



STATE LEGAL SERVICE  
BUREAU OF THE STATE LEGAL SERVICE

GENERAL SUB-DEPARTMENT OF  
LITIGATION SERVICES  
SVEA HOVRÄTT  
020101

INKOM: 2019-05-10  
MÅLNR: T 1626-19

**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**

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**REJOINDER ON THE MERITS AND REPLY ON JURISDICTION**

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**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  
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Spain

**3 October 2017**

#### (4) Tax on the value of the production of electrical energy (TVPEE)

826. As already mentioned, the TVPEE is a tax that was created by Act 15/2012, of December 27, 2012.
827. The TVPEE is a tax levied on the performance of the activities of production and incorporation of electrical energy in the Spanish Electricity System. The TVPEE is a measure that applies to both conventional and renewable electrical energy producers.
828. As has also been stated, the TVPEE is an income of the Spanish State that is included in the General State Budgets<sup>582</sup>. Therefore, the TVPEE, along with the rest of State income, contributes to the formation of the resources of the State with which public expenditures are financed.
829. Additionally, it should be recalled that the Fifth Additional Provision of Act 17/2012, of 27 December, on the General State Budgets for 2013, provides that an amount equivalent to the estimated annual collection deriving from the taxes included in Act 15/2012, among which is the TVPEE<sup>583</sup>, will be allocated in the General State Budgets' Act of each year to financing the electricity system costs related to the promotion of renewable energy<sup>584</sup>.
830. The economic impact - or rather the absence of economic impact - of the TVPEE on renewable producers has been analysed several times<sup>585</sup>. In this sense, we should recall that the effect of TVPEE on renewable producers, such as those involved in this arbitration, is neutralised through the regulated remuneration regime applicable to them. In particular, the TVPEE is a cost that is remunerated to renewable producers through the specific remuneration they receive.
831. The specific remuneration received by renewable producers enables them to recover certain costs which, unlike with conventional technologies, cannot be recovered in the

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<sup>582</sup> Excerpts from the General State Budget for for 2013 (R-0020), 2014 (R-0021), 2015 (R-0022), 2016 (R-0019) and 2017 (R-0236).

<sup>583</sup> Additional fifth provision of Act 17/2012, of 27 December, on the General State Budget for 2013:

"Five 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 energy**, provided for in the Electricity Sector Law:*

*a) The estimate of the annual collection derived from taxes included in the Act of fiscal 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-0023

<sup>584</sup> It must be remembered that Act 15/2012 establishes, apart from the TVPEE, other taxes such as i) the tax on the production of spent nuclear fuel and radioactive waste from nuclear power generation, ii) the tax on the storage of spent nuclear fuel and radioactive waste in centralised facilities and iii) the levy for use of continental waters for electric energy production.

<sup>585</sup> Section IV.I of the Counter-Memorial on the Merits and Memorial on Jurisdiction, 17 February 2017, Section III.B(3)(b)(ii) of this Memorial.

market, and which also allows them to obtain a reasonable return. In this way, such renewable producers are allowed to compete in the market on an equal footing with other technologies. One of the costs that are paid to these renewable producers is precisely the TVPEE.

**(5) Adjustment of the remunerations in relation to the Consumer Price Index at constant tax rates, excluding unprocessed foods and energy products**

832. This measure did not eliminate the updating of remunerations, tariffs and premiums. This measure simply replaced one updating index with another that is more in keeping with the normal calculation standards of the consumer price indices in the international economy. Its purpose is to avoid distortions in the consumer price index, as evidenced in the Counter-Memorial.

833. The Claimants omit that the adjustment mechanism provided for in Article 44 (1) generated in favour of producers and to the detriment of the SES, an undesired over-remuneration that it was necessary to correct. This was stated in the CNE report of 7 March 2012<sup>586</sup>. We will return to this issue later.

834. As demonstrated in our Counter-Memorial, during the time that this new measure was in force, it did not cause any negative effect for the Claimants. In fact, far from it, the Claimants benefited from the measure, due to the better performance of the CPI at constant taxes without unprocessed foodstuffs or energy products than the CPI.

**(6) New remuneration model for energy production based on renewable sources.**

**(6.1) The new model maintains the regime of support to renewable energies within the framework of a sustainable SES**

835. The Claimants maintain that the new remuneration regime entails a complete revision of the previous remuneration framework. However, this claim derives from a misunderstanding of the remuneration framework in which the Claimants made their investment. As we will demonstrate below, a large part of the elements that define the new remuneration system were already included in the system of Act 54/1997.

836. At this point, we must remember that in April 2011 the Sustainable Economy Act was published. This legal text reveals the criteria to be met by the regulation in energy matters in general and of the incentives to the feed-in regime in particular<sup>587</sup>: *“In all circumstances legislation will sort the public incentives, adapting to the need whereby compliance with the planning targets is reached taking into consideration the principles of economic efficiency among the different alternatives and of the economic sustainability of the measures adopted”*. In the words, the economic sustainability of the SES is the basis and the foundation for maintaining public support for the rollout of renewable energies.

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<sup>586</sup> Report on the Spanish energy sector Part I. Measures to guarantee the economic and financial sustainability of the electrical system, National Energy Commission, 7 March 2012, pag. 22. R-0105.

<sup>587</sup> Act 2/2011, of 4 March, on Sustainable Economy, Articles 77, 78, 79. R-0045