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STATE LEGAL SERVICE
BUREAU OF THE STATE LEGAL SERVICE

GENERAL SUB-DEPARTMENT OF
LITIGATION SERVICES

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AKTBIL: 61

IN THE CASE OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE STOCKHOLM CHAMBER OF COMMERCE (SCC) ARBITRATION INSTITUTE

AND

UNDER THE ENERGY CHARTER TREATY
(SCC ARBITRATION NO. V 2015/150)

BETWEEN:

GREENTECH ENERGY SYSTEMS A/S ET AL
Claimants

- and -

KINGDOM OF SPAIN
Respondent

RESPONDENT´S POST HEARING BRIEF

ARBITRATORS:

Mr. Michael J Moser
Mr. Klaus Michael Sachs
Mr. Raúl Emilio Vinuesa

Presented on behalf of the Respondent by:

State Attorney´s Office
C/ Ayala, 5
28001 Madrid
Spain

18 May 2018

If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent (...)"[198]

234. This means that even if liability is established, since the Claimants have not discharged the burden of proof, the Tribunal must reject its claims.

(1.4) Assessment of evidence: Proven Profitable Plants

235. Moreover, during the Hearing it was evidenced that the Claimants' Plants are today highly profitable thanks to the subsidies provided by the disputed measures, despite having low market, production and cost risks:

Q. (Mr Fernández Antuña) Mm-hm. Are you aware of the internal rate of return the Claimants' PV plants are getting?

A. (Mr Richards Yes.

Q. (Mr Fernández Antuña) Yes? What's the level of internal rate of return? Is it above that 7.398%?

A. (Mr Richards) I can't recall exactly, but they would be high single digits.

Q. (Mr Fernández Antuña) High single digits....[199]

(2) In the alternative, Claimants have not proved the separate and stand –alone damages of each different disputed measure

236. The lack of proof in this case is so egregious that Claimants have not even calculated the hypothetical damages of each one of the different disputed measures, measures adopted at different moments in time, from 2010 till 2014:

Q. (Mr Fernández Antuña) Mr Edwards, you are perfectly aware of my question. Could you please help the Tribunal understand your reports, and tell this Tribunal if you have calculated or not the hypothetical separate individual impact of each one of the measures?

A. (Mr Edwards) <u>No, I haven't calculated the impact of each measure</u> individually in my reports.

Q. (Mr Fernández Antuña) Thank you, sir.[200]

237. And the fact that each measure was adopted at different moment in time is not considered either in FTI model:

[198] Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010. Párr. 12-56. RL-90.
[199] HT2, Page 102:20-103:2.
[200] HT5, Page 52:13-20.

Q. (Mr Fernández Antuña) And that fact has no effect whatsoever on your damages calculation; correct?

A. (Mr Edwards) As I say, I've been instructed to assume one date of valuation, and that's what I've done. And as I explained yesterday in my presentation, yes, some of those impacts started before the date of valuation. But if I had -- I mean, I could in principle have calculated the impact of each one sequentially, and that would have required many, many hundreds of pages more of work....[201]

238. Each measure has caused, according to Claimants' position, a different damage. But Claimants have not calculated, and therefore have not proven, that damage.

239. That would make a hypothetical award disconnect the liability and quantum parts, since the damages would not be the ones caused by the measures.[202]

240. Moreover, the valuation date chosen by the Claimants is disconnected from the challenged measures. Actually, it does not represent either an ex ante (date of measure) nor an ex post (date of award) valuation. Additionally, it does not factor in the risks associated to the investment, neither the risks at the time the measures were enacted.

241. Therefore, it is an invalid valuation date and an invalid valuation.

(3) In the alternative, compensation would depend on liability findings

242. In addition to the necessity to differentiate between the valuation of the damages caused by each challenged measure in order to fulfil the burden of proof, another differentiation is needed when several standards of protection are invoked.

243. Reparation and, specifically, compensation, require as a necessary condition the existence of an internationally wrongful act (ILC Articles 31 and 36). And that necessary illegal act requires, as an essential element, the existence of a specific breach of an international obligation by a State (ILC Article 2).

244. Therefore, the nature and extent of the breach (primary rule) should condition the content and the elements of the obligation to reparation and to compensate (secondary rule). The latter obligation will be defined on the basis of the following elements, among others: date of valuation, standard of valuation, valuation approach or method, etc. That is why, depending on the breach (namely FET, CPS, UC, etc.), the principles of assessment can vary, in order to reach an equitable outcome.

245. According to Commentary 7 on ILC Article 36 (Compensation):

"As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective

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[201] HT5, Page 53:8-16.
[202] Causation, essential principle pursuant to ILC, Articles 31 (Reparation) and 36 (Compensation).