basis of an energy community between the regions of the world that were divided by the iron curtain*"[766].

1217. It was to export the market model for energy that existed in the EU to other countries outside it[767]. The Claimants have omitted the true objectives and principles that the European Energy Charter establishes for this end, that are applicable to the present case by reference to Article 2 of the Energy Charter Treaty. These objectives are:

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[762] Ibid. paragraph 324.

[763]Memorial on the Merits, paragraphs 315

[764] Paragraph 351 of the Memorial on the Merits, states that "the FET standard is an absolute standard that provides a fixed reference point regardless of the treatment others receive" (emphasis added).

[765] "Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation", T. W. Wälde (1996) 12 Transnational Dispute Management 4: "*The ECT is largely a product of EU external, political, economic and energy policy. It is meant to integrate the formerly Communist countries, provides an ante-chamber and preparation area for EU accession for many of them*". RL-0070.

[766] "The Energy Charter Treaty and related documents", consolidated text, page 8. Available on the Energy Charter page", Preface (English version). RL-0002.

[767] European Energy Charter, preamble. And this is because it was considered, as stated in the Treaties establishing the European Communities, that *"a wider cooperation in the field of energy among the signatories is essential for economic progress and, in general terms, for social development and the improvement of the quality of life"*. (emphasis added). RL-0002.

"to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the ***principle of non-discrimination*** *and on* ***market-oriented price formation****, taking due account of environmental concerns"*[768] *(emphasis added).*

1218. To achieve this goal, the signatory countries of the Charter state they are "*determined to create a favourable climate for the operation of the companies and the flow of investments and technologies, by applying the principles of the market economy in the field of energy*".[769] The ECT's protection of investments is aimed at achieving this free market in energy in all of Europe, based on the principle of non-discrimination and market-oriented price formation.

1219. Consequently, the principal objective of the ECT regarding investor protection is to attain the implementation of a free market to be able to perform energy activities without discrimination on the grounds of the investor's nationality.

1220. The ECT establishes protection measures for investments and for investors that limit the regulatory power of the signatory States in order to achieve this objective. However, under no circumstances is that regulatory power cancelled or extremely limited. The Guide for the Energy Charter Treaty makes it clear that the ECT does not prevent States exercising their power of macroeconomic control:

"8. Many ***Governments actions****, for example the* ***control of the macroeconomics*** *or the introduction of environmental and safety legislations,* ***can affect investment profits*** *but cannot be subject to absolute rules. In this case, the best defence for a foreign investor is the* ***guarantee*** *that he will be treated* ***at least as well*** *as are domestic investors, because no government will want to destroy their own industry."*[770] *(Emphasis added)*

1221. The Guide for the Energy Charter Treaty has been incorporated into the consolidated texts, among other official languages of the Treaty, into Spanish, French[771], Italian[772], German[773] and Arab[774]. These versions of the consolidated text graphically explain the ECT's objective: the guarantee that the investor will be treated *at least as well as national investors*, *"because no government will want to destroy its own industry."*

[768] Ibid. European Energy Charter, as established by the name of TITLE I of the Charter: "OBJECTIVES".
[769] Ibid. Title I.
[770] "The Energy Charter Treaty and related documents", consolidated version in Spanish, page 11, RL-0002.
Available at: http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-es.pdf
[771] "Le Traite sur la Charte de l'Energie et documents connexes", Consolidated text, page 7, RL-0082
available at: http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-fr.pdf
[772] "Trattato Sulla Carta Dell'Energia e documenti correlati", official version in Italian, page 7, RL-0083.
Available at:
http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-it.pdf.
[773] "Der Vertrag Über Die Energiecharta und dazugehörige Dokumente", German official version, page 9, RL-0084.
Available at http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-de.pdf
[774] Available at http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-ar.pdf

1222. Nonetheless, this non-discrimination objective is not fully achieved in the ECT. The reluctance of states to limit their regulatory power in any way in a sector as strategically important as energy leads the signatories of the ECT to differentiate between two moments: 1) the so-called "*making-investment process*" (paragraphs (2) and (3) of article 10 of the ECT), in which the conditions for guaranteeing the objective of national treatment and most-favoured nation treatment were reserved for the signing of a "*supplementary treaty*", that has still not been signed and 2) the moment after the investment, in which the guarantee of national treatment and the most-favoured nation clause apply to the foreign investor, albeit with certain limitations, as we shall see below.

1223. It should be noted, in this sense, that article 10 itself of the ECT notes regarding the moment in which the investment is made in its first subsections, as soft law, that:

> *"In accordance with the provisions of this Treaty, the Contracting Parties shall encourage and create stable, equitable, favourable and transparent conditions for investors of other Contracting Parties to make investments in their territory."*

1224. As C. Bamberger, who took part in the process of drafting the ECT, notes:

> *"As announced in a preambular provision of the ECT, national treatment and MFN treatment is expected to be applied to the making of investments pursuant to a "supplementary treaty". Paragraphs (2) and (3) of Article 10 therefore provide only for a "best efforts" ECT commitment to accord the better of national treatment or MFN treatment to investors of other Contracting Parties with regard to the making of investments".*[775]

1225. After the investment is made, the best protection standard granted by the ECT to the investor and to the foreign investment is "national treatment". ECT's greatest ambition is non-discrimination. In this regard, Professor Wälde says:

> *"The main standard imposed by the Treaty on investors is according to all authoritative accounts of the Treaty, "national treatment". (…). The strategy of the Treaty has been to incorporate the "favourable" element of national treatment, i.e. non-discrimination vis-à-vis national business, while countervailing the negative element, i.e. the application of possibly low-quality standards to foreigners, by the inclusion of international minimum standards. In other words, international law sets the minimum standard, even if national treatment would be much worse, but when it*

[775] *"An Overview of the Energy Charter Treaty"*, C Bamberger in T. W. Wälde (ed.), The Energy Charter Treaty: An East-West Gateway for Investment and Trade, (Kluwer Law International, 1996). RL-0085. In the same vein, Wälde says in "Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation" by Thomas W. Wälde: *"The Treaty distinguishes two phases of investment and treats them differently: the pre-investment phase [...] imposing a duty of "best efforts" at non-discrimination, national and most-favoured treatment. [...]. Once an investment is made ("post-investment phase"), [...], the investments are protected against discrimination, breach of contractual and other commitments, expropriation, destruction and impediments against transfer of capital and earnings (Arts.10-17)* RL-0070.

comes to governments favouring their own companies, then national treatment takes precedence".[776] *(Emphasis added).*

1226. That is to say, when Article 10.1 of the ECT obliges investments already made to be granted a "*treatment no less favourable than that required by international law",* it is resorting to the minimum standard of protection guaranteed by International Law. The maximum aspiration of the ECT is, therefore, national treatment, as this treatment shall apply to foreign investments when it is more favourable.

1227. In this way, section (7) of Article 10 of the ECT establishes that:

"Each of the Contracting Parties shall grant within its territory to investments of investors of other Contracting Parties, as well as to activities related to it, such as management, maintenance, use, enjoyment or liquidation, a treatment no less favourable than that accorded to investments and to their management, maintenance, use, enjoyment or liquidation, of its own investors or those of any other Contracting Party or third-party State, by applying the most favourable situation." (Emphasis added)

1228. However, this guarantee of national treatment to investments already made contains a significant *exception* in the field of subsidies or public aid in paragraph 8 of Article 10:

"The conditions for the application of paragraph 7 to the programmes by which a Contracting Party provides grants or other ***financial assistance*** *or signing of contracts for research and development on energy technologies,* ***shall be reserved for the supplementary treaty referred to in paragraph 4****". (Emphasis added).*

1229. This exception is applicable to this case, in which the Claimant claims the receipt of subsidies or State aid for the production of electricity. The "Supplementary Treaty" has not yet been signed, so that there is still no obligation by the signatory States of the ECT to grant the foreign investor the main objective: the "*national treatment*" The national treatment in the matter of programmes by which a Contracting Party provides grants "*or other financial assistance*".

1230. Along the same lines, in regulating state subsidies to promote trade or investment abroad, we should note that section four of Article 9 of the ECT expressly provides that nothing in this Article "*shall prevent a Contracting Party from taking measures*":

(i) for prudential reasons, including the protection of Investors, consumers, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier; or

(ii) to ensure the integrity and stability of its financial system and capital markets."

1231. Moreover, as well as the literal interpretation of the ECT, the European Energy Charter, the opinion of the aforementioned Doctrine, the ECT Secretariat in its "*Decision*

[776] T. W Wälde, *"International Investment under the 1994 Energy Charter Treaty*" in T. W. Wälde (ed) The Energy Charter Treaty: An East-West Gateway for Investment and Trade (Kluwer Law International, 1996), RL-0086.

of the Energy Charter Conference, Subject: Road Map for the Modernisation of the Energy Process", of 24 November 2010, sets out non-discrimination as an *objective* in the Area D, concerning "Investment Promotion and Protection":

> *"Area D: Investment Promotion and Protection [...] Objective [...]*
>
> *The Energy Charter Treaty's investment provisions should remain untouched in their fundamentals. The Energy Charter will need to assess the instruments at its disposal in view of their continued ability to promote investments into all parts of the energy chain and to ensure non-discriminatory access to international energy markets. [...]*
>
> *Output 1: Promoting the Investment Climate.*
>
> *The Investment Group should draft policy recommendations for member states [...]to draw on - A comprehensive Review of the exceptions to non-discriminatory treatment in the Blue Book of the Charter [...]."*[777] *(Emphasis added).*

1232. The ECT Secretariat confirmed in 2010 that the highest aspiration of the ECT in its future evolution is to remove barriers to *non-discrimination*. This ECT objective does not remain unfulfilled, as we shall see, as regulatory measures that are (1) proportionate, (2) justified on grounds of public interest and (3) applied without distinction to national and foreign investors alike, have been adopted *erga omnes*.

1233. It is undoubtedly important to resolve this issue according to the ECJ standard established by the ECT. Indeed, it has been developed in the Precedents that have applied the ECJ standard of the ECT, as we shall now outline.

1234. The Claimants confirm in their Reply on the Merits that, as far as the Kingdom of Spain has not raised any objections on certain statements made in their Memorial on the Merits , there are a number of issues that must be considered as not disputed between the Parties.[778] This statement is denied. We shall now proceed to deny or qualify those issues which are disputed between the Parties.

(2) The ECT does not prevent Macroeconomic Control Measures from being adopted.

1235. The Claimants make a one-sided reading of the ECT, according to which this treaty would guarantee an alleged right to petrification of the general rules in favour of foreign investors, even to the detriment of national investors[779].

1236. However, this is not the ECT's objective. In the absence of a *specific commitment* to stability, an Investor cannot have an expectation that a regulatory framework such as the one discussed in this arbitration will not be amended. This has been clearly stated by the

[777] Energy Charter Secretariat, "Decision of the Energy Charter Conference, Subject: Road Map for the Modernisation of the Energy Process", Energy Charter Secretariat, 24 November 2010. Area D, Pages 6 and 7. RL-0087.
[778] Para. 351 of the Memorial of Claim.
[779] Memorial on the Merits,, para. 436.

precedents that have applied the ECT, such as the Cases of *Plama Consortium*[780] and *AES Summit*[781].

1237. It was again stated in the final Award of the *Electrabel* Case, which clearly provides that:

> *"The host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance. […] even assuming that Electrabel had an expectation that it would be awarded the maximum compensation […], once weighed against Hungary's legitimate right to regulate in the public interest, such an expectation does not appear reasonable or legitimate."*[782] *[Emphasis added]*

1238. In applying the ECT to the Spanish SES, the Award of *Charanne v. Spain* reached the same conclusion as the aforementioned Awards:

> *"Turning a regulatory provision, due to the limited number of persons that may be subject thereto, into a specific commitment entered into by the State towards each and every one of those persons would be an excessive limitation of the capacity of States to regulate the economy* ***according to the public interest****.*
>
> *[...] "In the absence of a specific commitment to stability, an Investor cannot have a legitimate expectation that a regulatory framework such as the one discussed in this arbitration cannot at any time be amended to adapt it to the needs of the market and public interest."*[783] *(Emphasis added)*

1239. Therefore, the States that are party to the ECT are not required to maintain a predictable *regulatory* Framework during any investment. We should note that Article 10(1) ECT alludes to "*stable conditions*", not a "*regulatory framework*"[784]. However, under no circumstances is the power to amend the regulatory framework cancelled or strongly limited.

1240. The Claimant accepts that the ECT must be interpreted in its *context* and in accordance with its *subject matter*. Its *subject matter* relates to investments in the energy sector, which is a very strategic and highly regulated sector in the signatory countries of the ECT. It is not very realistic for the Parties to the ECT to agree to provide a kind of "Insurance Policy", in such a strategic sector, to foreign investors, which would protect them against regulatory reforms adopted for reasons of public interest. The Guide for the Energy Charter Treaty also makes it clear that the ECT does not prevent States exercising their power of macroeconomic control:

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[780] Plama Consortium Limited v. Republic of Bulgaria, Award 27 August 2008, ¶219. RL-0088.
[781] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, Award 23 September 2010, para. 9.3.25; upheld by the Decision of the Ad hoc Committee for Annulment, 29 June 2012, para. 95. RL-0047 and RL-0054.
[782] Electrabel S.A. V. Hungary (ICSID Case No. ARB/07/19), Award 25 November 2015, paras 165 and 166, RL-0089.
[783] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain (SCC v. 062/2012), Final Award, 21 January 2016, and individual opinion, paragraph 493 and 510. RL-0071.
[784] The Claimant manages to identify both concepts in its interpretation of the Legitimate Expectations protected by 10(1) ECT in paras250 and 251 of the Memorial of Claim.

*"8. Many **Governments actions**, for example the **control of the macroeconomics** or the introduction of environmental and safety legislations, **can affect investment profits** but cannot be subject to absolute rules."*[785] *(Emphasis added)*

1241. This Spanish version is that known or should be known by the Claimant and Sovereign Funds of Abu Dhabi. The consolidated version of the Guide to the Energy Treaty in Arabic also expressly includes the **possibility of adopting macroeconomic control measures, even if they affect investor profitability**[786]:

8. يمكن لإجراءات عديدة تتّخذها الحكومات ، كالسيطرة على القطاعات الإقتصادية الكبرى ، أو سنّ تشريعات خاصة بالبيئة و السلامة، أن تؤثر على عوائد الاستثمار، ولكن لا يمكن أن تخضع لقواعد مطلقة . و إن أفضل حماية هنا بالنسبة للمستثمر الأجنبي، هي الضمان بأن يعامل على الأقل، معاملة المستثمر الوطني، بما أنه لا توجد أية حكومة ترغب في تدمير صناعتها الوطنية.

1242. These consolidated official versions in Spanish and Arab of the Guide of the ECT graphically explain the *main objective of the ECT* as outlined above: the guarantee that the investor will be treated at least as well as national investors, without limiting the possibility for States that are party to this Treaty to adopt Macroeconomic Control Measures for reasons of public interest.

1243. Furthermore, the Claimant itself invokes and accepts that in their Memorial on the Merits.[787] the application of the principles and objectives set out in this Guide to Energy Charter Treaty.This interpreter principle on the real objectives of the ECT can therefore not be ignored, established by the General Secretariat of the Energy Charter Treaty in the consolidated versions of the Treaty since 2002.

1244. Therefore, the States that are party to the ECT are not required to maintain a *predictable* regulatory framework during the whole life of the investment of all foreign investors. That would be similar to requiring the petrification of the regulatory framework in such a strategic Sector. We should note that Article 10(1) alludes to "conditions", not a "regulatory framework". Professor Wälde shows that the obligations imposed on States in Article 10 must be tempered with the forecasts laid down in Part IV of the ECT:

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[785] "The Energy Charter Treaty and related documents", consolidated text, page 8. Available on the Energy Charter page: RL-0002.
http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-es.pdf

[786] *"8. Many Government actions, for example the control of macroeconomics or the introduction of environmental and safety legislations, may affect the profitability of the investment but cannot be subject to absolute rules. In this case, the best defence for a foreign investor is the guarantee that it will be treated at least as well as national investors, because no government will want to destroy its own industry."*
Available at http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-ar.pdf, Page 8, RL-0002.

[787] Memorial on the Merits, paragraph. 319.

"one needs to appreciate that these "primary" obligations are tempered by the miscellaneous provisions of part IV- with reference to sovereignty (Art.18 (1)), presumably an emphasis on respecting the power of economic regulation of states and perhaps equivalent to the reference to "subsidiarity" under the EU Treaty, the – partial and some extent only suspensive- tax veto in Art.21, the exceptions in Art.24 and the hotly contested attribution rules in Art.22 and 23."[788]

1245. As far as Professor Schreuer is concerned, he asserts that:

"At the same time, it is clear that this principle is not absolute and does not amount to a requirement for the host State to freeze its legal system for the investor´s benefit. A general stabilization requirement would go beyond what the investor can legitimately expect. It is clear that a reasonable evolution of the host State´s Law is part of the environment with which investor must contend."[789] *(Emphasis added)*

1246. In conclusion, the Claimant intends to obtain, in practice, a non-modifiable (*predictable*) legal framework throughout the entire useful life of its RE plants. However, the ECT does not set out any limits on the regulatory power of the States other than the minimum standards of international law, with an objective of non-discrimination. And it is even reiterated that this treaty does not set out requirements in matters of subsidies or public aid. At any rate, the ECT allows Macroeconomic Control Measures to be adopted by the States that are party thereto, based on reasons of public interest.

1247. The respondent has already confirmed that it adopted regulatory measures for several legitimate reasons:

(1) The legal obligation to ensure that the economic regime is always consistent with the principle of Reasonable profitability for investors, thereby preventing over-remuneration which is contrary to EU Law;

(2) The existence of public interest by the sustainability of the SES, in a context of a severe international crisis and with a sharp reduction in energy demand affecting the RE Sector, which decreased the revenue of the SES and economically destabilised the SES, along with increased RE costs; and

(3) The impossibility of passing the whole burden of the economic imbalance onto consumers. Therefore, a consumer that paid EUR 370 on its electricity bill per year in 2003 paid a total of EUR 669 in 2012. The cumulative increase over these years for receiving the same service is disproportionate. The greatest increases, however, took place in 2008 (10%), 2009 (10.1%) and 2011 (17.7 %).[790]. The aforementioned increase has placed the electricity price in Spain among the most expensive in the European Union. It should be taken into account that a great effort has been made by Spanish consumers in a scenario of a deep economic crisis. The Claimant alludes to the possibility of raising prices further, in line with Germany and Italy, where they are even

[788] T. W. Wälde, "Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice" (2004) 1 Transnational Dispute Management 2. RL-0074.
[789] C. Schreuer, Fair and Equitable Treatment in Arbitral Practice, 2005, Journal of World Investment & Trade ("Schreuer"), p. 365. RL-0090.
[790] Counter-Memorial, paragraphs 440 and 441.

higher. This unfounded argument dismisses an evident element: The purchasing power of German and Italian citizens is superior to that of Spanish citizens. Therefore, equating the price of energy would negatively impact Spanish consumers with respect to German and Italian consumers.

1248. This is also put into context by a set of macroeconomic control measures that were adopted in compliance with international commitments, such as the European Council's Recommendations of March 2012[791] and the Memorandum of Understanding signed with the European Union on 20 July 2012. In both documents Spain undertakes to adopt macroeconomic measures to deal with a specific imbalance: *address the electricity tariff deficit in a comprehensive way*." This undertaking has been binding on Spain since July 2012[792].

1249. In the indicated context, the contested measures continue to provide (national and foreign) investors with a guaranteed Reasonable profitability within the framework of a sustainable SES. That is to say, the Spanish system allows investors to obtain the reimbursement (1) of the amounts invested in the Plants, (2) of the operating expenditure during the useful life of the Plants and (3) obtain a Reasonable profitability referenced by Law to the State Bonds to 10 years [a value without risk] plus 300 points.

1250. All of these measures have been adopted in a reasonable and proportionate manner, and affect the entire Sector equally, without any discrimination whatsoever (consumers, producers, distributors, etc.). What the Claimant attempts is not reasonable: to use the ECT as an insurance policy against situations of crisis, such that the Claimant is more protected, even, than the national investors of the Kingdom of Spain. This is not the ECT's objective.

1251. As a result, in light of the subject matter and purpose of the ECT and according to established facts, the Kingdom of Spain has not violated the ECT. It will now be argued and shown that the Respondent has not incurred in any of the specific violations alleged by the Claimant with respect to Article 10(1) ECT.

(3) The Respondent does not have the Legitimate Expectations it argues.

1252. As a premise, we should note that the burden of proof in relation to the violation of the ECJ standard by the contested measures rests with the Claimant. This is stated by the Tribunal in the Electrabel Case:

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[791] Council's Recommendation of 10 July 2012: "address the tariff deficit of the electricity sector globally, in particular by improving the profitability of the electricity supply chain". R-0101.

[792] Memorandum of Understanding signed with the European Union on 20 July 2012: Sections 29 and 31: "*There is a close relationship between macroeconomic imbalances, public finances and financial sector soundness. Hence, [...], with a view to correcting any macroeconomic imbalances as identified within the framework of the European semester, will be regularly and closely monitored in parallel with the formal review process as envisioned in this MoU. [...]*
Regarding structural reforms, the Spanish authorities ***are committed*** *to implement the country-specific recommendations in the context of the European Semester. These reforms* ***aim at correcting macroeconomic imbalances,*** *as identified in the in-depth review under the Macroeconomic Imbalance Procedure (MIP). In particular, these recommendations invite Spain to: [...] 6) [...]* ***address the electricity tariff deficit in a comprehensive way***." (Emphasis added) RL-0091.

"The Tribunal starts with the premise that it is Electrabel which bears the burden of proving its case under the ECT's FET standard." [793]

1253. However, it has been demonstrated in the Counter-Memorial and in the facts that the Kingdom of Spain has not violated the ECJ standard contained in the ECT, as this standard was interpreted by the Arbitral Tribunals that have applied the ECT.

1254. The attention of the Arbitral Tribunal is drawn to the fact that the Claimant avoids the application of significant Precedents that have applied the ECT standard, such as the AES Summit Award, the Award of the Annulment Committee of the Aes Summit Case or the Final Award of Electrabel. Instead, it invokes less important precedents, which were ordered on the basis of breaches of *contracts* or *administrative concessions* in States such as Mexico, Ecuador, Chile or Argentina.

1255. The major significance of the Precedents that apply the ECT is obvious, as they have taken into account the context, subject matter and purpose of the ECT. Moreover, it is surprising that the Claimant claims that these elements should be taken into account; however, it avoids applying any Precedents that interpret the ECT, by invoking numerous Awards that apply BITs that are unrelated both to (a) the subject matter, context and objectives of the ECT and (b) the facts that are under examination in this arbitration.

(3.1) Thesis of the Claimant

1256. The Claimant reiterates in its Memorials that, given the express wording of Article 44(3) of RD 661/2007, it had the legitimate expectation of maintaining the *entire* regime of RD 661/2007, in its favour, unmodified, throughout the entire useful life of the CSP Plants in which it has invested[794]. This includes: (a) the choice between premium and tariff (b) the limitless sale of the electricity produced, (c) during the entire useful life of the plants, (d) the production burning natural gas at a subsidized price (e) with priority of dispatch and (f) updating the subsidies in accordance with the CPI[795].

1257. That is, the Claimant denies that any future reform could affect the CSP Plants in terms of operation or regime. In practice, the Claimant is claiming the *freezing* of RD 661/2007 in its favour, *sine die*, while contradictorily affirming that it does not claim any freeze[796].

(3.2) Absence of proof of a comprehensive analysis of the legal framework by the Claimant.

1258. The Respondent agrees with the following assertions made by the Claimant:

[793] *Electrabel S.A. v.* Hungary (ICSID Case No. ARB/07/19) Award 25 November 2015 para. 154. RL-0089.
[794] Reply on the Merits, paragraphs. 79.
[795] Reply on the Merits, paragraph 139.
[796] Reply on the Merits, paragraphs. 104: "*The Claimant has made it clear repeatedly throughout its submission that it is not positing that States are prevented from changing their legislation and regulations.*"

- "*Legitimate expectations are to be assessed objectively and not with regard to the subjective considerations of each investor*."[797]

- "*The timing of the assessment of the Claimant's expectations is also of crucial importance*."[798]

1259. In order to establish whether the ECJ standard has been violated, the legitimate expectations that the Claimant had on the treatment that its investment would receive at the time of its completion must be assessed. These expectations must be reasonable and objective as regards the existing general regulatory framework. As part of this assessment, the Arbitral Tribunal must analyse the knowledge of the investor about the general regulatory framework at the time of the investment, or rather the aspects that its knowledge should have covered.

1260. International arbitration case-law is clear in this regard. At the time when an investment is made, the investor must know and understand (i) the *regulatory framework*, (ii) how it is applied, and (iii) how it affects its investment. An investor makes an investment on the basis of this knowledge and must be aware of the risks assumed when the investment is made. The *Electrabel v. Hungry* Precedent, which applies the ECT, provides, in relation to the diligence of investors, that:

> *"Fairness and consistency must be assessed against the background of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host State"*[799].

1261. In this regard, the Award of *Charanne against the Kingdom of Spain*, of 21 January 2016, clearly indicates that:

> *The determination of whether the investor's legitimate expectations have been defeated must be based on an objective standard or analysis. The mere subjective belief that the investor could have had at the time of making the investment does not suffice. [...] in order to rely on legitimate expectations, the Claimants should have conducted a diligent analysis of the legal framework applicable to their investment"*[800].

1262. Therefore, it is an inexcusable obligation of all investors that invest in Spain to know about the *general regulatory framework* which governs investments and includes the standards and Case-law applicable to their investment. It does not seem acceptable that the investor, unaware (or claiming to be unaware) of the applicable legal framework, would make the investment and subsequently resort to International Law in a bid to establish that the Tribunal is ignorant of the legal framework in which it invested.

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[797] Reply on the Merits, paragraph 178.
[798] Reply on the Merits, paragraph 179.
[799] *Electrabel S.A. v.* Hungary (ICSID No. ARB/07/19) of 25 November 2015, paragraph 7.78. RL-0089.
[800] Award of Charanne B.V. and Construction Investments S.A.R.L v. the Kingdom of Spain, of 21 January 2006, paras. 495 and 505 RL-0071.

1263. Nor does it appear acceptable that it would seek for the Arbitral Tribunal to apply only part of the regulatory framework and to omit the part of the regulatory framework by which it is prejudiced.

1264. In this arbitration proceeding, the Claimant party has not accredited that on making its investment **in 2008 and in 2009** it requested any legal due Diligence Report on the alleged "commitments" of the regulatory framework of RD 661/2007. More important still is that no legal Due Diligence report is produced in support of its alleged expectations about a "*commitment*" of the Kingdom of Spain to petrify the regime arising from RD 661/2007 or to maintain or improve it by subsequent reforms.

1265. Within the scope of the ECT, the Award of the Charanne Case also required confirmation of the prior and comprehensive analysis of the legal framework applicable to the sector, which the Claimant could and should have conducted:

> *"The Tribunal estimates that the Claimants could have, at the time they made their investment in 2009, conducted an analysis of the legal framework of their investment under Spanish Law and understood that there was a possibility that the regulations adopted in 2007 and 2008 could be subject to change. At least, this is the level of diligence one would expect from a foreign investor in a highly regulated sector such as the energy sector, in which a **preliminary** and **comprehensive** analysis of the legal framework applicable to the sector is **essential** in order to make the investment"* [801] *(Emphasis added)*

1266. In this regard, the legal interpretation of the rules made by the Supreme Court is relevant for configuring the legitimate expectations of an investor[802]. However, the Claimant denies the relevance of this Jurisprudence[803]. It is inexcusable for the Claimant to have been unaware and ignorant of this Jurisprudence to configure its alleged Expectations with respect to RD 661/2007 or RD 1614/2010 when it has been accredited that: (1) the NEC also referred to this Jurisprudence in 2007 and 2008; (2) this Jurisprudence was well known by (a) the Associations of the RE Sector and (b) by the main investors in the RE Sector, including the Claimant's Partner, Sener.

1267. In this Case, the Claimant does not show that it had the level of diligence one would expect from a foreign investor in a highly regulated sector such as the energy sector, in which a preliminary and comprehensive analysis of the legal framework applicable to the sector is essential in order to make the investment.

1268. The burden of proof of the existence of comittments rests with the Claimant. The lack of due diligence means that the expectations alleged by the Claimant cannot be deemed to be real and objective. In this regard it is important to note that, although the ECT does not apply, the Award of the Invesmart v. Czech Republic is clear:

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[801] Ibid. page 507.
[802] Award of Charanne B.V. and Construction Investments S.A.R.L v. the Kingdom of Spain, of 21 January 2006, paras. 506 to 508. RL-0071.
[803] Reply on the Merits, paragraphs. 222 to 251.

> *"for the Tribunal, the test of whether such an expectation can give rise to a successful claim at international law is an objective one. It is not enough that a claimant have sincerely held an expectation; the expectation must be reasonable and the Tribunal must make the determination of reasonableness in all of the circumstances. If the expectation was unreasonable (for example, ill-informed or overly optimistic), it matters not that the investor held it and it will not form the basis for a successful claim."*[804]

1269. As a result, the alleged violation of its legitimate expectations by the Kingdom of Spain should be dismissed as the regulatory Framework was not properly understood by the Claimant, as shown by the Respondent.

(3.3) Subsidiarily, even if the Due Diligence provided is deemed sufficient, the contested measures do not violate the objective expectations of a diligent investor.

1270. There is already a sufficient number of arbitral Precedents that have applied the standard of Legitimate Expectations that the ECT covers. From these precedents it is worth highlighting the following characteristic notes, from which an established principle can be seen: the ECT is not a kind of *insurance policy* in favour of the investor against the risk of changes in the regulatory framework:

a. It is necessary to have *specific commitments* made to *an investor* that the regulation in force is going to remain immutable. This is outlined in different Precedents of the ECT, such as the Cases Charanne B.V. v. Spain[805], AES Summit v. Hungary[806] and Electrabel v. Hungary[807].

b. The investor's Expectations must be reasonable and justified in relation to any changes in the laws of the host country. This is outlined in different Precedents of the ECT, such as the Cases Plama Consortium Limited v. Bulgaria[808], y Electrabel v. Hungary[809]

1271. Therefore, in accordance with the facts set out in the Counter-Memorial and in the already accredited Facts, (a) neither was there a specific commitment of the Kingdom of Spain in favour of the Claimants (b) nor were the expectations of the claimant reasonable and justified.

(a) Non-existence of specific commitments in the Spanish regulatory framework on the future immutability of the framework of RD 661/2007 in favour of RE installations.

[804] Invesmart B.V. v. Czech Republic (UN-0036-01) Award of 26 June 2009, paragraph 250. RL-0092
[805] Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain (SCC V 062/2012), Final Award, 21 January 2016, and dissenting vote, para. 499. RL-0071.
[806] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22; Jurisdiction Award of 23 September 2010. Paragraph 9.3.29. RL-0047.
[807] Electrabel S.A. V. Hungary (ICSID Case No. Arb/07/19) Award, of 25 November 2015 paragraphs 155, 157 and 162, RL-0089.
[808] Plama Consortium Limited v. the Republic of Bulgaria, ICSID Case No. ARB/03/24, Award on 27th August 2008, paragraph 219, RL-0088.
[809] Electrabel S.A. V. Hungary ICSID Case No. ARB/07/19, Award of 25 November 2015, paragraph 154, RL-0089.

1272. It has been accredited in the Facts that RD 661/2007 does not contain any guarantee or promise to freeze their framework in favour of the Claimant or its investments[810]. Nor do they contain any guarantee or commitment that the successive measures will improve or maintain the framework established therein. The regulatory framework guaranteed that the RE facilities were able to achieve Reasonable profitability during their useful life.

1273. Furthermore, the non-existence of a specific commitment was already declared by the Tribunal of the Case of Charanne, which assessed the Legal Framework in place in the electrical sector during 2007 and 2008 in Spain:

> *"499. According to the Arbitration Tribunal, in the absence of a specific commitment an investor cannot have the legitimate expectation that the regulation in place is going to remain unchanged [...]*
>
> *503. "In the present case, the Claimants could not have the legitimate expectation that the regulatory framework established by RD 661/2007 and 1578/2008 would remain unchanged throughout the useful life of its plants. Admitting the existence of such an expectation would, in effect, be equivalent to freezing the regulatory framework applicable to the eligible plants even if circumstances change [...] The Arbitral Tribunal cannot support such a conclusion. [...]*
>
> *504. The conclusion that the Court reaches according to which, in the absence of a specific commitment, the Claimants could not have had a reasonable expectation that the regulatory framework laid down by RD 661/2007 and 1578/2008 would remain unchanged, is reinforced by the fact that the jurisprudence of the highest Spanish judicial authorities had clearly established, prior to the investment, the principle that domestic law allowed changes to be made to the regulation.*
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> *505. [...] in the present case the Arbitration Tribunal considers that the Claimants could have easily foreseen the possibility that the regulatory framework was going to be modified [...]. Spanish law actually states perfectly clear that the remuneration system applicable to photovoltaic energy may be modified. [...]*
>
> *511. The Court therefore concluded that the Claimants could not have the reasonable expectation that Royal Decrees 661/2007 and 1578/2008 were not going to be modified during the useful life of their facilities."[811] (Emphasis added)*

1274. This Award has examined the Legal System in force in 2009 and has corroborated what the Kingdom of Spain maintain and what the Associations of the RE Sector maintained in 2009 and 2010: RD 661/2007 did not contain any promise or guarantee relative to the freezing of its regime in favour of investors. This lack of specific commitment refers to the entire applicable regime of RD 661/2007. Therefore, there was no specific commitment with respect to: (i) the remuneration regime, (ii) the subsidised hourly or yearly production regime, (iii) the receipt of subsidies for producing using fossil fuels and (iv) the tariff update regime.

[810] Section IV.A.3.3 (para. 847 and seq. of this Memorial.

[811] Award of Charanne B.V. and Construction Investments S.A.R.L v. the Kingdom of Spain, of 21 January 2006, paras. 504 to 508. RL-0071.

1275. No diligently informed investor could expect the *petrification* of all these regimes in its favour by the fact that it has fulfilled the regulatory requirements to obtain subsidies, such as the registration in a compulsory administrative Register. Nor could it expect that these conditions would be maintained indefinitely or improved for it at any rate, as no commitment exists in this regard. It is obvious that the regulatory risk existed for the Claimant party and that it was or should have been aware of it, as they perfectly knew (1) the Case-law that examined the Spanish regulatory framework[812] and (2) the Associations of the RE Sector, such as APPA and AEE, were clearly aware of it.

(b) The Expectations of the Claimant are not reasonable and justified in relation to the contested measures

1276. It is peaceful between the parties that "*Legitimate expectations are to be assessed objectively*[813]". The alleged expectations of the Claimant are not reasonable or objective. This has been accredited with respect to the regulatory framework in force at the time of the investment and with respect to other alleged sources, such as advertising leaflets, consultative reports and PowerPoint presentations invoked by the Claimant.

1277. A significant fact has been accredited by the Kingdom of Spain for the purpose of evaluating the *objective* expectations of any investor: (1) The main Association of the CSP technology (PROTERMOSOLAR), (2) The main Association of wind energy (AEE), (3) The main Association of the RE Sector (APPA), (4) The main investor in RE in Spain (Iberdrola), (5) The Claimant's partner (Sener) and (6) the leading CSP Sector companies considered that the guarantee of the regulatory framework was the granting of Reasonable profitability. This implies the dynamic and non-frozen or immutable nature of this Reasonable profitability. These Associations do not maintain the indefinite freezing of the entire regime of RD 661/2007 in its favour. Neither in 2009, nor in 2010, nor in 2012 nor at present.

1278. In fact the AEE Association expressly alluded to the possible regulatory changes for reasons of general interest[814] and even assumed the possible "retroactivity" that would respect the Reasonable profitability of the investments[815]. Iberdrola required such

[812] *Powering the Green Economy. The feed in tariff handbook."* Miguel Mendonça, David Jacobs and Benjamin Socacool. Editorial. Earthscan, 2010. R-0058.

[813] Reply on the Merits, paragraph 178.

[814] SWA claims to the NEC during the Spanish National Energy Commission hearing process on the Proposed Royal Decree which regulates and modifies certain aspects of the special regime. 29 August 2010, paragraph 6.

"*It is true that the Supreme Court has stated*, in relation to this type of *retroactive reforms*, that there is no "unalterable right" for the economic regime to remain unchanged and that "from the prescriptive content of Act 54/1997 of 27 November of the Electricity Sector no freezing of the electricity power facility holders' remuneration regime in special regime can be drawn nor the impossibility to reform such regime", *thereby recognising a* ***relatively wide margin of the Administration's "ius variandi"*** *in a regulated sector where general interests are involved."* R-0182.

[815] SWA claims to the NEC during the Spanish National Energy Commission hearing process on the Proposed Royal Decree which regulates and modifies certain aspects of the special regime. Page 6. R-0182.

discounts for solar thermal technology and the Protermosolar Association requested that the premiums of other technologies were lowered based on this Principle.

1279. The objective Expectation of any diligent investor which has comprehensively examined the regulatory framework and its legal interpretation by the Jurisprudence of the Supreme Court since 2005 was the lack of a commitment included in RD 661/2007 to maintain its validity throughout the entire useful life of plants in operation.

1280. In addition to this fact accredited by the Kingdom of Spain, there are other elements alluded to by the Claimant which have been disproved. The Kingdom of Spain has accredited that[816]:

(a) Article 43(3) of RD 661/2007 does not contain a stability commitment or clause in favour of the Claimant or of its plants. The Claimant did not request a legal Due Diligence with respect to the existence or non-existence of a commitment to maintain RD 661/2007.

(b) Neither does Article 4 of RD 1614/2010 have a stability commitment or clause in favour of the plants, when referring to the regime of Article 44(3) of RD 661/2007.

(c) The Communications of 2010 do not contain a commitment in favour of the Plants to maintain the regime of RD 661/2007 frozen in the future.

1281. The Claimant itself expounded in its Presentations to the Mubadala Investment Committee in 2008 and 2009 the existence of a regulatory risk. Also, the Respondent has accredited the definitions and Clauses of the Project finance that the Claimant signed in 2008 and 2009. The Claimant agreed to the possibility that RD 661/2007 could be amended or replaced and, more importantly, the Claimant agreed to the legal consequences in the event that said RD 661/2007 was amended or replaced. This must be taken into consideration by the Arbitral Tribunal. In accordance with the Invesmart v. Czech Republic is clear:

> *"a source of contemporaneous evidence of the investor's expectation can be the contractual documents by which it acquired its investment or otherwise dealt with the seller of the investment where it purchased an existing investment."*[817]

1282. Moreover, in the three Project finance agreements entered into with Spanish Banks, a Report prepared by the insurance advisor was attached as Appendix IV, which affirmed the following:

> *"Identification of Risks": [...] "Environmental Risks": "The projects, will carry out their activities in an **environment defined by a certain regulatory framework**, fulfilling all the legal and regulatory requirements currently established as*

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*" the Jurisprudence has set limits to the Administration's "ius variandi" regarding the **retroactive modification** of that remuneration framework, particularly "that the **requirements of the Electricity Sector Law be fulfilled with regard to the Reasonable profitability** of the investments" R-0182.*

[816] Section IV.A.3 "Subjective Expectations of the Claimant",

[817] Invesmart B.V. v. Czech Republic (UN-0036-01) Award of 26 June 2009, paragraph 251. RL-0092.

*necessary for said activities. However, **this environment is dynamic** and, therefore, **it is possible that the regulations may vary and that unforeseen investments may have to be addressed** in order to be able to continue carrying out its activity. This type of risks fall under the category of identified and unknown risks, i.e. they represent the **acknowledgement** of a situation that **may affect** the activity but the probability of occurring is not immediate or foreseeable."*[818] *(Emphasis added)*

1283. The Claimant did not request any clarification or Legal Due Diligence on the "clear and accurate" immutability commitments of RD 661/2007.

1284. The Respondent adds another alleged confirmation through the registration of the Plants in the RAIPRE: "With the registration of each of the Claimants' installations in the RAIPRE, Spain confirmed that each installation was entitled to the benefit of those commitments."[819] It has already been accredited that registration in the RAIPRE is a mandatory administrative requirement for participating in the SES[820]. This makes it possible to control the owners and Facilities that operate under the SES, whose technical sustainability must be guaranteed to the citizens by the Government. In fact, Reports on the owners[821] and changes in ownership[822] are attached to said section.

1285. The RAIPRE is a Section of the Administrative Register in which all producers of the SES, Section 2, are registered. Registration in the RAIPRE is not, therefore, a State commitment to indefinitely and unalterably maintain the future profitability of the FV sector, but rather an administrative register that makes it possible to control and know those involved in the SES.

1286. However, the Precedent of the case Charanne v Spain has dismissed that this registration could create the expectations claimed by the Claimants:

"The Claimants have alleged that, according to the existing regulatory framework, the registration in the RAIPRE gave generators an acquired right to receive the rate which would establish a legitimate expectation that it was not going to be subsequently amended. The Court does not accept this argument.

The respondent has convincingly demonstrated that, under Spanish law, the registration in the RAIPRE was simply an administrative requirement to be able to sell energy, and did not imply that the facilities registered had an acquired right to a particular remuneration".[823]

1287. Consequently, it can also be dismissed that the Claimants could put together reasonable legitimate expectations that, with the registration of the CSP plants in the RAIPRE, any

[818] Loan Agreement GEMASOLAR 2006 SAU. 5 November 2008, entered into between Gemasolar 2006 and the Banks, Pages 168 and 169/478 PDF. R-0249.
[819] Reply on the Merits, paragraph 410.
[820] Section IV.A.3.6 (paragraphs 956 et seq.) of this Memorial
[821] Report on the number of owners registered in Section 2 of the RAIPEE of the SubDirectorate-General of Electricity, MINETUR R-0260.
[822] Report on the number of changes in ownership registered in Section 2 of the RAIPEE of the SubDirectorate-General of Electricity, MINETUR R-0261.
[823] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain (SCC v. 062/2012), Final Award, 21 January 2016, and individual opinion, paragraphs 509 and 510, RL-0071.

investor would block the regime of RD 661/2007 during the entire useful life of the plants.

1288. Moreover, if the Claimant harboured any doubts about the non-existence of a freezing commitment in its favour, given the nature of the two-way inter-governmental relations between Abu Dhabi and the Kingdom of Spain, a Letter sent by the Secretary of State to Dr. Sultán Al Jaber dated 14 January 2010 has been attached, in which mention is made to the dynamism of the RE remuneration system. In this letter, the obtainment of a Reasonable profitability "that does not put the stability of the system at risk" is guaranteed:

> *"In the future, the Spanish Government will adopt a* ***new regulatory scheme*** *to adapt the renewable energy legislation to market needs and technology evolution. [...]*
>
> *We are aware of companies' important efforts and wish to provide proper regulatory reforms that may allow them to obtain reasonable benefits whilst not jeopardizing the system stability.*[824]

1289. With respect to this letter, the Claimant alludes to statements made in Press Releases or phrases from PowerPoint Presentations accessible on the Internet. Moreover, it is based on the unknown expectations of other Claimants. It has already been accredited that the Claimants represent less than 0.5% of the owners of the registered facilities. The Claimant has not accredited a single legitimate expectation of these Claimants, except Charanne's expectation, to which, after learning the Decision, it renounces.

1290. With respect to this lack of or inconsistency in the proof offered by the Claimant, the Kingdom of Spain has already accredited that an investor which has performed a prior and comprehensive analysis of the Regulatory Framework applicable to the Spanish RE sector would have known that this Framework had the following <u>essential principles:</u>

(1) The regulatory system governed by the *principle of regulatory hierarchy* and the result of legally stipulated procedures to draft regulations[825].

(2) The regulatory framework is not limited to RD 661/2007 and RD 1614/2010 as claimed by the Claimant. It is configured on the basis of Act 54/1997 and any regulatory standards that have implemented it, as interpreted by Case-law[826].

(3) The fundamental principle that RE subsidies are a cost of the SES, subject to the principle of *economic sustainability* of the same[827].

(4) Right to priority of access and dispatch of electricity production.

[824] Exchange of letters between the CEO of Masdar and the Ministry of Industry of the Kingdom of Spain, dated 25 November 2009 and 14 January 2010. R-0158.
[825] Section IV.A. (1) (paras. 354 et seq.) of this Memorial.
[826] Section IV.B.3 (paragraphs 523 et seq.) of the Counter-Memorial
[827] Section IV.A (2.1) (paras. 636 et seq.) of this Statement

(5) That the remuneration of the RE consists of a subsidy which, once added to the market price, provides RE Plants with *Reasonable profitability*, in the context of its useful life, according to capital markets, which has a *dynamic and balanced* nature within the SES[828]. This return was linked exclusively to the cost made in the construction and operation of the plants.

(6) That the subsidies were determined according to any developments in demand and other basic economic data, expressed in the Renewable Energy Plans on the investment and operation costs of standard installations, with a view to ensuring that these installations are able to reach Reasonable profitability during their useful lives[829].

(7) That the regulatory changes in the remuneration regime of the RE have been *motivated* since 2004 (i) to correct situations of over-remuneration, or (ii) or by the strong variation in the economic data that served as the basis for the estimation of subsidies[830].

1291. These essential principles constitute the objective legitimate expectations of a diligent investor. Therefore, the Claimant could expect that the Spanish State would no longer adopt measures to resolve any deficit or economic imbalance that affected the sustainability of the SES.

1292. Likewise, no investor could expect that the State would not rectify any situation of "over-remuneration". As shown above, the *leitmotif* inherent to all the measures was precisely to address that situation of unsustainability of the SES and to rectify situations of over-remuneration, thereby preventing its cost being exclusively borne by consumers.

1293. The cherry picking carried out by the Claimant to attempt to attribute alleged "legitimate expectations" identical to those of the Claimant to the Kingdom of Spain are fully unjustified. The forcefulness of the Supreme Court with respect to the appeals filed internally suffices. This jurisprudence has been newly reiterated by the Supreme Court in the decisions handed down in relation to RD 413/2014 and Order IET/1045/2014:

> *"this Court has insisted, in view of the successive regulatory reforms, that it was not possible to recognise pro futuro an "unalterable right" to the owners of special regime electricity production facilities to the maintenance of the remuneration framework approved by the holder of regulatory power unaltered, provided that the requirements of the LSE are fulfilled as regards the Reasonable profitability of the investments."*
>
> *[...] the* ***jurisprudence of this Court has been constant over the years*** *on pointing out, in the interpretation and application of the authorising rules of the legal and economic system applicable to electricity production using renewable energy sources, which guarantee the right to the Reasonable profitability of the investments made by the owners of these facilities, but do not recognise their unalterable right to*

[828] Sections IV.B.1 (paragraphs 523 et seq.) of the Counter-Memorial.
[829] Sections IV.A.1.4 (paragraphs 409 et seq.), IV.A.2.2.a.v (paragraphs 589 et seq), IV.A.2.2.a.i (paragraphs 656 et seq.) and IV.A.4.5.e (paragraphs 1095 et seq.) of this Memorial.
[830] Sections IV.A.2.4 (paragraphs 780 et seq) and IV.A.2.5 (paragraphs 783 et seq.) of this Memorial.

maintain the remuneration framework approved by the holder of regulatory power unaltered (...)"[831] *(Emphasis added)*

1294. It is inexcusable for the Claimant to have been unaware and ignorant of this constant jurisprudence since 2005 to configure its expectations.

1295. Additionally, this dynamism is that communicated by the Secretary of State to Dr. Sultán Al Jaber in 2010: We "*wish to provide proper regulatory reforms that may allow them to obtain reasonable benefits whilst not jeopardizing the system stability*."[832]

1296. It should be recalled that an arbitral precedent has also confirmed this lack of commitment from an objective viewpoint, as expounded earlier[833]. This conclusion is consistent with previous precedents, as in the case *Plama Consortium v. Bulgaria*[834] or *AES Summit v. Hungary*[835], which applied the ECT, in cases of lack of specific commitments in the investor's favour.

1297. Therefore, the Expectations held by the Claimant in this Case should not be admitted. Neither the wording of Article 44.3 RD 661/2007 nor of the other Statements that the Claimant attributes to the Kingdom of Spain.[836]

1298. It is therefore appropriate to deny that the Claimants could reasonably have legitimate expectations to maintain the regime of RD 661/2007 in their favour, *sine die*. It should be recalled, in accordance with the Precedents that ECT apply that:

"The Tribunal starts with the premise that it is Electrabel which bears the burden of proving its case under the ECT's FET standard."[837]

(4) The Kingdom of Spain has respected the standard of Fair and Equitable Treatment of Article 10(1) of the ECT

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[831] Among many others, the Decision handed down by the Supreme Court on 1 June 2016, 1260/2016 (Rec. 649/2014). R-0242.

[832] Exchange of letters between the CEO of Masdar and the Ministry of Industry of the Kingdom of Spain, dated 25 November 2009 and 14 January 2010. R-0158.

[833] Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain (SCC V 062/2012), Final Award, 21 January 2016, and individual opinion, paragraphs 503, 510 and 511, RL-0071

[834] Plama Consortium Limited v. the Republic of Bulgaria, ICSID Case No. ARB/03/24, Award on 27th August 2008, paragraph 219. *"the Tribunal believes that the ECT does not protect investors against any and all changes in the host country's laws. Under the fair and equitable treatment standard the investor is only protected if (at least) reasonable and justifiable expectations were created in that regard. It does not appear that Bulgaria made any promises or other representations to freeze its legislation on environmental law to the Claimant or at all." (emphasis added)* RL-0088

[835] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22; Jurisdiction Award of 23 September 2010. Paragraph 09/03/1934. "*absent a specific commitment from Hungary [...], Claimants cannot properly rely on an alleged breach of Hungary's Treaty obligation to provide a stable legal environment [...]. This is because any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the times.*" RL-0047.

[836] The Press Release, Speech and the Power Point presentations dealt with in section IV.A.3.9 of this Memorial (paragraphs 972 and seq.)

[837] Electrabel S.A. V. Hungary (ICSID Case No. Arb/07/19) Award, dated 25 November 2015 para. 154, RL-0089.

1299. The Claimant states that the measures adopted by the Kingdom of Spain imply the violation of Article 10(1) of the ECT. They breakdown this alleged violation in four obligations: (a) frustration of their Legitimate Expectations. (b) violation in providing a stable and predictable Regulatory Regime; (c) violation of the duty of transparency; (d) non-adoption through abusive and disproportionate measures; and (e) fulfilment of the obligations incurred with the Claimant or its investments (the protection clause).

1300. The non-existence of violation of the Legitimate Expectations has already been thoroughly examined. It is therefore appropriate to make reference to the other alleged violations set out by the Claimants.

1301. In Section 6.3 of the Reply on the Merits, the Claimant argues that "Spain has not provided a separate answer to the Claimants' claim that their investments have been impaired as a result of unreasonable measures under Article 10(1) of the ECT."[838]. The Claimant alleges that the Kingdom of Spain has accepted these arguments on not having alleged anything against them. The arguments referred to are reiterations of those already described in Sections 6.2 and 6.4 of the Reply on the Merits. Consequently, we refer to what is stated in the rebuttal of these Sections, in denying the prejudice in the investments that the Claimants hold. This has been accredited in the second witness statement of Mr. Montoya, as we will expound on alluding to the reasonable and proportionate nature of the measures.

(4.1) The obligation to ensure that stable conditions has not been violated.

(a) Creation and promotion of stable conditions of the general regulatory Framework: the right to a Reasonable profitability before and after the reforms.

1302. The Claimant asserts that "*Spain failed to provide a stable and predictable regulatory regime*"[839]. It also asserts that the Kingdom of Spain does not dispute that the FET standard of the ECT includes the obligation to provide a "stable and predictable" legal Framework"[840].

1303. It is denied that the ECT standard of providing stable conditions imposes a "predictable" regulatory Framework, since the literal interpretation of Article 10(1) of the ECT does not include this term among those it enumerates.

1304. The real objectives of the ECT are set out in sections IV.B (1) and (2) of this Memorial, which are to give foreign investors national treatment or non-discriminatory treatment. It also showed that the objectives of the ECT cannot assume the impossibility for a State to be able adopt Macroeconomic control measures in a non abusive manner. This impossibility is contrary to the objectives of the ECT itself.

1305. The Precedent Electrabel v. Hungary has set out a basic principle in the implementation of the ECJ standard laid down in the ECT:

[838] Reply on the Merits, paragraph 493.
[839], Reply on the Merits section 17.3.
[840] Reply on the Merits, paragraph 402

"The host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance. As was decided by the tribunals in Saluka v Czech Republic and Arif v Moldova, an FET standard may legitimately involve a balancing or weighing exercise by the host State."[841]

1306. This is also expressed by the General Secretariat of the Energy Charter Treaty, in the official consolidated version in French, Spanish, Italian or German of said Treaty.[842] In this case, it should be recalled that after the contested measures, the investors still maintain an economic equilibrium of the investment, receiving the value of the investment and long-term costs and with a reasonable profitability guaranteed by Law.

1307. The Claimant claims the right to the maintenance of a predictable and stable regulatory framework. It invokes nine (9) jurisprudential Precedents in its theory to sustain such arguments.[843] The attention of the Arbitral Tribunal is drawn to a fact: of the nine (9) Precedents invoked, none applies the standard established in the ECT. In this point, the Claimant claims to ignore the Precedents that have applied the ECT, evidently more relevant, on having weighted and applied the FET standard and stable conditions established by the ECT.

1308. The applicants start their argumentation from two premises that we consider wrong: (1) Reduce the regulatory framework to an article in two regulations and (2) Confuse the "stable conditions" guaranteed by the ECT with an alleged right to "*block"* a regime arising from regulatory rules.

1309. In the case *Plama v. Bulgaria*, with a reasoning fully applicable to this case, the regulatory framework in itself is not a specific commitment with respect to the Claimants.[844] This Award is evidently more relevant than those cited by the Claimant, insofar (1) as it applies to the ECT and (2) there are no administrative concessions, licences or agreements between the investor and the recipient State.

1310. The Case *Aes summit v. Hungary* is equally applicable to this case, since it sets out the purposes and objectives of the ECT clearly:

"The stable conditions that the ECT mentions relate to the framework within which the investment takes place. Nevertheless, it is not a stability clause. A legal framework is by definition subject to change as it adapts to new circumstances day

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[841] Electrabel S.A. V. Hungary (ICSID Case No. Arb/07/19) Award, dated 25 November 2015 para. 165 RL-0089.

[842] *"Many Government actions, for example* ***macroeconomic control*** *[...]* ***can affect the profitability of investment*** *but cannot be subject to absolute rules."* "The Energy Charter Treaty and related documents", consolidated text, page 8. Available on the Energy Charter page: RL-0002. http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-es.pdf

[843] Counter-Memorial, paragraph 406.

[844] *Plama Consortium Limited v. The Republic of Bulgaria,* ICSID Case No. ARB/03/24; Jurisdiction Award of 27 August 2008: "*the Tribunal believes that the ECT does not protect investors against any and all changes in the host country's laws* [...]. *It does not appear that Bulgaria* ***made any promises or other representations to freeze its legislation*** *on environmental law to the Claimant or at all*." (emphasis added) RL-0088.

by day and a state has the sovereign right to exercise its powers which include legislative acts."[845] *(Emphasis added)*

1311. The Arbitral Tribunal of AES Summit says with other words what the General Secretariat of the Energy Charter Treaty confirms in the Reading Guide of the Treaty.[846] Recently the Arbitral Tribunal in the matter *Mamidoil v. Albania*[847] has also followed this approach.

1312. Even this Award seems to have influenced the Case-law. Professors Dolzer and Schreuer in 2012 amended their understanding of the *full warranty and security* standard, against what had been stated in previous versions of their work "*Principles of International Investment Law".* The explanation of this standard includes the criterion of AES Summit:

"The standard will not be violated if a State exercises its right to legislate and regulate and thereby takes reasonable measures under the circumstances" [848]

1313. Consequently, while investors may reasonably and legitimately expect a host State to provide them with stable conditions for their investment, this cannot prevent a host State from being unjustifiably prevented from making regulatory changes or legitimate and reasonable reforms imposed by justified circumstances. Moreover, the amendments to the regulatory framework questioned in this arbitration are not only possible, but also predictable. In the words of the Supreme Court, in its ruling on these measures it has established that:

"All these elements of absence of commitments or conclusive external signs of the Administration in relation to the unalterability of the regulatory framework, existence of a reiterated jurisprudence of this Court which has insisted that our system does not guarantee the immutability of the remuneration to the owners of the renewable electrical energy production facilities, the situation of tariff deficit and threat to the feasibility of the electricity system and the fulfilment of the participation objectives of the renewable energy, prevent the change made in the remuneration

[845] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22; Jurisdiction Award of 23 September 2010. Paragraph 9.3.29. RL-0047.

[846] "The Energy Charter Treaty and related documents", consolidated text, page 8. RL-0002.

[847] *Mamidoil Jetoil Greek Petroleum Products Société Anonyme S.A. v. The Republic of Albania*, ICSID Case No. ARB/11/24; Award 30 March 2015, paragraph 617-618. *"Economic, social, environmental and legal circumstances and problems are by their nature dynamic and bound to constant change. It is indispensable for successful public infrastructure and public services to exist that they are adaptable to these changes.*
Accordingly, State policy must be able to evolve in order to guarantee adequate infrastructure and services in time and thereby the fair and equitable treatment of investments. The legal framework makes no exception."
"The Tribunal is reassured of its view by findings of other arbitral tribunals. Claimant has introduced AES v. Hungary into the proceedings where the tribunal found: The stable conditions that the ECT mentions relate to the framework within which the investment takes place. Nevertheless, it is not a stability clause. A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts."(Added emphasis) RL-0048.

[848] R. Dolzer and C. Schreuer, Principles of International Investment Law, Oxford University Press, 2012, page 162. RL-0008.

system of renewable energies from being considered unexpected or unpredictable by any diligent operator."[849]

1314. In this Case, the letter sent by the Ministry in January 2010[850] warned Dr. Sultán of this circumstance, of the need to carry out reforms due to the risk of instability of the system, but maintaining a reasonable profitability for the investors.

1315. The measures adopted must be evaluated in accordance with the general regulatory framework in force in Spain at the time of the investment. This Framework includes the LSE 1997, which enshrined the principle of "reasonable" profitability, the Renewable Energy Plans that implement it and the Jurisprudence that interpreted this principle. Ignoring these facts means carrying out a partial and wrong examination of the stable conditions that the Kingdom of Spain is obliged to create and promote. Note that, notwithstanding the circumstances through which the world economy has passed since 2008, the Kingdom of Spain has always maintained a reasonable profitability in benefit of the investors.

1316. What is more, there can be no talk of instability when the various changes in the Spanish Legal System have been addressed, precisely, at underpinning and making sustainable this principle of reasonable profitability in the long term.

1317. The pillars of the Spanish remuneration model established in 1997 have been maintained at all times. Specifically:

a. It has maintained the concept of efficiency pursued by the SES since 1997, which consists of providing electricity to Spanish consumers at the lowest possible cost.
b. It has maintained the subsidies to renewable energies as a cost of the SES and, therefore, linked to its economic sustainability.
c. It has maintained and improved the priority of access and dispatch for REs.
d. It has maintained the basic structure of the Spanish remuneration model, consisting of allowing RE plants to reach a reasonable profitability by combining two elements at market price (pool) and a subsidy.
e. It has maintained the characteristic attributes of the principle of reasonable profitability: its equilibrium and dynamism.
f. It has restored the equilibrium by eliminating situations that generated unjustifiable remunerations such as the indexation of all the elements that integrate the subsidy or CPI or the adjustments arising from the pool plus premium option.
g. It has maintained the dynamic character of reasonable profitability. Therefore, the reasonability of the profitability continues to be evaluated in accordance with the price of money on the capital market (the price of the Spanish ten-year bond). Dynamism which makes it possible to protect the value of the investment over time, consequently endowing it with greater stability.

[849] Among many others, the Decision handed down by the Supreme Court on 1 June 2016, 1260/2016 (Rec. 649/2014). R-0242.
[850] Exchange of letters between the CEO of Masdar and the Ministry of Industry of the Kingdom of Spain, dated 25 November 2009 and 14 January 2010. R-0158.

h. It has maintained and improved the methodology historically followed by the SES to establish the reasonable profitability, consisting of the determination of types of facilities and standards.
i. It continues to provide RE plants with reasonable profitability. The profitability provided by the Spanish remuneration model is better than the discount rate (opportunity cost) of the sector and, specifically, better than the discount rate (opportunity cost) of the Claimant. Consequently, the profitability that continues to be provided by the Spanish system is reasonable.

1318. I.e., one can hardly speak of instability when the changes carried out have been aimed precisely (1) to applying the principle of reasonable profitability; (2) to resolving situations of imbalance of the SES which threatened its economic sustainability and (3) to strengthening the stability of the regulatory framework through the elevation to the regulation of legal rank of some aspects regulated previously by a RD.

1319. Accordingly, reasonably valuing the existing system and the current one, it must be concluded that the regulatory framework applicable to renewable energies has remained stable. The Kingdom of Spain pledged and undertakes to provide the investor with reasonable profitability on the investment costs in a renewable asset, currently guaranteed by a regulation with the rank of Law.

1320. From the examination of the Precedents which have applied the ECT standard, it must be concluded that the Kingdom of Spain has complied with the obligation envisaged in Article 10(1) of the ECT to provide stable conditions for Claimants' investment.

(b) Non-retroactivity of the contested measures

1321. The Claimants insistently reiterate the existence of retroactive measures, without justifying or arguing that, in accordance with international legislation, the adopted measures are retroactive. In this Memorial, it has been revealed[851] to the Honorable Arbitral Tribunal that the contested measures are not retroactive (1) nor compliant with international arbitral Jurisprudence, (2) nor in line with Spanish national Jurisprudence, nor compliant with scientific doctrine, (3) nor compliant with the criterion of RE Sector Associations nor of other investors, such as Sener, the Claimant's partner. Also, the Kingdom of Spain has accredited (4) that the Claimant learned from the documents it provided from 2007 and 2008 that it could adopt future regulatory changes in pre-existing facilities.

1322. The Claimants, by insisting on the assertion of retroactivity, incur a basic mistake and concept. For a regulation to be retroactive in the sphere of international law it must affect acquired rights. As has been proven, the Claimants have never had a "acquired right" to remuneration by means of a fixed and unchanging FIT, not subject to possible macroeconomic control measures or reforms of the SES.

[851] Section IV.A.3.2 (paragraphs 801 et seq.) of this Memorial

1323. The Claimants do not clarify what specific protection of those contained in Article 10(1) of the ECT was allegedly violated by Spain when it affirms the "retroactivity" of the measures. Evidence of how forced their statements are, is that the Claimant is not able to provide arbitral Jurisprudence that supports their allusions to a retroactivity that violates the stable conditions of the regulatory Framework. This is due to the fact that there is in fact no Jurisprudence that endorses their claims. The Respondent has invoked the two international arbitration Precedents that address this question and both incorporate the theory of the Kingdom of Spain, since they require the existence of an acquired Right.

1324. The case *Nations Energy v. Panama* is particularly illustrative.

> *"it does not have a retroactive nature because it does not have the effect of revoking acquired rights and applies only to the future [...] Said requirements only apply to the future, and cannot have the effect of retroactively nullifying or reducing the deductions already made [...]*
> *In reality, the Claimants **confuse** the principle of non-retroactivity and the principle of immediate effects of the new law for the future.* [852]*(Emphasis added)*

1325. This reasoning has been confirmed by the Final Award of Charanne v. Kingdom of Spain[853].

1326. In this case the reform is applied only towards the future, without possibility of claiming the subsidies paid previously. The Claimant affirms that it is retroactive, since the granted subsidies are already offset with future profit. This is incorrect. The legislator has modified the remuneration regime of the facilities, establishing a reasonable profitability in the useful activity of the facility as a whole. This remuneration makes it possible to take into consideration the remunerations already received from the facility commissioning date, for the purpose of calculating the future subsidies to be received outside of the market, without incurring in retroactivity. Moreover, this avoids the perception of over-remuneration that may constitute Government Subsidies contrary to EU law.

1327. Consequently, the Claimant has not accredited that the contested measures, which are applied towards the future without affecting the acquired rights, violate International Law rules. The Claimant actually seeks to indefinitely freeze the legal regime of RD 661/2007 towards the future by invoking an alleged retroactivity. This does not form part of the

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[852] Case Nations Energy Inc. and others v. Republic of Panama (ICSID Case No. ARB/06/19) paragraphs 642, 644, 646 RL-0080.

[853]Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain (SCC v. 062/2012), Final Award, 21 January 2016, and individual opinion, paragraphs 545 and 546: "it is about assessing to what extent the Government can modify, with immediate application, regulatory rules of general application.
In fact, the Claimants' argument of retroactivity is no more than a different formulation of the argument according to which the State did not have the possibility of altering the regulatory framework that benefited the Claimants' plants in any way. [...] That attitude would lead, in effect to freezing the regulatory framework, limiting any change to the regulation of new plants that were installed after such changes. , RL-0071

ECT standard nor does it comply with its object and purpose, due to the absence of a commitment of the Kingdom of Spain in the Claimant's favour.

(4.2) The obligation to ensure that investors' transparent conditions have not been violated.

1328. The Claimant asserted in its Memorial on the Merits that "said decree was followed by a transitional regime of more than 11 months during which the Government did not give any indication relative to the specific remuneration to which the authorised plants would be entitled."[854] The Facts of the Counter-Memorial have confirmed that this assertion is not true.[855] In the Reply on the Merits, the Claimant attempts to rectify its argument, but ends up asserting the same as in the Memorial of Reply: that for 11 months "the Claimant was unable to value its investments in the CSP Plants"[856]. Once again, something that is not true is transferred to the Arbitral Tribunal. It only had to read the Monthly Report prepared by Torresol Energy in January 2014 to become aware of this assessment[857] and the subsequent monthly reports to stay abreast of the evolution of the procedure. Therefore, the Claimant has not accredited anything in favour of its theory that could

[854] Memorial on the Merits, paragraph 392(a)
[855] Counter-Memorial, paragraphs 969 to 973.
[856], Reply on the Merits paragraph 421.
[857] **Torresol Energy January 2014 Newsletter:** "*The draft Royal Decree on RECORE has been positively informed by the Energy Regulator (former Spanish Energy Commission, now NMCC). After that, has been sent to another legal consultancy body of the Spanish Administration (State Council), in the last legal step to be fulfilled before receiving final approval by the Government. Apparently, publication is imminent (expected for February).*
*Considering this progress, **the Ministry of Energy decided to circulate a draft version of the Order containing the numerical values of the new retributive parameters**, for the 1020 categories of renewable and CHP installations considered by the Government, on January 31st. This new retributive scheme is based in the following elements:*

- *Retribution is assigned on the basis of providing a reasonable profitability on investment, fixed by the Government as an IRR of 7,4 % (indexed to long term debt)*
- *Each plant type has been assigned an average investment, and an average P&L accounts for the past activities, as well as a projection on the future power sales (at market prices, expected to be 49,6 €/MWh) and running costs.*
- ***According to these figures, for each type, a variable price has been calculated (if the running costs are higher than the expected power sales to the market),** corresponding to the difference between those two concepts.*
- ***A fixed payment, based on the estimated investment, is calculated to provide the expected profitability.***

Values for TEI's plants are the following:

			2013		**2014-2016**	
PLANT	**Id. Code**	**Regulatory lifetime** (years)	**Rinv** €/MW	**Ro** €/MWh	**Rinv** €/MW	**Ro** €/MWh
GEMASOLAR	IT-01011	25	544,201	37.031	1,161,599	38.877
ARCOSOL	IT-01006	25	261,445	24.887	558,056	24.859
TERMESOL	IT-01006	25	261,445	24.887	558,056	24.859

*This order is **open to allegations by all the agents** involved in power production until the end of February, approximately. We will be filing our own claims, since in all the cases we disagree with some of the values considered by the government."* (page 4/19). BQR-0063.

prevent it from learning these data. We must recall that the burden of proof of the violations corresponds to the Claimant.

1329. The Claimant invokes arbitral precedents for this standard that are not applicable.

1. They cite the Tecmed Case. However, this Award has been disputed. In this regard, the Annulment Committee of the MTD Case declared that:

"According to the Respondent, the Tecmed programme for good governance" is extreme and does not reflect international law. […] The Committee can appreciate some aspects of these criticisms. For example the TECMED Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations […] is questionable."[858]

2. They cite the Electrabel Case. However, the Electrabel Arbitral Tribunal did not interpret this condition when applying the ECT. Therefore, it is not relevant:

"Electrabel makes no allegations regarding lack of transparency"[859]

1330. 3. They cite the Plama v. Bulgaria Award, which merely refers this ECT standard to the FET and the stability of the regulatory framework.

1331. As stated before, the ECT does not guarantee the predictability of the regulatory framework of the States that are party to it unless there is a *specific* commitment by the State in this regard[860]. This has been corroborated by the Tribunal of the AES Summit Case, which applied the ECT and interpreted this *condition* of transparency established in the ECT.

1332. In said Case, the company AES Summit alleged Hungary's *lack of transparency* given that, after signing an agreement with the Claimant, Hungary re-introduced administrative prices, which was unpredictable. The Arbitral Tribunal examined, among others, the Tecmed Award[861] invoked by the Claimant. However, the Arbitral Tribunal concluded that, pursuant to the ECT, Hungary did not violate transparent conditions as it had acted within the acceptable range of legislative and regulatory conduct:

"Respondent's process of introducing the Price Decrees, while sub-optional, did not fall outside the acceptable range of legislative and regulatory behaviour. That being the case, it cannot be defined as unfair and inequitable."[862]

1333. For its part, the Kingdom of Spain has accredited that the Ministry circulated drafts of the texts that were to be enacted. The draft of the Regulation was circulated on 26

[858] MTD Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile (ICSID Case No. ARB/01/7) Decision on Annulment, 21 March 2007 paras. 66 and 67. RL-0095.
[859] Electrabel S.A. v. Hungary (ICSID Case No. ARB/07/19), Award 25 Nov. 2015, para. 115 RL-0089.
[860] Section IV.B(1) of this Memorial.
[861] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, Case ICSID No. ARB/07/22; Award of 23 September 2010. Paragraph 9.1.6, footnote 28. RL-0047.
[862] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, Case ICSID No. ARB/07/22; Award of 23 September 2010. Paragraph 09/03/1973. RL-0047.

November 2013 and on 3 February 2014 the draft of the Order of parameters was also circulated. Therefore it has been proven that 4 months from the publication of RDL 9/2013 of 12 July, the Claimants were already familiar with the implementing rules in the drafts.

1334. Likewise, it has accredited that the pleadings of the interested parties were taken into account in the evolution of the parameter drafting process[863].

1335. The Arbitral Tribunal must assess the attitude and foolhardiness of the pleadings made by the Claimants, since the Kingdom of Spain has accredited that Torresol Energy duly participated in these procedures through the documents provided by the Claimant itself. In addition, Torresol was able to calculate the revenue it would obtain with the published parameters from the first draft. It should also be noted that, after the pleadings, these parameters were substantially improved. Particularly in the case of Gemasolar 2006.

1336. In addition, it has been accredited that all sectors that were interested participated and that the allegations made were taken into account. The degree of acceptance was so great that it gave rise to a new draft Regulation being re-submitted.[864] Let us remember that ECT's main objective is the *non-discrimination* of the foreign investor, not the privileged treatment of foreign investors compared to nationals.

1337. Furthermore, the Claimant argues that the lack of delivery of a Report by Boston Consulting implies an infringement of the ECT, since it could not have known the parameters of said Report[865]. The Claimant has not accredited that it requested such reports during the pleadings phase. Neither has it accredited that, insofar as the ECT measure guarantees that Investors will be aware of the procedures of an administrative proceeding, including those that do not exist. The Kingdom of Spain has stated that the contract was terminated prior to the receipt of the Report, due to which said report does not exist. The agreement upon the confidentiality clauses agreed upon between a Consulting firm and the Government cannot imply (as intended by the Claimant) the sentence of a signatory Government of the ECT due to lack of transparency. Such an unfounded theory is not grounded on any Precedent applied by the ECT. What is relevant is that the interested parties may make pleadings and that these pleadings were taken into account, as in the case of Gemasolar.

1338. Finally, the Counter-Memorial verified the need to address the tariff deficit and rebalance the SES. This need was already announced from RD-L 6/2009[866] and was known by the claimants before their investment. The Explanatory Statement of the RD-L 6/2009 expressly stated that:

[863] Second witness statement of Mr. Carlos Montoya, paragraphs 23 and 24 and Section IV.A.4.5g) of this Memorial
[864] Report of the Council of State dated 6 February 2014, issued in the administrative appeal relative to the draft Royal Decree 413/2014. The report sets out the processing, with the participation of the whole sector and the restart of its processing as a result of the proposals admitted. R-0133.
[865] Counter-Memorial. 424 to 429
[866] Counter-Memorial paragraph 430

"The growing tariff deficit [...] is causing serious problems which, in the current international context of financial crisis, is deeply affecting the system and puts not only the financial situation of the electricity sector companies at risk, but also the sustainability of the system itself. This imbalance is unsustainable and has serious consequences, [...] Fourthly, by its increasing incidence on the tariff deficit, mechanisms are established with regard to the remuneration system of the installations under the special regime "

1339. And in consistency with this duty of rebalancing the system aggravated in 2011, the structural reform of the electricity sector was announced from 19 December 2011, more than a year before its implementation.[867] These announcements were transparent, constant and consistent with the commitments made at international level to adopt macroeconomic control measures over the course of 2012 and 2013 in numerous national economic sectors. The announcements of the reform for rebalancing the system since 2009 also fulfil the principle generally affirmed in the case Electrabel v. Hungary:

"The reference to transparency can be read to indicate an obligation to be forthcoming with information about intended changes in policy and regulations that may significantly affect investments, so that the investor can adequately plan its investment and, if needed, engage the host State in dialogue about protecting its legitimate expectations."[868]

1340. The Kingdom of Spain has accredited that Dr. Sultán contacted the Ministry in 2010 and that the Ministry answered him is writing, clarifying (1) that the Government was going to reform the regulatory framework, (2) its intention to negotiate with producers and (3) the intention of providing reasonable profitability that does not put the system's sustainability at risk[869]. In addition, he was offered the possibility of clarifying any other doubt.

1341. It is therefore appropriate to categorically deny that the contested measures violated the duty to create transparent conditions for investors. And this, both in the announcement of the Measures as well as in the processing of these measures.

(4.3) The contested measures are not abusive or disproportionate.

1342. As has been described in Section IV.B.1 (a) (paragraphs 730 et seq.), the ECT's main objective is the *non-discrimination* of foreign investors. Furthermore, Article 10(1) of the ECT sets a *FET standard* and also when it obliges investments already made to be granted a "*treatment no less favourable than that required by international law",* it is resorting to the *minimum standard of protection* guaranteed by International Law.

1343. The Kingdom of Spain presented in the Counter-Memorial three different Tests applied by international arbitral Jurisprudence, which show that the contested measures are not

[867] Counter-Memorial, paragraphs 442 to 465.

[868] Electrabel S.A. v. Republic of Hungary, (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012., para. 7.79. RL-0096.

[869] Exchange of letters between the CEO of Masdar and the Ministry of Industry of the Kingdom of Spain, dated 25 November 2009 and 14 January 2010. R-0158.

abusive or disproportionate, by meeting the objectives and standards of FET established in the ECT:

(a) The EDF v. Romania Test , which allows us to examine whether Spain has fulfilled the main objective of the ECT, adopting *non-discriminatory* measures against the Claimants;

(b) The AES Summit v. Hungary Test, accepted by the claimant as relevant, which allows us to examine whether the Kingdom of Spain has respected the FET standard of 10(1) ECT; and

(c) The Total v. Argentina Test that allows us to examine whether the Kingdom of Spain has respected the *minimum protection standard* guaranteed by International Law for long-term investments, as happens in the Energy Sector.

1344. The fulfilment of these Tests shall determine the respect by the Kingdom of Spain for the objectives and standards of FET established in the ECT:

(a) Relevance of EDF v. Romania Test

1345. In the appraisal of the FET standard, the Claimants have not opposed the implementation of the Test set out by Prof. Schreuer and included in the *case EDF v. Romania*. It is appropriate to support the full implementation of this Test in this Case, since it has already been revealed that the main objective of the ECT is to ensure the principle of *national treatment* or *non-discrimination.* The Claimants limit the objectives of the ECT, in a biased manner, to the protection of investors and the *imposition* of a regulatory framework that is predictable and stable. However, it has already been proven that privileged protection to investors is not ECT's main objective, as stated in the Guide to the Energy Treaty[870] and includes the Precedent Electrabel v. Hungary[871].

1346. This test by Prof. Schreuer allows to assess whether the measures taken by a State have been arbitrary or discriminatory. And that is definitely the true objective of the Test applied by EDF v Romania. The Respondent has accredited the compliance of the weighted elements in this Test, which have not even been discussed by the Claimants.[872] This allows us to conclude that the contested measures, non-discriminatory in respect of the Claimants have met the ECT's target.

(b) Compliance with the requirements laid down in the Test applied by the arbitral Tribunal in the AES Summit Case

[870] "The Energy Charter Treaty and related documents", consolidated text of the Spanish version, page 8: *"8. Many **Governments actions**, for example the **control of the macroeconomics** [...], **can affect investment profits** but cannot be subject to absolute rules."* RL-0002.

[871] Electrabel S.A. V. Hungary (ICSID Case No. Arb/07/19) Award, dated 25 November 2015 para. 165: "*The host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance. As was decided by the tribunals in Saluka v Czech Republic and Arif v Moldova, an FET standard may legitimately involve a balancing or weighing exercise by the host State*." RL-0089.

[872] Counter-Memorial, paragraphs 852 to 858.

1347. The Claimants accept that the Test carried out in the case AES Summit v. Hungary can be used to see if the challenged measures have been abusive or disproportionate.[873] This party welcomes that the Claimants support the relevance and applicability to this case of an Award that applies the ECT. The review of the requirements assessed by the Arbitral Tribunal in the case AES Summit will therefore allow us to see that the contested measures have not violated the FET standard of the ECT.

1348. The Claimants deny (1) that there is a rational policy, and (2) that the action of the Government was not reasonable.

(i) There was a rational policy supported in theAES Summit Test, which has been accepted by the Claimants.

1349. The criterion of admissibility of reforms arising from a rational policy has again been confirmed by another further Award: In the case Electrabel v Hungary the Arbitral Tribunal has pointed out that:

> *"Standard for "Arbitrariness": As already indicated above, this Tribunal agrees with the Saluka, AES, and Micula tribunals in that a measure will not be arbitrary if it is reasonably related to a rational policy. [...] A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter."*[874] *(Emphasis added)*

1350. The Claimants state that there was no rational policy, since the justifications provided by the Kingdom of Spain are not acceptable. It distinguishes each of the reasons expounded by the Respondent without possibility of accepting its pleadings:

Tariff deficit

1351. Firstly, the Claimant denies that the tariff deficit justifies the contested measures. The Claimant asserts that (1) the CSP Sector did not give rise to the tariff deficit, (2) This deficit is exclusively attributable to Spain, due to not having further raised consumers' electricity bill and (3) there were other alternative measures for addressing this deficit.

(1) The Claimant considers that the CSP Sector did not give rise to the deficit. It commits a basis error because, once again, it attempts to separate CSP technology from the other REs. RD 661/2007 was applicable to the renewable energy sector as a whole, due to which there is not appropriate to examine each of the subsectors as independent from the others. It is therefore unappropriate to try to distinguish the CSP sector from the rest of the renewable energies. In addition, this theory is also misleading, since the Claimant alludes to a date (2012) in which the CSP sector had phased its entry into operation. Therefore, the figures for 2012 are not significant with regard to the actual volume of the CSP subsector in the tariff deficit over the years. This increase in costs would be exponential in 2014, when all the stages phased until 2013 would already be at full

[873] Reply on the Merits, paragraph 433.
[874] Electrabel S.A. V. Hungary (ICSID Case No. Arb/07/19) Award, dated 25 November 2015 para. 179, RL-0089.

performance. This would have meant a new increase in the costs of the renewable energies and greater imbalance of the SES.

(2) The Claimant asserts that the deficit is attributable to Spain, since it did not fulfil the "Principle of tariff sufficiency"[875] due to not having raised consumer tariffs sufficiently. The Claimant invokes the principle of "tariff sufficiency" and asserts that any investor expected that this principle included in LSE 54/1997 will be applied. It is surprising that the Claimant has omitted all references to the "Principle of economic sustainability" of the LSE 54/1997 and now claims the application of the principle of tariff sufficiency, which is inferred from the foregoing, to raise consumer tariffs in an unlimited manner. The reply given to the Respondent should be that, on raising consumer tariffs indefinitely to address over-remunerations of investors is not a rational policy, according to the AES Summit Precedent, invoked by the Claimant.

(3) Thirdly, the Claimant asserts that there were alternatives to the rise in consumer tariffs. However, it does not accredit the feasibility of the measure it proposes, introducing a fuel tax. There is no record of any modelling or study on legal, tax and budgetary feasibility and in accordance with the international obligations assumed by the Kingdom of Spain in July 2012, such as the measures imposed by the MoU signed by Spain in relation to the bailout of the EU. The alternative proposed by the Claimant is pointless.

Economic crisis

1352. In addition to the tariff deficit, the Counter-Memorial expounded the existence of an *economic crisis* that forced the Kingdom of Spain to adopt numerous macroeconomic control measures in various sectors, including the energy sector. The Claimant maintains that Spain has not accredited that some unspecified economic measures could justify the contested measures.

1353. The Kingdom of Spain also expounded the difficulty of obtaining international financing, which gave rise to the need to suspend issues of the Securitisation Fund for the Tariff Deficit between March and November 2012.[876] Also, Spain has accredited a well-known fact: the bailout performed in July 2012 that determined the signature of a MoU, setting limits to the public deficit in Spain. This Memorandum imposed the commitment of adopting numerous macroeconomic measures in different sectors of the economy. Among these Sectors, Spain undertook to address the tariff deficit in a global manner[877].

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[875] Reply on the merits, paragraph 442

[876] Counter-Memorial, paragraph 1003.

[877] Memorandum of Understanding signed with the European Union on 20 July 2012: "*VI. Public Finances, Macroeconomic Imbalances And Financial Sector Reform:*

"*29. There is a close relationship between macroeconomic imbalances, public finances and financial sector soundness. Hence, [...], with a view to correcting any macroeconomic imbalances as identified within the framework of the European semester, will be regularly and closely monitored in parallel with the formal review process as envisioned in this MoU. [...]*

31. Regarding ***structural reforms****, the Spanish authorities* ***are committed*** *to implement the country-specific recommendations in the context of the European Semester. These reforms aim at* ***correcting macroeconomic imbalances,*** *as identified in the in-depth review under the Macroeconomic Imbalance*

This implied a structural reform of the SES that would enable its long-term rebalancing and sustainability. It says nothing about the reasonableness of macroeconomic control measures aimed at guaranteeing the economic sustainability of the SES in such circumstances, when the EU's bailout and the conditions imposed are well known.

Burdens on consumers.

1354. The Claimant denies that the excessive burden on consumers justifies the contested measures for three reasons: (1) because the bill could have been raised to the same level as Italy, (2) because there are other indirect consumer taxes that were not lowered and (3) because the artificially low consumer costs were maintains for political, not economic, reasons.

(1) It insists once again, proposing another rise to balance part of the cost of the SES in one year. It should be reiterated once again that, in the AES Summit case, the Arbitral Tribunal declared that lowering (not raising) the consumers' bill is to be considered as a rational policy admissible for amending the regulatory framework. And this, although detrimental to investors.[878]

The *Ad Hoc Annulment Committee* ratified this policy as rational and admissible for amending the regulatory framework of the host State. Also, the Claimant does not accredit that this new rise rebalances the deficit in the long term.

(2) As regards the alternative proposed by the Claimant of lowering indirect consumer taxes[879], it is incomprehensible to propose a supposed alternative that is not aimed at guaranteeing the sustainability of the SES as a whole and for the future. Lowering indirect taxes would not rebalanced the SES, but rather would have equally raised consumer tariffs. In addition, there is no minimum study of their legal, tax or budgetary feasibility. Nor is there a study on their impact on economic activity or on the sustainability of the measures against the growth of the deficit in the future. There is not even a legal study on the territorial feasibility of this proposal, on affecting non-State taxes and on affecting the provisions of the Memorandum Of Understanding of July 2012[880]. This alleged alternative of lowering indirect taxes is also meaningless.

Procedure (MIP). In particular, these recommendations invite Spain to: [...] 6) [...] address ***the electricity tariff deficit in a comprehensive way***." (emphasis added) RL-0091

[878] "*the majority has concluded that Hungary's reintroduction of administrative pricing in 2006 was motivated principally by widespread concerns relating to (and it was aimed directly at reducing) excessive profits earned by generators and the burden on consumers.*
[…] Having concluded that Hungary was principally motivated by the politics surrounding so-called luxury profits, the Tribunal nevertheless is of the view that it is a perfectly valid and rational policy objective for a government to address luxury profits. And while such price regimes may not be seen as desirable in certain quarters, this does not mean that such a policy is irrational." AES Summit Generation Limited and AES-Tisza Erömü Kft v. Hungarian Republic, ICSID Case No. ARB/07/22, Award of 23 September 2010, paragraph 10.3.31 and 10.3.34. RL-0047.

[879] Reply on the Merits, paragraphs. 462 to 465.

[880] Memorandum of Understanding on Financial-Sector Policy Conditionality in Spain, 20 July 2012, pages 14 and 15. RL-0091.

(3) Lastly, as regards the maintenance of artificially low consumer prices for political rather than economic reasons[881], the Kingdom of Spain has accredited the constant rise in the consumer tariff since 2003 and acutely since 2007[882]. It has also accredited the reduction in demand caused by the crisis. In addition, it has accredited that the deficit would have continued to rise until unbalancing the system. Alluding to the maintenance of "artificially low" prices is, in fact, a different approach to the need to have raised consumer bills in an unlimited manner.

It has been already stated that this is not an alternative that the Arbitral Tribunal of AES Summit considered reasonable. But nor is it admissible as a viable alternative. Especially when a part of the tariff deficit was caused by the drop in economic activity, which led to consumers using less electricity. A disproportionate rise on consumers would have lowered demand and unbalanced the situation of the SES even more, aggravating said Deficit. Therefore, nor is it an alternative admissible or proven by the Claimants.

(ii) The measures were reasonable and proportionate, to ensure investors a reasonable profitability

1355. The reasonableness and proportionality of the measures have been highlighted in the Counter-Memorial[883] and in this document.[884] These facts accredit that the macroeconomic control measures adopted by the Kingdom of Spain have affected all the interested parties in the SES, including consumers, distributors, carriers and producers[885].

1356. The Claimants are focused on two specific points, for which it is considered that the contested measures are not reasonable: (i) the profitability granted is not reasonable, (ii) the operating costs are not recovered.

Regarding the reasonability of the profitability.

1357. When judging the reasonability of profitability we must refer to generally accepted criteria. One such criterion is to meet the opportunity cost or discount rate used by the agents involved in a certain economic activity.

1358. In this regard, we must recall, as pointed out by Accuracy[886], that the discount rate (opportunity cost) that the Sector expects to obtain after the measures would range between 6.38% and 6.86%. That is, values below 7.398 granted by the Spanish remuneration model.

[881] Reply on the merits, paragraph 468.
[882] Such measures are expounded in Sections IV.A.3.3, IV.A.3.4 and IV.D.2.5 of the Counter-Memorial. A consumer that paid 370 euros per year on its electricity bill in 2003 paid a total of 616.2 euros in 2014. The cumulative increase over these years is in excess of 66.54%. The greatest increases, however, took place in 2008 (10%), 2009 (10.1%) and 2011 (17.7 %).
[883] Sections IV.D.4.2 to 4.8 (paragraphs 724 et seq.)
[884] Section IV.A. 4.5.b) (paragraphs 1062 et seq.)
[885] Section IV.A.2.5 of this Memorial.
[886] Accuracy, Report on the incentives of the thermosolar sector in Spain of 10 June 2016. Appendix 6.

1359. Moreover, if we compare the profitability of 7.398 with the opportunity cost of 6.4% stated by Brattle, we can similarly affirm that the profitability offered by the Spanish system is reasonable at least for the Claimant[887].

1360. Another criterion that we can use to determine whether the profitability offered by the Spanish system is reasonable consists of comparing it with the profitability offered by the Spanish system to activities subject to the same risk level. Specifically, comparing said profitability with other regulated activities such as transport and distribution.

1361. In this regard, we must recall that the profitability of transport and distribution activities, which are also regulated, is established by Law for the first regulatory period, in the profitability of the ten-year Spanish bond plus 200 basis points[888]. That is, 100 basis points less than the production activity using renewable energy sources. From this viewpoint, profitability is also reasonable.

1362. Thirdly, the profitability of 7.398 is the result of increasing the average performance of the Spanish ten-year bond prior to RDL 9/2013 by 300 basis points is the profitability that the Sector requested from the Spanish Government in 2009. As expounded in Section IV.A.2.2(c), the sector presented a new regulatory framework proposal in which it indicated the reasonable profitability for this activity:

> *"The Government shall set the amounts for regulated tariffs, premiums and supplements, in all cases assessing the operation and maintenance costs and the investment costs incurred by facility operators in order to reach reasonable profitability with reference to the cost of money on the capital market. As for the capital remuneration tariff, an annual percentage equal to the average of the previous year's remuneration average of Treasury obligations to 10 years will be taken, plus a spread of 300 basis points."*[889] *(Emphasis added)*

1363. Consequently, the profitability is also reasonable pursuant to the requirements of the Sector itself.

1364. Lastly, we only have to recall the profitability levels given by Banks to assess whether the interest guaranteed by law in the investments in renewable energies in Spain is reasonable or not. This simple comparison was expressly collected by the Arbitral Tribunal in the *case AES Summit v. Hungary*.[890] Let us remember that the Claimants have expressly admitted this Award as a examining parameter of the FET standard in this case. Consequently, a profitability of 7.298 when the Euribor (at the time of writing) records negative rates is more than reasonable.

Regarding the recovery of operating costs.

[887] Ibid. Appendix 6.
[888] Act 24/2013, of 26 December, on the Electricity Sector. Additional Provision Ten. R-0192.
[889] AREP-Greenpeace Press Release concerning the Draft Bill for the Promotion of Renewable Energy of the Draft Bill presented by AREP-Greenpeace in May 2009. Article 23.4 R-0212.
[890] "*One need only recall recent wide-spread concerns about the profitability level of banks to understand that so-called excessive profits may well give rise to legitimate reasons for governments to regulate or re-regulate*." AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary, ICSID Case No. ARB/07/22, Award of 23 September 2010, paragraph 10.3.31 and 10.3.34. RL- 0047.

1365. The assertion made by the Claimant cannot be accepted. Said assertion does not correspond to the reality of the situation. In accordance with that reflected by the Claimant's technical advisors and the comparison prepared by Mr. Carlos Montoya, it appears that:

> *"Based on the foregoing, it can be concluded that the investment costs corresponding to the claimant plants are lower than those considered in the Order. Likewise, it can be concluded that the operating costs corresponding to the claimant plants are lower than those considered in the Order, except the item relating to the lease of the plot of land, which is completely disproportionate compared to average market values"*[891]

1366. In this point we must reproduce that pointed out by Mr. Carlos Montoya, where he indicates that:

> *"The cost of the properties envisaged in Order IET/1045/2014 is compatible with that considered in the "Due Diligence Report" prepared by BNP PARIBAS on 24 January 2008 and provided by the Claimants with reference C-0043. Page 56 of the aforementioned report includes a plot lease cost at TERMESOL 50 of EUR 645,000 per year, far below the cost of 1,969,004 euros reflected in the DISEPROSA report"*[892]

1367. Consequently, the only discrepancy between the Order of Parameters and the Claimant's operating costs are the costs associated with the lease. As can be observed, said costs are disproportionate and contrary to the only "due diligence" provided by the Claimant on this cost when making its investment. The fact that the Claimants have decided to pay for the plot lease nearly 300% more than that indicated in said due diligence is a risk that can only be attributable to the investor's mistaken decision in this regard. The aforementioned investment does not correspond to the actions of an efficient and well-managed company. Therefore, the negative consequences arising from a bad business decision should not be repaired with the money of Spanish consumers. The subsidised Spanish system, like the Bilateral Investment Treaty, is not an insurance policy that covers even the consequences of the erroneous decisions made by investors.

1368. The Claimant, on building its arguments, points out that it assumed significant financial risk. However, it forgets that the Spanish regulatory model has never considered financial costs when setting premiums. In this point we must recall that:

> *"Below follows a review of the hypotheses, estimates and assumptions taken into account in the preparation of this proposal:*
>
> *(...)*
>
> *Project funding: it is assumed, in all cases, that 100% of the funding will come from equity. The leverage and percentage between equity and other sources of funding are independent decisions in each project and for each promoter that, when*

[891] Second Statement by Mr. Carlos Montoya on 6 June 2016. Paragraph 38
[892] Second Statement by Mr. Carlos Montoya on 6 June 2016. Paragraph 37.

made wisely, should provide better ratios than those estimated in this report"[893] *(Emphasis inherent in the text)*

1369. Furthermore, this criterion, as expounded earlier, was clearly reflected both in the REFP 2000-2010 and in the REP 2005-2010.

Conclusion

1370. The arguments set out for the lack of reasonableness of the contested Measures should be dismissed. The Spanish remuneration model guarantees the recovery of the CAPEX of the OPEX inherent to an efficient and well-managed company and makes it possible to obtain reasonable profitability. The Arbitral Tribunal in the Electrabel Case examined the reasonableness of the measures taken, in accordance with the Test set out in the ASE Summit case, stating that:

"The test for proportionality [...] requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved"[894]

1371. As has been proven, it is clear that the contested measures have achieved the aim of rebalancing the SES and at the same time have kept reasonable levels of remuneration for Plants, whose remuneration was also made with the previous regime. Consequently, it must be concluded in the light of the criteria examined, that the reform of the electricity sector carried out by Spain constitutes a rational valid policy, and has been made possible by a reasonable action, which fits within the standard of FET, laid – down by in the ECT, as stated by the arbitral Tribunal in the case AES Summit v. Hungary.

(c) Test carried out in the *Total v. Argentina case,* to show the respect for the economic equilibrium of the investment

1372. Even though it may be considered, as a mere hypothesis, that the Test set out in the case *AES Summit v. Hungary* is not met, it is also appropriate to dismiss the claim of the Claimants.

1373. The Counter-Memorial revealed the maintenance after the reform, of the economic balance of the investment of the Claimants.[895] Spain has carried out the structural reform of the electricity sector due to a reasonable cause and without breaking the economic equilibrium of the investment of the Claimant, respecting the minimum standard of FET.

1374. The Claimant has objected to two questions[896]:

(1) It asserts that this Award is not applicable because the Total case, expounds this Test with respect to the general regulatory framework and in the Spanish

[893] Economic Report of RD 436/2004.Page 5/10 R-0220.
[894] Electrabel S.A. V. Hungary (ICSID Case No. Arb/07/19) Award, dated 25 November 2015 para. 179, RL-0089.
[895] Counter-Memorial, paragraphs 1010 to 1019.
[896] Reply on the Merits, paragraph 491.

framework there ere *specific* commitments made by Spain. It has been demonstrated that there are no specific commitments in the Spanish regulatory framework. It has thus been ratified by the Charanne case, which denied the existence of these commitments in an investment made in 2009.

(2) It also objects that the arbitral tribunal in the case *Total v. Argentina*[897] observes the *minimum* conditions required in the FET standard and that they are entitled to more. As has been stated in the Section relating to the ECT's[898] objectives, this Treaty guarantees the national treatment and in any case comes to protection by using the *minimum* standard of protection guaranteed by international Law. The Arbitral Tribunal in the case *Total v. Argentina* ruled on the basis of this *minimum* standard. Therefore, it is relevant to the present Case, since it accredits that the Kingdom of Spain has observed the minimum standard of protection of international law, to which the investor is entitled, together with the guarantees of Article 10(1) of the ECT.

1375. In the Total Case the Arbitral Tribunal pondered whether the principles of economic balance had been fulfilled to allow a long-term investor to recover costs and obtain a return on its investment[899]. In this case, the energy sector requires the implementation of long-term investments, and these were made in application of the regulatory framework. Such weighting requires, therefore, to check if the electricity sector reform made by Spain respects, ultimately, if the investor "*is able to recover its operations costs, amortize its investments and make a reasonable profitability over time"*.

1376. As is proven in the witness statement of Mr Carlos Montoya,[900] the reform carried out after the investment made by the Claimants meets these requirements. It ensures a remuneration for the operation, which allows the repayment of all operational costs. For the calculation of operating costs, it takes into account the costs associated with power generation for each technology, required to perform an efficient and well managed activity. The remuneration established after the structural reform includes the variable and fixed operating costs.

1377. However, the foregoing is not a simple theoretical or argumentative invocation. If we analyse the application of the Spanish remuneration model to the Claimant's specific investments, we can affirm that the balance required in the Total Test is maintained.

1378. As expounded earlier on explaining the AES Summit Test, the Spanish remuneration model guarantees the recovery of the operating costs of an efficient and well-managed company. Likewise, it grants reasonable profitability. Therefore, it only remains to accredit if it allows the Claimant to recover its investment costs.

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[897] *Total S.A. v. The Argentine Republic,* ICSID Case No. ARB/04/01; Decision on Liability 27 December 2010. RL-0043.
[898] Section IV.B.1 of this Memorial, paragraphs 1212 and seq.
[899] Ibid. paragraph 313.
[900] First Witness Statement of Mr Carlos Montoya. RW-0001.

1379. The aforementioned question is resolved by the Claimant's technicians when they point out, with respect to the Arcosol 50 plant, that:[901]

> *"The investment ratio amounted to €6.2/W installed, a figure in line with the standard value data from the initial investment considered in Annex VIII (Parameters considered for calculating the remuneration parameters for standard installation type) of the aforementioned Order. As stated in the report drawn up by ALATEC in 2009 for project financing, this ratio fell within the usual investment range for parabolic trough installations with a similar storage capacity."*

1380. Likewise, in relation to the cost of the investment in the Arcosol 50 Plant, the technical advisor who prepared the technical evaluation report for the refinancing of the plant reflects the following in its report: [902]

> *"The investment ratio amounted to €6.2/W installed, a figure in line with the standard value data from the initial investment considered in Annex VIII (Parameters considered for calculating the remuneration parameters for standard installation type) of the aforementioned Order. As stated in the report drawn up by ALATEC in 2009 for project financing, this ratio fell within the usual investment range for parabolic trough installations with a similar storage capacity."*

1381. As regards the investment costs corresponding to the Gemasolar Plant, its IT reflects investment costs higher than those actually made by the Claimant in its construction. Specifically, a difference of 11.7% in the Claimant's favour[903].

1382. Based on the foregoing, it can be concluded that, in the reform of the electricity sector, Spain has recognised and guaranteed all of the remunerations and reimbursements required by the arbitral Tribunal in the *Total v. Argentina* case. The Kingdom of Spain has guaranteed and, in some cases, improved, as in the case of the Gemasolar plant, the minimum threshold required to consider the FET standard not violated by supervening amendments to the general regulatory framework, in investments involving large amounts of capital and long term.

1383. It must be concluded that, in application of the test of the *Total v. Argentina Case* , the reform operated by Spain, ensuring the remuneration and reimbursement that respect the principle of economic equilibrium of the investment, does not violate the minimum standard of FET established in the field of international law, applicable in this case together with the ECT. It is therefore appropriate to dismiss the claims of violation of that FET standard raised by the Claimants in this Case.

(4.4) The Kingdom of Spain has not violated the umbrella clause.

1384. In their Reply on the Merits,[904] the Claimants insist on the applicability of the so-called "Umbrella clause," when considering that the facts previously reported constitute

[901] "Technical assessment report for the refinancing of the ARCOSOL 50 solar thermal plant located in San José del Valle (Cádiz)." Page 42.-R-0265.
[902] "Technical assessment report for the refinancing of the TERMESOL 50 solar thermal plant located in San José del Valle (Cádiz)." Page 42. R- 0266.
[903] Accuracy, First "Economic report on the Claimant and its claim". Paragraph 422.

unilateral acts of the Kingdom of Spain by which specific "*vis a vis*" commitments would have been acquired against the Claimants.

1385. As we shall reason below, the arguments of the Claimants cannot be covered by the Arbitral Tribunal because:

(a) The interpretation of umbrella clause made by the Claimant is contrary to the literal wording of Article 10 (1) of the ECT and to the concept of the umbrella clause in the arbitral Precedents applied to the ECT.

(b) The Kingdom of Spain has acquired no vis-á-vis commitments with the Claimants neither in virtue of RD 661/2007 nor in virtue of RD 1614/2010.

(c) The Communications of 2010 are not a vis-à-vis agreement with the investor that has created rights in its favour on the future immutability of the regime of RD 661/2007.

(a) The Claimant's interpretation is contrary to the literal wording of the ECT and to the concept included in the arbitral Precedents that have applied the ECT.

1386. The Reply on the Merits reiterates that the Government of Spain contracted obligations with the Claimants within the meaning of Article 10(1) of the ECT. This is based on the premiss that "*the decisive element arising in all the precedents submitted by both Parties is the clarity and specificity of the undertaking made by the State."*[905] It seems to suggest to the Arbitral Tribunal that the Respondent admits that this clause could be applied to "specific obligations", even if not contractual. This is contrary to the affirmation made by the Kingdom of Spain.

1387. As already indicated in our Counter-Memorial, both the arbitral Precedents that interpret the ECT and the case-law that interpret the ECT are based on a premise arising from its wording. That is, of the existence of an agreement (entered into) between the Government and the investor. We must therefore begin by recalling the wording of Article 10(1) of the ECT last subparagraph:

> *"Each Contracting Party shall observe any obligations it <u>has entered into</u> with an Investor or an Investment of an Investor of any other Contracting Party".*

1388. The literalness of the Article obliges us to consider included within the protection clause *"any obligations"* that the Contracting Party "*<u>has signed</u>*".

1389. Therefore, the unilateral acts cited by the Respondent related to resolutions of the International Court of Justice, in which there is no investor, are evidently excluded. Even one of the cases that it invokes contradicts its arguments, since it maintains that when there is a different legal instrument in the Government to assume the obligation (contracts or administrative acts), it must be understood that a simple unilateral statement is not

[904] Reply on the Merits, paragraphs 494 et seq.
[905] Reply on the Merits, paragraph. 511.

suitable for constituting a commitment.[906] Once again, the Claimants make an interestingly extensive interpretation of a concept of International Law, thus abandoning the literal meaning of the ECT.

1390. The wording of the umbrella clause of Article 10(1) of the ECT literally refers to the specific bilateral obligations assumed by the Government with respect to an investor through an express, unequivocal and individual commitment for each investor or investment. This implies the formalisation or signature (entering into) of a contract or equivalent bilateral instrument, since there is no other way in which the Government can "sign" or acquire a commitment with an investor.

1391. Further, the Claimant considers that registration in an administrative register such as the RAIPRE is a specific commitment between the investor and the Government[907]. It has already been accredited that the RAIPRE is a Section of another register established to include all the producers of the SES. In fact, in 2016 more than 64,400 facilities owned by over 44,600 owners were registered in the RAIPRE [908]. Inferring from this registration that Spain has acquired a vis-à-vis commitment with the 64,400 facilities or with the more than 44,000 owners implies an absolute distortion of the literality of Article 10(1) of the ECT on using the term "entered into".

1392. Moreover, the Precedent which has considered the application of this section has done so presupposing that it implies the requirement of a contract between the Government and the investor. Therefore, the AES Summit Award is relevant, since it is based on this premise to reason its lack of jurisdiction:

> *"this Tribunal cannot rule on the scope of contract obligations and consequently cannot determine if the Claimants' contract rights under the 2001 Settlement Agreement – and the 2001 PPA – were eviscerated because it has no jurisdiction to do so."*[909]

1393. This requirement of a contract is reaffirmed by another Precedent that has applied the ECT, the case *Plama Consortium Limited v. Bulgaria*. This Award is not positioned on the scope of the umbrella clause because it understands that in that case there was a contract between the parties and that "*contractual obligations are covered by the last sentence of Article 10 (1) of the ECT*"[910]. Therefore, it is based on the premise that there must be a contract between the Government and the investor.

1394. The Case-law that interprets the ECT is also based on this premise. The Claimant claims that the Reading Guide of the ECT by the Secretariat of the ECT "*says nothing*

[906] Case on border dispute (Burkina Faso v. Republic of Mali), ICJ Rep. 1986, judgement of 22 December 1986, paragraph 40, RL-0098.
[907] Reply on the Merits, paragraph 505.
[908] Report of 26 April 2016 on the number of operators registered in Section 2 of the RAIPRE, of the SubDirectorate-General of Electricity, MINETUR R-0260.
[909] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22; Award 23 September 2010, paragraph 9.3.4. RL-0047.
[910] *Plama Consortium Limited v. the Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award on 27th August 2008, RL-0088.

about the kinds of obligations covered by Article 10(1) in fine"[911]. A simple reading of the Guide is enough to prove that the Claimants are not telling the truth[912]:

> *"**According to Article 10 (1), last sentence**, each CP shall observe any obligations it has entered into with an investor or an investment of any other CP. This provision covers any **contract** that a host country has concluded with a subsidiary of the foreign investor in the host country, or a **contract** between the host country and the parent company of the subsidiary.*
>
> *Respect of the international principle of "pacta sunt servanda" is of particular relevance in the energy sector where most major investments are made on the basis of an **individual contract** between the investor and the state. Article 10 (1) has the important effect that a breach of an individual investment **contract** by the host country becomes a violation of the ECT. As a result, the foreign investor and its home country may invoke the dispute settlement mechanism of the Treaty". (Emphasis added)*

1395. Despite the clarity of its wording, the Claimants are striving to point out that the information that appears in the Reading Guide of the ECT in relation to the application of Article 10 (1) "in fine" of the Treaty refers to something completely different to what we are dealing with.

1396. In addition to the Precedents and Case-law that apply and interpret the ECT, the Respondent has expounded the arguments of Professor Wälde and Weissenfels relative to the exclusion of legislative acts from the scope of the umbrella clause[913], as well as the impossibility of applying the cases *LG&E v. Argentina*, *Enron v. Argentina* and *Sempra Energy International v. Argentina* by referring to specific contracts entered into between the host State and the investors, which has not existed in this case.

1397. What is true is that the Claimants have not cited a single case in which the umbrella clause has been applied without the existence of a contract, a concession or similar bilateral act that generate vis-á-vis obligations between the State and the claimant investor.

1398. The Claimant refers in its Reply in the Merits to the inapplicability of the award *Noble Ventures v. Romania* in this case,[914] but in its argumentation it reinforces the position held by Spain. That Arbitral Tribunal should define the scope of the umbrella clause. And by defining the scope of application, the Arbitral Tribunal came to the conclusion that:

> *"[…]The employment of the notion "entered into" indicates that specific commitments are referred to and not general commitments, for example by way of*

[911] Reply on the Merits, paragraph 510.
[912] *The Energy Charter Treaty: A Reader's Guide*, June 2002, page 26. RL-0073.
[913] Counter-Memorial, paragraphs 1038 to 1041 and 1046.
[914] Reply on the Merits, paragraph 499

legislative acts. This is also the reason why Article (2)(c) would be very much an empty base unless understood as referring to contracts.[…]"[915].

1399. The obligations of the State have to be, therefore, specific, and to have been assumed by the State with respect to a particular investor, in a vis-á-vis relationship, as stated by the Arbitral Tribunal in *SGS v.The Philippines:*[916]

> *"[T]he host State must have assumed a legal obligation, and it must have been assumed vis-à-vis the specific investment-not as a matter of the application of some legal obligation of a general character. This is very far from elevating to the international level all the 'municipal legislative or administrative or other unilateral measures of a Contracting Party."*

1400. In the same line delivered its opnion the Ad Hoc Committee for the annulment of the award in the case *CMS v. Argentina*[917].

1401. Based on the foregoing, we can conclude that the ECT, in its final paragraph of Article 10(1) of the ECT refers to alleged vis-à-vis relationships arising from agreements signed or entered into between a State and an investor. The Laws or the general provisions included in their implementation do not generate legal obligations *per se* at the expense of the State that integrate the scope of the umbrella clause. This is a logical consequence of the literal wording ("entered into") and of the purpose of Article 10(1) last subparagraph. This wording presupposes in the first place, a *vis-à- vis* relationship between the State and the investor, and, secondly, that due to this *vis-á-vis* relationship the State has consented to assume a specific obligation with such an investor.

1402. In this case, inferring from RD 661/2007 that the Spanish Government has assumed obligations vis-à-vis with more than 64,4000 facilities or with more than 44,600 owners completely distorts the expression "entered into". The *erga omnes* nature of the rule is also evident from the more than 4,000 changes in ownership registered in the RAIPRE [918]. It is absurd to think that the 4,000 new owners subrogated to the alleged "vis-à-vis agreements" in the position of the previous owner with respect to the Government.

1403. Therefore, in order for the application of the umbrella clause to be invoked, the investor invoking it must accredit its essential budget: a specific *bilateral* relationship between the Government and the investor, in the course of which the Government has assumed (entered into) a specific obligation with said Investor that gives rise to the Investor's right to claim the fulfilment thereof.

1404. This specific bilateral relationship does not exist in this case, in which the Claimants decided to invest in a liberalised although regulated sector. Therefore, there was no

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[915] *Noble Ventures, Inc v. Romania*, Case ICSID No. ARB/01/11, Award of 12 October 2005, paragraph 51. RL-0055.

[916] *Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, of 29 January 2004, paragraph 166. RL-0056.

[917] CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Annulment. 25 September 2007, paragraph 95. RL-0057.

[918] Report of 26 April 2016 on the number of operators registered in Section 2 of the RAIPEE, of the SubDirectorate-General of Electricity, MINETUR R-0260.

contract, or concession or any act by which a consensual bilateral relationship was established between the Claimant and the Kingdom of Spain.

(b) Neither Royal Decree 661/2007 nor Royal Decree 1614/2010 imply the assumption by the Kingdom of Spain of *vis-á-vis* obligations with the Claimant.

1405. RD 661/2007 and RD 1614/2010 are regulations issued by the Government and applicable to all electricity producers included within its scope of application, with an *erga omnes* nature. That is to say, they were not applied vis-a-vis to the Claimants or to their investment. As accredited in this Memorial, RD 661/2007 did not contain specific commitments: (i) neither immutability of the remuneration regime against new macroeconomic circumstances or in situations of over-compensation; and (ii) nor immutability of non-economic measures, such as the possibility of producing energy from burning gas.

1406. Moreover, the non-existence of a *freezing* commitment of the regime of RD 661/2007 has been declared in the arbitral Precedent for the Case Charanne v. Spain:

> *"In the absence of a specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest.*
>
> *The Tribunal therefore concludes that the Claimants could not have the legitimate expectation that RD 661/2007 and RD 1578/2008 would not be changed during the lifespan of its facilities."*[919]

1407. On the other hand, the provisions of Article 4 of RD 1614/2010 was limited to implementing the regime for periodic revisions of RD 661/2007 to the CSP plants that delayed their entry into operation in successive phases subsequent to 2010. It does not guarantee or include any other commitment.

1408. Lastly, it should be noted that the exchange of letters vis-à-vis between Dr. Sultán and the Ministry confirms the non-existence of any commitment to maintain the regime of RD 661/2007 in the future. It only undertook to try to "maintain a reasonable profitability that would not put the stability of the system at risk"[920]

(c) The Communications of 2010 do not imply a vis-á -vis commitment of the Kingdom of Spain with the Claimant nor with the Plants to maintain the regime of RD 661/2007 immutable in the future.

1409. The Communications of 2010 of the Directorate-General for Energy Policy and Mining are issued in response to the letters sent by the Plants. According to the Claimant, they are "*favourable administrative acts*" whereby the Kingdom of Spain would undertake to

[919] Charanne B.V. and Construction Investments S.A.R.L. vs. Kingdom of Spain (SCC V 062/2012), Final Award, 21 January 2016, and individual opinion, paragraphs 510 and 511, RL-0071.
[920] Exchange of letters between the CEO of Masdar and the Ministry of Industry of the Kingdom of Spain, dated 25 November 2009 and 14 January 2010. R-0158.

maintain a certain regime[921]. In this Memorial it has been accredited[922] that such Resolutions do not include a commitment by the Government to not modify the regime of RD 661/2007 or declare any right in favour of the Claimants. It must be recalled that the Claimant has provided a translation into English of the aforementioned Communications that does not correspond to its literal meaning in Spanish.

1410. Effectively, an interpretation according to the strict meaning of the words of the title and content of these documents proves that the Communications of 2010 were limited to: 1) accepting the waiver made by the companies operating the Plants, on understanding that said waiver is a right to which the interested party is entitled[923], 2) accepting the statement made by the companies operating the Plants (and not by the Claimant) with respect to the classification made of the facility, and 3) communicate the information requested on the applicable legislation to the companies operating the Plants (and not to the Claimant). This last request is made under the rule of Spanish Law that recognises the interested parties' right to obtain information from the Administration[924].

1411. It can be observed that the existence of a vis-à-vis commitment of the Government with the CSP Plants to maintain neither the regime of tariffs or premiums nor other non-economic regimes of RD 661/2007, nor the possibility of producing energy by means of gas flaring, cannot be concluded, not even from the literal meaning of the Communications invoked (in their correct translation).

1412. It should be noted that these Communications have never been used by the CSP Plants in which the Respondent participates to claim the maintenance of the regime of RD 661/2007 in its favour. This accredits that it did not create any right in its favour that it could claim, because if it had created it they would have already claimed it.

1413. The umbrella clause of the ECT does not circumvent the obligation which, in any case, must comply with Spanish Law. The umbrella clause protects the commitments acquired by the Government with the investor or its investment, but provided that those commitments really exist for the host Government of the investment. In this case, the Communication of the applicable regime is not a source of the obligations of the Spanish Government, as perfectly understood by the CSP Plants, which have never claimed property damage from the Administration in this regard.

1414. In short, the Kingdom of Spain has not assumed specific "commitments" or "obligations" to maintain the regime of RD 661/2007 in favour of the Claimant or of the CSP Plants in the future neither by virtue of Royal Decrees 661/2007 and 1614/2020, nor by virtue of the Communications of 2010. Therefore, the standard established in the last paragraph of Article 10(1) of the ECT has not been violated.

(4.5) Conclusion

[921] Reply on the Merits, paragraph 517
[922] See Section IV.A.3.5 of this Memorial.
[923] Article 90 of Law 30/1992, of 26 November, on the Legal Regime of Public Administrations and the Common Administrative Procedure. R-0142.
[924] Article 35g) of Law 30/1992. R-0142.

1415. The umbrella clause is not applicable because the Kingdom of Spain has not contracted any vis-á-vis obligation with the Claimants or their investment, or by means of regulations or Communications sent to the Plants. The Kingdom of Spain did not specifically undertake a vis-á-vis commitment to maintain in favour of the Claimants or their investment the freezing *sine die* of all the articles included in RD 661/2007 and RD 1614/2010. The *umbrella clause* of Article 10(1) in fine of the ECT has therefore been respected by the Respondent.

V. THE CLAIMANT DOES NOT HAVE THE RIGHT TO THE COMPENSATION REQUESTED

A. Introduction

1416. In the first place, in view of the Reply on the Merits submitted by the Claimants, we ratify in each and every one of the points made in this regard in the Counter-Memorial of 16 September 2015. As we shall indicate, the Claimants have not disproved the arguments put forward by the Kingdom of Spain in which it was demonstrated that they have no right to the compensation requested. This section is complemented with the expert report of rejoinder from Accuracy on *quantum* of 09 June 2016, in which certain aspects about it are stated.

1417. In the Counter-Memorial, the Kingdom of Spain carried out "*full reservation to formulate further objections to the calculation of the compensation requested*[925]", enumerating an open illustrative list of possible additional objections.

1418. Remarkably, in this Rejoinder on the Merits, subsidiarily and for the case that the Arbitral Tribunal understood it to be appropriate to resort to speculative methods for the calculation of the impact of the measures discussed, calculations based on Cash Flow Discounts (DCF) are presented. These calculations shall show that the hypothetical impact is positive for the Claimants.

1419. It is also necessary to advise that the experts of Accuracy in their report examined and removed categorically the quantification alternative proposed by Brattle which was supposedly based on a hypothetical static and petrified nominal profitability of 9.5% *after tax*. These alternative calculations proposed by Brattle lack legal or economic basis and perform a mistaken interpretation of the reasonable profitability, as developed by Accuracy. In this regard, we have already argued that the reasonable profitability has to be an essentially dynamic concept in nature. To try and anchor it to a fixed figure *ad eternum*, without reference to any market, would not be economically reasonable for investors or for the State.

1420. In any case, a correct valuation approach based on the value of the assets and reasonable profitabilities (ABV) results in a positive financial impact for the Claimant, as indicated by Accuracy in Section 2.3.3 of its rejoinder report on quantum.

[925] Counter-Memorial, paragraph 1079.

1421. Lastly, it must once again be noted that this section (V) is subsidiarily presented, for the assumption that, in the first place, the Arbitral Tribunal accepted to have jurisdiction over this dispute and, additionally, in second place, the Arbitral Tribunal understood that there is an infringement by the Kingdom of Spain of one of the precepts of the ECT.

B. The quantification of the damages claimed by the Claimants is totally and absolutely speculative

1422. As we already advised, the alleged damage estimated in the Brattle reports is not compensable, as they are totally and absolutely speculative.

1423. Without intending to obviously reiterate the arguments already held in the Counter-Memorial, we understand the need to summarise the key points and, in view of the Reply on the Merits, make some clarifications.

1424. The claimant intends to support a claim based on a simplistic comparison of scenarios (actual and butfor), assuming that the "actual" is going to be maintained during the next decades, ignoring that the guiding principle of the system is constituted by reasonable guaranteed profitability. Inter alia, in its models it tries to predict data like the pool price (dependent on the price of crude oil) and the demand for energy to 40 years. It is because of all this that the projection of the existing parameters is hypothetical and illusory.

1425. In this sense, this representation, the same as the Supreme Court of the Kingdom of Spain in comparable circumstances, understands that the alleged damages have not even been minimally proved. The long time horizon, together with the fact that nothing guarantees that the remuneration shall remain petrified in the current form (always ensuring reasonable profitability), makes the calculation of damage done speculative.

1426. This reasoning was clearly embodied in nearly a hundred judgements in which the Supreme Court has known of amendments to the remuneration regime of renewable energies. Among them, mention can be made of the judgement of 24 September 2012 that, in its Sixth Legal Basis, declares the following:

> *"Finally, with regard to the expert report provided with claim document in order to quantify the impact on the profitability of projects involves the application of Royal Decree 1565/2010, of 19 November, we shall confine ourselves to reiterate that its conclusions may not be accepted from the moment in which they are based on extrapolations to a future of thirty years of magnitudes whose determination lacks the necessary rigour and security. Before "a time horizon" of limitation to 30 years for the right to receive the regulated tariff, the loss of the "equity value" of the photovoltaic plants that is stated in those reports is not demonstrated. We refer, as on previous occasions, to what is stated in the judgement of 19 June 2012 (appeal 62/2011) and in subsequent ones.* [926]*"(emphasis added)*

1427. As we see, the Supreme Court understands that the extrapolations to a future so far from the magnitudes to consider lacks the necessary rigour and security. And that the

[926] Judgement from the Third Chamber of the Supreme Court, 24 September 2012, Sixth Legal Basis. R-0145.

Claimant has not substantiated the loss of value of the Plants. In other words, that the calculations of the Claimants are mere speculation and that, therefore, the burden of proof required for it has not been proved in any way.

1428. In this respect, two clarifications: first, the quantities referred to by the Supreme Court as unpredictable or "lacking the necessary rigour and security" are the same ones that Brattle's experts have had to predict; and secondly, the statements of the Supreme Court in this particular paragraph do not constitute any legal interpretation of Spanish law in the field of energy, but that it is a pure appreciation of the factual elements of evidence, it is a plain and simple appraisal of the evidence in accordance with the principle of good judgement.

1429. With regard to the inadmissibility of the DCF method, both the Kingdom of Spain as the Claimants themselves have made reference to scientific doctrine and arbitral precedents that, under certain circumstances, the DCF is considered inappropriate as an appraisal method, as they are unduly speculative. Therefore, both parties agree that the DCF is not a method that is appropriate in all cases.

1430. In this sense, it is the Arbitral Tribunal who will, as the case may be, determine if the predictions that have to be carried out in a horizon of several decades, on external factors such as for example the energy demand of a country or the pool price (also identified by the evolution of the price of crude oil), are reliable or speculative. And it shall also have to determine in the same way if the calculations made by Brattle's experts, who have a *track record* of less than five years, and make projections for almost 37 years (until 2051), are reliable or speculative.

1431. For this reason we believe that to evaluate the existence of damage, we should resort to methods based on the cost of the assets, examining whether they are recovered and reasonable profitability is obtained from them:

> *"The method of calculating FMV by reference to actual investments has proved quite popular in arbitral practice. […] they have turned to the historic costs of investment as the relevant approach to valuation when the evidence necessary to apply an income base method has been considered insufficient"*[927]*. (Emphasis added)*

1432. As already pointed out, *Marboe* has an impact on the advantages of the methods based on assets, less speculative and simpler to apply:

> *"The advantage of this approach is that, in comparison with the income capitalization approach, it appears to be much easier and less speculative. It looks into the past and not into the future and is seemingly much simpler to apply than the highly complex forecasting and discounting processes"*[928]*. (Emphasis added)*

[927] *Damages in International Investment Law*, Sergey Ripinsky with Kevin Williams, British Institute of International and Comparative Law (BIICL), page 227. RL-0061.
[928] *Calculation of Compensation and Damages in International Investment Law*, Irmgard Marboe, Oxford, Oxford International Arbitration Series, 2009, page 267. RL-0062.

1433. In this regard, surprisingly the Claimant said in paragraph 634 of the Reply on the Merits that "Spain cites no authority for how the temporal proximity of an investment with the valuation date supports the adoption of the investment-based method". However, as we already conveniently set out in paragraph 1100 of our Counter memorial that Marboe makes reference to the normal profitability and the book value as an obligatory reference, particularly when the investment is very recent:

> *"Experienced economists point to the fact that the significance of the ABV usually works with companies with normal rates of return. Extraordinarily high or low rated are rather rare and cannot be explained or be appropriately reflected by this method. Stauffer notes that extraordinarily high and 'abnormally poor performance must be explained, since, by definition most firms or ventures realize "average" rates of return'. This is also confirmed by Lou Wells who supports the use of the book value method for recently established businesses*
>
> *When the investment is very recent, or still in process of being made, there is an obvious and often easier alternative to using NPV of future cash flow to determine FMV. If the project was expected to generate 'normal' rates of return for the business, then the amount of investment itself provides a reasonable starting point for determining FMV. In most cases, the FMV of recently acquired assets is unlikely to be substantially different from the cost of those assets. Cost of investment will approximate what a buyer might pay; moreover, the investor who receives his investment back can invest the sum in another project, earn normal returns, and be equally well off. […]"*[929] *(Emphasis added)*

1434. This is particularly appropriate when the date of acquisition of the assets is close to the appraisal date. Therefore, *Ripinsky* (paragraph 1101 of the Counter-Memorial) states the following:

> *"On the date a particular asset is bought, the price paid for it normally represents the market value of this asset. Accordingly, on that date, the price reflected in the buyer's books represents the asset's book value and market value at the same time."*[930] *(Emphasis added)*

1435. Coinciding with the same idea, Sabahi (again, paragraph 1102 of the Counter-Memorial) discusses the recovery of the costs plus a return on them as an appropriate compensation method, considering that the investment was recent:

> *"In Metalclad v. Mexico, for example, […] considering that the investment was made recently and lacked a history of profitability, held that the investor could only recover its actual investment […] sunk costs in this case may have approximated the fair market value, because the investment was made recently.*
>
> *Another example is the case of Wena v. Egypt […]. The tribunal […] did not consider DCF appropriate because the ventures were new and the claimant has not proved*

[929] *Calculation of Compensation and Damages in International Investment Law*, Irmgard Marboe, Oxford, Oxford International Arbitration Series, 2009, pages 275 and 276. RL-0062.
[930] *Damages in International Investment Law*, Sergey Ripinsky with Kevin Williams, British Institute of International and Comparative Law (BIICL), 2008, page 221. RL-0061.

satisfactorily that they would have become profitable. Instead, the tribunal awarded the value of the investment actually made […].'[931] *(Emphasis added)*

1436. In short, agreeing with the factual elements mentioned above, we understand that all of them have to be considered by the Arbitral Tribunal, in order to rule out any estimate of value based on a DCF in this case.

C. The useful life of the Plants would be, as a maximum, 25 years

1437. Prior to the implementation of subsidiary calculations using DCF, it is necessary to address an issue that shall directly affect them: the useful life of the Plants under this arbitration which, as we shall demonstrate, would have a maximum of 25 years. This question is conveniently expounded in Appendix 6 of the second Accuracy report on the Claimant and its claim.

1438. Against all evidence, and without any rational foundation, Brattle considered for his calculations of damage a useful life of 40 years, artificially extending the hypothetical financial impact.

(1) Masdar never had an useful life expectancy of the Plants of more than 25 years

1439. The useful life stated in official accounts of the owner companies of the Plants is 25 years. Said statement in its financial reports constitutes an action that has not been discredited at any time by the Claimant.[932] Furthermore, in the analysis of the useful lives reflected by the other solar thermal plants in Spain performed by Accuracy, an average of 22.5 years is obtained.

1440. Secondly, the original models of the investor, used to obtain financing, consider a maximum of 25 years[933]. Again, in no case is a useful life of the plant beyond the 25 years taken into account.

1441. Additionally, all the references in the Due Diligence techniques indicate useful lives of 25 years (that annexed to the financing of Gemasolar, that of BNP Paribas for Valle II, that of the refinancing of Valle I, etc.).

1442. Finally, both the Draft law Report of RD 661/2007, as well as the PER 2005-2010, estimated a useful life of 25 years.

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[931] *Compensation and Restitution in Investor-State Arbitration – Principles and Practice,* Borzu Sabahi, Oxford, International Economic Law, 201, pages 132-133. RL-0063.

[932] The useful life contained in the financial statements has to meet economic and technical criteria (this is not a mere figure for the purposes of depreciation, but that in fact has to reflect the true picture of the duration of the plant). In this way, International Accounting Standards define the concept of useful life: *"The period over which an asset is expected to be available for use by an entity"* (IAS 16, par. 6). Also, we should remember the principle of true picture which is to govern the presentation of the financial statements of any entity: *"Financial statements shall present fairly the financial position, financial performance and cash flows of an entity"* (IAS 1, par. 13). IAS adopted in the European Union by the Commission Regulation (EC) No 1126/2008 (R-0187):
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:320:0001:0481:en:PDF

[933] Documents BQR-60, BQR-61 and BQR-62.

1443. Considering the above, we should not, in any case, or at any time, provide for a higher life expectancy than 25 years for the Plants.

(2) The Servert report demonstrates that Plants have a maximum useful life of 25 years

1444. The reports of the expert Engineer in solar thermal plants, Mr. Jorge Servert[934], conclude the following:

> *"As a conclusion, my personal opinion is that, under the assumption of a correct design and operation, the expected lifetime of Valle I&II power plants will be 25 years".*
>
> *"As a conclusion, my personal opinion is that, under the assumption of a correct design and operation, the expected lifetime of Valle I&II power plants will be 25 years".*

1445. It must be added to the foregoing that various elements of the plant will have a useful life of even less than 25 years and must perform the relevant renovations, as detailed in the Servert reports.

(3) Brattle's calculations have not taken into account the renovations or their effect on the subsidies

1446. The calculations of the Claimant have not taken into account the necessary renovations that, in view of the reports from the engineers, should be performed. Cash flows computed withdraw from this technical aspect of the Plants.

1447. In second place, and no less important, Brattle has also not taken into account that a substantial modification of the components of the Plant would provoke, even according to RD 661/2007, a "new date to put into service" for the purposes of not applying the subsidy of RD 661/2007. In fact, in accordance to Article 4.3 of RD 661/2007:

> *"3. Substantial modification of a pre-existing installation is understood as the replacement of the main equipment such as boilers, engines, hydraulic, steam, wind or gas turbines, alternators and transformers, when it is certified that the reversal of the partial or overall modification that is performed exceeds 50% of the total investment of the Plant, valued with replacement criterion. <u>The substantial modification will give rise to a new date to put into service for the purposes</u> of Chapter IV".*[935] *(Emphasis added)*

1448. Therefore according to the article transcribed, a substantial modification, would necessarily and automatically entail the lack of application of RD 661/2007.

(4) Conclusion: Brattle's calculations, in addition to being speculative, are based on wrong technical and economic assumptions

[934] Expert reports of SERVERT Engineering: "GEMASOLAR Solar Tower CSP Plant Lifetime Analysis" and "Valle / & // Parabolic Trough CSP Plants Lifetime Analysis, of 8 June 2016, prepared by the Engineer Mr. Jorge Servert, page 27.
[935] Let us remember that Chapter IV is dedicated to "Economic Regime" of RD 661/2007 C-0038 ESP.

1449. Instead of taking lightly the useful life without any foundation, Brattle should have performed a rigorous study of the technical characteristics of his Plants. Based on these features he should have reflected in his calculations the aspects highlighted in the preceding paragraphs.

1450. That is why we understand that the calculations of the Claimant, in addition to relying on a speculative method, are deficient *ab initio* of the minimum rigour required, by being based on wrong assumptions on the duration of the various technical equipment of the Plants.

D. Subsidiary calculations using DCF: positive financial impact for the Claimants

1451. To simplify the comparisons, and as the object of the subsidiary calculations DCF is to substantiate the volatility of the method in this case and how wrong of Brattle's calculation is, Accuracy has started by using the Brattle outline as far as possible.

1452. The experts of Accuracy have computed the financial impact of the measures in accordance with a DCF method. The result is that the financial impact of the new measures is clearly positive for the Claimant, with a gain of €12.5 million[936]:

Table 1.1 - Value of economic impact (DCF)

€m		"But For"	"Actual"	Impact
		[a]	[b]	[b] - [a]
=	**Value of shareholders' equity at 100% before discount**	**309.5**	**279.0**	
*	Percentage stake	40.0 %	40.0 %	
-	Illiquidity discount	35.0 %	16.7 %	
=	**Value of shareholders' equity for the Claimant as at 31/12/2012**	**80.5**	**93.0**	**12.5**
=	**Total impact for the Claimant at 31/12/2012**	**80.5**	**93.0**	**12.5** (1)

(1) *Positive impact of the Measures for the Claimant.*

Source: Accuracy analysis

1453. The discrepancies between the different DCF (that of Brattle and the one of Accuracy) are derived from the different model of DCF and of the different parameters considered.

1454. It should be noted that Accuracy has considered a useful life of plants of 25 years, which is the maximum according to the available information.

1455. Also, Accuracy has taken into account (as opposed to Brattle) that the conditions of the but-for scenario would obviously have a greater risk and greater uncertainty than the current scenario. The revenue would be subject to greater risk in the But-for scenario. In fact, in the Actual scenario, under the current regulations, we are faced with a stable, more predictable framework with less risk. This is undoubtedly proved by the assessments of the market players and the numerous transactions that have occurred since the adoption of the contested measures. These considerations, logically, will have their impact on the different discount rates to be taken into account and on the various *marketability* discounts to apply.

[936] Accuracy, Second Economic report on the Claimant and its claim, dated 10 June 2016. Table 1.1.

1456. Lastly, as regards the interests between the valuation date and the Award, Accuracy's experts consider, in the hypothetical case that the Arbitral Tribunal would estimate damage, the interest to be taken into account would be very different from that chosen by Brattle. In this way, instead of opting for the bond to 10 years, applying a rational approach of correlation in time, they decided to choose the bond but to a period equal to the gap in time between the appraisal date and the estimate of the award date (approximately 2 years). The same criterion should be followed, if applicable, for subsequent interests.

1457. In conclusion, we have verified that, even when using speculative DCF methods, the hypothetical impact is positive for the Claimant.

E. The "Tax Gross-Up" for the hypothetical taxes payable in the Netherlands is inappropriate

1458. In the event that they saw their claim for compensation estimated, in the Memorial on the Merits and Reply on the Merits the Claimant also seek to include in the compensation approximately EUR 57 million for "Tax Gross-Up" (hereinafter **TGU**), for the hypothetical tax payable in the Netherlands by the Claimant, resident in said territory ("income tax" / "corporate tax", at the rate of 25%), on quantities granted, if applicable, in the arbitral Award.

1459. The claim of no less than EUR 57 million, and on a subject that is so complex, is dispatched in a simple paragraph of the Memorial on the Merits , without further substantiation, justification, nor of course legal or doctrinal support:

> *"503. Any amounts received by the Claimants will be subject to corporate tax at a rate of 25%.* To *achieve full reparation the damages should be subject to a tax gross-up since damages are calculated to place the Claimants in the same position they would have been in net of tax. The Tribunal should therefore order compensation, including a tax gross-up of 25%. Assuming the Claimants obtain an award for compensation (including interest due) in October 2016, the tax gross up amounts to around EUR 57 million"*[937].

1460. Notwithstanding the fact that we understand that the aforementioned claim for the TGU is manifestly unfounded, *ad cautelam,* this section accredits the absolute inadmissibility of such a claim for various reasons.

[937] Paragraph 503 of the Memorial on the Merits. The references to the footnotes have been deleted, which referred to the Quantum Report, paragraph 22, 176 and Table 17. In any case, the Quantum Report provides absolutely no justification or additional rationale to that contained in the paragraph transcribed above. It only includes a footnote making reference to a document titled "Tax Advice" (BQR-81), which appears to be an -unsigned- letter supposedly sent by the company Allen & Overy LLP -Claimant's Counsel- to Masdar, making reference to an "insurance contract". Said letter does not contain any relevant point of a tax nature or applicable to the case at hand. It does not contain any case-law relative to the taxation of an Award arising from an International Arbitration. Therefore, it is understandable that this letter from the Claimant's Counsel -referenced in a footnote- has not been reproduced neither in Brattle's expert report nor in the Memorial on the Merits.

1461. In the first place the TGU is vetoed in Article 21 of the ECT, which literally establishes that there are no provisions whatsoever in the ECT that impose obligations with regard to taxation measures *"of the Contracting Parties"*. Therefore, there cannot be any obligation whatsoever based on the ECT for a TGU for a hypothetical taxation measure of The Netherlands.

1462. Subsidiarily, and secondly, we shall develop the legal basis for which the Claimant, residing in The Netherlands, would never have to pay tax on the amount granted in an estimated Award, due to being classified as tax-free income. That is to say, the assumption of fact necessary to argue a TGU would not even occur in this case.

1463. Finally, even in the unlikely event that we were not dealing with an income exempt *per se*, there would be other miscellaneous items to consider that they would make inappropriate the TGU requested for being excessively speculative, uncertain and contingent. This has been stated by the arbitral tribunal doctrine.

(1) The Tax Gross-Up is vetoed in Article 21 of the ECT: "TGU carve-out"

1464. The Claimants claim the TGU of the hypothetical taxes that a resident in The Netherlands would have to pay to the State Revenue Services of The Netherlands.

1465. However, Article 21(1) of the ECT, under the heading of "Taxation"", stipulates that:

> *"Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency".* (Emphasis added)

1466. That is to say, Article 21 of the ECT establishes a "*Tax Gross-Up carve-out"*. Let us examine analytically how it is configured.

1467. We divide paragraph one of Article 21 into its two sentences and we begin with the first one: "…*nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties*". That is to say, nothing in this Treaty shall impose obligations with respect to taxation measures. Taxation measures "*of the Contracting Parties*", whether they may be of the home country or of the host country.

1468. In this regard, let us remember that the ECT itself, in Article 15, recognizes the concept of "Host Party" ("…in respect of an Investment of an Investor… in the Area of another Contracting Party (hereinafter referred to as the "Host Party")…") and therefore distinguishes among "Contracting Parties" between the investment receiving party ("host country") and the party where the Claimant is established ("home country").

1469. Therefore, the *tax carve-out* of Article 21 ECT applies both to the taxations measures of the *host country* and to the taxation measures of the *home country*, since both are "*Contracting Parties*".

1470. In addition, the second sentence of the first paragraph of Article 21 ECT emphasizes, in case of any doubt, that *"In the event of any inconsistency between this Article and any*

other provision of the Treaty, this Article shall prevail." That is to say, this Article will prevail over any other provision of the ECT, including Article 10, Article 13, or Article 26 itself of the ECT.

1471. In this way, it is clear that no taxation measure of Luxembourg could create any obligation for the Kingdom of Spain based on the ECT. Due to this, Article 21 ECT establishes a *TGU carve-out*.

1472. Clearly, the above is perfectly consistent with the Draft Articles on Responsibility of States of the International Law Commission and its comments. In this sense, Article 2 (Elements of an internationally wrongful act of a State) indicates as the first element that the act be *"attributable to the State under international law"*. In fact, Comment 1 on this Article 2 expressly warns that: *"First, the conduct in question must be attributable to the State under international law"*[938].

1473. For all these reasons, it is clear that the Kingdom of Spain may not have any liability for a tax measure that would be totally alien to it. It cannot be liable for a tax measure of a different State, in this case, The Netherlands.

(2) The compensation would be an income that is exempt from taxation in the Netherlands

1474. Secondarily, even in the case that the ECT had not excluded from the root the TGU requested, the fact is that any hypothetical compensation granted in the Award would be exempt from taxation in the Netherlands.

1475. To summarise, both the application of the domestic tax regulation of The Netherlands (internal transposition of the EU Directive), as well as the application of the international tax regulation in force in The Netherlands (which, let us recall, has prevalence over the previous one) lead to the hypothetical compensation being exempt.

1476. On the one hand, the compensation for income that was not received would fall within what is known as "participation exemption" within the scope of the European Union, established by the EU Directive. The participation exemption provides for the exemption of the "profit distributions" between parent companies and subsidiaries of different Member States of the European Union and aims to eliminate double taxation. This is clear from the analysis of both the Dutch internal regulation[939], as well as the Parent-Subsidiary Directive[940].

(3) Any claim of TGU is essentially speculative, contingent and uncertain

[938] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001.http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf R-0146.

[939] A simplified description of this figure can easily be found on any website specific to this subject matter. For example:
https://www.government.nl/topics/taxation-and-businesses/contents/corporation-tax. R- 0291.

[940] Council Directive 2011/96/EU of 30 November 2011on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:345:0008:0016:en:PDF. R-0292

1477. Finally, and secondarily, in the event that the ECT did not have a TGU *carve-out* and, in addition, the compensation was not totally exempt from taxation pursuant to the tax provision in force in the Netherlands, there are circumstances that motivate qualifying the claim of TGU as inappropriate due to it being essentially speculative, contingent and uncertain.

1478. In this way, by way of example and without limitation, we would have to respond to certain questions such as: Does the Claimant benefit from a *tax ruling* in the Netherlands? Would the Claimants neutralise the compensation with other negative income that they may have now or in the future in the Netherlands? Do they benefit from any special tax regime? All issues that would affect the taxation of the Claimant.

1479. It is obvious, in view of the foregoing, the purely speculative and uncertain nature of the claim of TGU for taxation in the *home country.*

1480. This is how it was declared, for example, by the Arbitral Tribunal in the case *Mobil v. Venezuela.* In this case, based on the BIT between Venezuela and the Netherlands,[941] the Claimants claim that the compensation should be calculated and paid net of all tax, domestic or foreign (e.g., taxation of the *host country* or the *home country*). The Claimants consider that *"at the very least"*, the Arbitral Tribunal should specify that the compensation provided for in the Award *"is net of taxes and shall be automatically grossed up to offset any Venezuelan tax liability that may be imposed or purportedly may arise from that compensation"*.

1481. With regard to taxation in Venezuela, the Arbitral Tribunal recalls that the compensation has already been calculated taking into account the taxes to pay in Venezuela *(host country).* And, in relation to the foreign taxation (which is claimed by the Claimants in this arbitration, the TGU for taxation in the *home country*), the decision of the Arbitral Tribunal in its Award of 9 October 2014 is clear in this regard:

> *"388. Regarding foreign taxation, the Claim ants contend that there is a risk that other jurisdictions will seek to impose taxes that would have been prevented in the absence of the expropriation. According to the Claimants, such taxation would constitute*

[941] Note that the BIT Venezuela-Netherlands lacks TGU *carve-out*, in accordance with the wording of its Article 4, which is very different from the wording of Article 21 of the ECT:
Article 4: "With respect to taxes, fees, charges, and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party with respect to their investments in its territory treatment not less favourable than that accorded to its own nationals or to those of any third State, whichever is more favourable to the nationals concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party;
(a) under an agreement for the avoidance of double taxation; or
(b) by virtue of its participation in a customs union, economic union, or similar institutions; or
(c) on the basis of reciprocity with a third State."
Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela http://investmentpolicyhub.unctad.org/Download/TreatyFile/2094

additional consequential damages. The Tribunal considers that this claim is speculative and uncertain. Accordingly, the claim is dismissed."[942] (Emphasis added)

VI. PETITUM AND RESERVATION OF RIGHTS

1482. In light of the arguments expressed in this writ, the Kingdom of Spain respectfully requests the Arbitral Tribunal:

a) To declare its lacks of jurisdiction over the claims of the Claimants or, if applicable, their inadmissibility, in accordance with what is set forth in section III of this Document, referring to Jurisdictional Objections;

b) Subsidiarily, for the case that the Arbitral Tribunal decides that it has jurisdiction to hear this dispute, that it dismiss all the claims of the Claimants on the merits because the Kingdom of Spain has not breached in any way the ECT, in accordance with what is stated in paragraphs (A) and (B) of section IV of this Document, on the substance of the matter;

c) Subsidiarily, to dismiss all the Claimants' claims for damages as said claims are not entitled to compensation, in accordance with section V of this Document; and

d) Sentence the Claimants to pay all costs and expenses derived from this arbitration, including ICSID administrative expenses, arbitrators' fees, and the fees of the legal representatives of the Kingdom of Spain, their experts and advisors, as well as any other cost or expense that has been incurred, all of this including a reasonable rate of interest from the date on which these costs are incurred and the date of their actual payment.

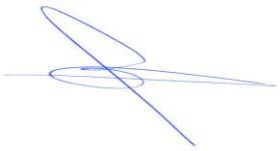
1483. The Kingdom of Spain reserves the right to supplement, modify or complement these pleadings and present any and all additional arguments that may be necessary in accordance with the ICSID Convention, the ICSID rules of arbitration, procedural orders and the directives of the Arbitral Tribunal in order to respond to all allegations made by the Claimant in regards to this matter.

Madrid, 10 June 2016

Respectfully submitted,

[942] Par. 388. *Mobil v. Venezuela*. ICSID CASE NO. ARB/07/27. Award 9/10/2014. RL-0069. http://www.italaw.com/sites/default/files/case-documents/italaw4011.pdf





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