ARBITRATION INSTITUTE OF THE

STOCKHOLM CHAMBER OF COMMERCE

In the Matter of

FORESIGHT LUXEMBOURG SOLAR 1 S.À.R.L., FORESIGHT LUXEMBOURG SOLAR 2 S.À.R.L., GREENTECH ENERGY SYSTEMS A/S, GWM RENEWABLE ENERGY I S.P.A., AND GWM RENEWABLE ENERGY II S.R.L.,

Claimants

v.

The Kingdom of Spain,

Respondent

SCC Arbitration V 2015/150

CLAIMANTS' RESPONSE TO REQUEST FOR CORRECTION OF FINAL AWARD

December 28, 2018

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1. Spain's Request for Correction of Final Award (the "**Request**") purports to seek correction of a "computational error in the Final Award," but in reality, Spain's Request submits an entirely new quantum case. The core premise of its new quantum case is that the Tribunal should exclude hypothetical future losses from its damage award attributable to the measures for which the Tribunal found no jurisdiction or liability. As explained further below, the Tribunal should reject Spain's new quantum case because (A) it is factually baseless, (B) it is inconsistent with Spain's prior positions, (C) it is inconsistent with the Tribunal's liability findings, (D) it is inaccurate, and (E) the relief Spain requests is beyond this Tribunal's limited authority to correct a "computational error" in the Final Award.

A. Spain's New Quantum Case is Factually Baseless

2. The Tribunal found no jurisdiction with respect to the TVPEE imposed in Law 15/2012, and no liability with respect to the Hours Cap imposed in RDL 14/2010 and the CPI Amendment enacted in RDL 2/2013.[1] Based on those findings, the Tribunal correctly reduced damages by €8 million, which was FTI's calculation of the Claimants' losses prior to the Date of Assessment (*i.e.*, prior to the finalization of the New Regulatory Regime in June 2014.[2]

3. Spain's new quantum case argues that the Tribunal also should reduce damages by the amount of hypothetical losses attributable to those measures *after* the introduction of the New Regulatory Regime. The Tribunal's reduction of damages in the Award by €8 million is correct, however, because the measures at issue were only in effect until the introduction of the New Regulatory Regime.

4. The Sole Derogatory Provision of RDL 9/2013 expressly abolished RD 661/2007, and further provided that "[a]ll of the rules of equal or inferior rank which contradict or go against what has been set forth in the present royal decree-law are hereby repealed."[3] Because the Hours Cap in RDL 14/2010 and the CPI Amendment in RDL 2/2013 modified how the tariffs in RD 661/2007 were calculated and applied, RDL 9/2013 repealed those measures. Furthermore, the Sole Derogatory Provision of Law 24/2013 repealed Law

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1 Final Award, Nov. 14, 2018 ("**Final Award**"), ¶¶ 247, 388.

2 *Id.*, ¶ 537.

3 RDL 9/2013, Sole Derogatory Provision, C-91.

54/1997, the primary legislation under which RD 661/2007, and the amendments to that decree in RDL 14/2010 and RDL 2/2013, were enacted.[4]

5. This fact is undisputed. In its Counter-Memorial, Spain stated with respect to the Hours Cap in RDL 14/2010, "we must highlight the fact that these measures have been left without effect by RD-Act 9/2013, which has absorbed all their effects."[5] In its Rejoinder, Spain said with respect to the CPI Amendment, "during the time that this new measure was in force, it did not cause any negative effect for the Claimants."[6]

6. Likewise, the New Regulatory Regime also mooted the effect of the TVPEE on the Claimants' PV plants. While that levy continued to be in force (because it also applied to non-renewable producers), the New Regulatory Regime included a payment to offset the TVPEE for renewable plants. Spain acknowledged this fact in its Rejoinder, stating:

> The specific remuneration received by renewable producers [under the New Regulatory Regime] enables them to recover certain costs which, unlike with conventional technologies, cannot be recovered in the market . . . . One of the costs that are paid to these renewable producers is precisely the TVPEE.[7]

Additionally, Spain's counsel confirmed this fact during opening statements, stating "the 7% levy is an operating cost, and so the [new] regulatory regime gives back the 7% levy in order to obtain a reasonable return for the plants."[8]

7. Accordingly, the only damages in FTI's model attributable to these measures are historical damages prior to introduction of the New Regulatory Regime; from the introduction of the New Regulatory Regime forward, all of the damages calculated by FTI are attributable to the New Regulatory Regime, which the Tribunal found to violate the ECT. Thus, the Tribunal correctly eliminated from its Award the damages actually attributable to the Hours Cap, the CPI Amendment, and the TVPEE. Those measures caused no harm to Claimants' PV plants after the introduction of the New Regulatory Regime, and thus there are no losses attributable to those measures after the Date of Assessment to deduct from the Award.

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4 Law 24, 2013, Sole Derogatory Provision, C-180.

5 Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, Feb. 17, 2017 ("**Spain's Counter-Memorial**"), ¶ 728.

6 Spain's Rejoinder on the Merits and Reply on Jurisdiction, Oct. 3, 2017 ("**Spain's Rejoinder**"), ¶ 834.

7 *Id.*, ¶ 831.

8 Tr. Day 1, 213:17-22 (Mr. Santacruz).

8. Furthermore, the core premise of Spain's Request is based on unfounded speculation. Spain hypothesizes that if it had not enacted the New Regulatory Regime, the Hours Cap, CPI Amendment, and TPVEE would have remained in effect indefinitely. There is no basis for this speculation, and in fact, good reason to believe otherwise.

9. To begin with, the purpose of these measures was to remedy Spain's burgeoning tariff deficit. The preamble to RDL 14/2010 states that "the objective of this Royal Decree-law is to urgently address the correction of the tariff deficit of the electricity sector."[9] Similarly, the stated purpose of RDL 2/2013 is to alleviate "imbalances between these costs and the revenues from regulated prices," *i.e.*, the tariff deficit.[10] Likewise, Law 15/2012 states that it was enacted in order to "favor[ ] budgetary balance," which is confirmed by the fact that the law committed the revenues generated by the TVPEE to reduction of the tariff deficit.[11]

10. Spain's tariff deficit was a temporary phenomenon. On Spain's own case, the tariff deficit emerged because of the global financial crisis and ensuing recession, which caused a "radical drop in the demand for electricity," reducing income to the system.[12] While in Claimants' view the main cause of the tariff deficit was Spain's failure to raise consumer electricity prices sufficiently, Spain also contends that the recession constrained its ability to raise consumer prices.[13] That recession, however, obviously would not (and did not) persist forever. GDP growth in Spain turned positive in 2014 and has exceeded 3% in years since.[14] It is thus not logical to assume that Spain would have maintained the emergency measures that it enacted to remedy the tariff deficit after the causes of that deficit, and the constraint on its ability to raise prices to consumers, disappeared.

11. Indeed, Spain subsequently did suspend one of the measures at issue. On October 5, 2018, Spain enacted Royal Decree-Law 15/2018, which suspended the 7%

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9 RDL 14/2010, Preamble, ¶ 3, R-58.

10 RDL 2/2013, Preamble, R-63.

11 Law 15/2012, Preamble and Second Additional Provision, R-3.

12 Tr., Day 1, 199:5-20 (Mr. Santacruz).

13 *See* Tr., Day 5, 103:20-24 (BDO) ("But what about the consumers' ability to just continue to have increases in the electricity price? GDP was contracting, the economy was contracting; unemployment had risen to circa 20-22% in 2010").

14 *See* Tr., Day 5, 184:21 – 185:6.

TVPEE for a period of at least sixth months.[15] Thus, there is concrete evidence that Spain's tariff-reduction measures were not necessarily permanent.

12. Unfortunately, Spain's suspension of the TVPEE did not benefit PV producers, because the same law directed the government to modify the specific remuneration paid to renewable plants in order to neutralize the suspension of the TVPEE.[16]As noted above, and as Spain acknowledges, the New Regulatory Regime mooted the TVPEE for renewable producers by including specific remuneration to offset the amount of the 7% levy. Thus, in order to maintain the target rate of return at the heart of the New Regulatory Regime, Spain is reducing the amount of remuneration paid to renewable plants to offset the suspension of the TVPEE.[17] This fact confirms beyond doubt that the €8.9 million that Spain's Request calculates as future losses attributable to the TVPEE are in fact attributable to the New Regulatory Regime, not the TVPEE, because those losses persist regardless of whether Spain maintains or suspends the TVPEE.

13. In short, Spain superseded the Hours Cap, the CPI Amendment, and the TVPEE when it enacted the New Regulatory Regime. The Tribunal correctly reduced damages by the amount of the losses actually caused by those measures. It is not the Tribunal's responsibility to speculate about what measures Spain might have taken if it had not enacted the New Regulatory Regime, and repealed or mooted the hours cap, CPI amendment, and TVPEE.

B. Spain's New Quantum Case is Inconsistent With Its Own Prior Positions

14. In its prior submissions in this case, Spain consistently attempted to minimize the harm attributable to the Hours Cap, CPI Amendment, and TVPEE. Only now, after the Tribunal has found no jurisdiction or liability with respect to these measures, Spain belatedly shifts its position, arguing that the measures in question caused nearly all of the Claimants' damages.

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[15] RDL 15/2018, Preamble and Sixth and Seventh Additional Provisions, C-276 ("we proceed to exonerate from the Tax on the value of the production of electricity to electricity produced and incorporated into the electricity system for six months, matching with the months of greatest demand and higher prices in wholesale electricity markets, in accordance with the ultimate goal pursued by this standard").

[16] *Id.*, Eighth Additional Provision, C-276.

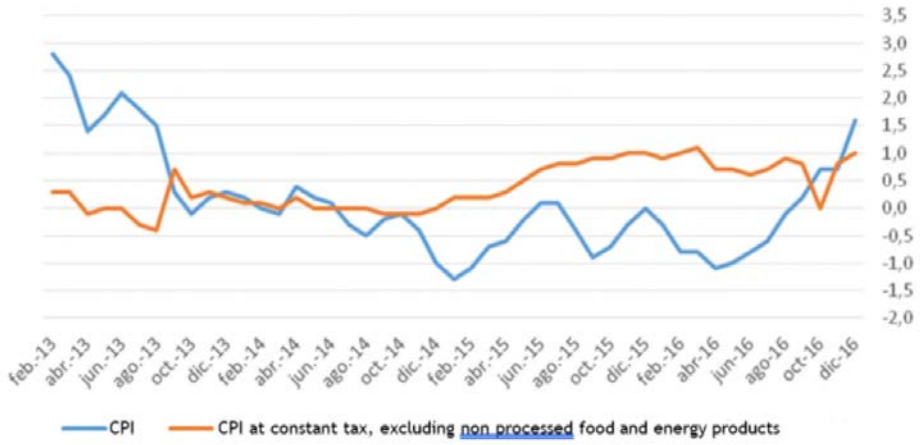
[17] The Eighth Additional Provision of RDL 15/2018 requires the government to issue a Ministerial Order modifying the remuneration for renewable producers within three months (*i.e.*, by January 5, 2019). To Claimants' knowledge, Spain has not yet issued that Ministerial Order.

15. For example, with respect to the Hours Cap, Spain's Counter-Memorial sought to minimize the impact of that measure by emphasizing the fact that the plants could still sell electricity in excess of the cap, potentially for more than the tariff rate:

> In any case, it has to be emphasised that this limitation refers to the hours with tariff, not to the operation of the facility, which may, in any case, receive the market price for the rest of the hours not affected by the limitation. Additional hours that also enjoy priority access and dispatch. Also taking into account that the market price in a useful life scenario of 30 years might be even higher than the tariff.[18]

16. Similarly, Spain repeatedly argued that the CPI Amendment was insignificant in scope and had not caused significant (if any) harm to the Claimants. For instance, in its Counter-Memorial, Spain argued:[19]

> This measure, justified both scientifically and legally, has produced effects that do not harm the Claimant, as it has been beneficial to those facilities. CPI at constant taxes has evolved over the CPI in certain periods of 2013, 2014 and 2015. This evolution is confirmed by the following table:



17. Spain also emphasized the following opinion of its Supreme Court regarding the CPI Amendment:

> Indeed, the Spanish Supreme Court has ruled on the matter stating that the reform made by RD-Act 2/2013 is limited in scope, since

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[18] Spain's Counter-Memorial, ¶ 735.

[19] *Id.*, ¶ 818.

> the differences between the two update methodologies are not especially significant.[20]

18. Additionally, as already discussed, Spain repeatedly emphasized that the New Regulatory Regime compensates plants for the costs of the TVPEE. Similarly, Spain repeatedly asserted that the Hours Cap and CPI Amendment were limited in time because they had been replaced by the New Regulatory Regime.

19. Spain's objective in attempting to minimize the impact of these measures is apparent. A central theme of Spain's case, as set forth in its Counter-Memorial, is that the FET standard requires a "balancing exercise" that "takes into account whether the measure adopted was reasonable or proportionate to the objective or public interest sought . . . ."[21] Likewise, in its Rejoinder, Spain argued that "the reform of the electricity sector carried out by the Kingdom of Spain constitutes a valid rational policy and has been carried out by means of reasonable and proportionate action, which falls within the FET standard established in the [ECT], as declared by the Arbitral Tribunal in the case *AES SUMMIT v Hungary*."[22] Similarly, during opening statements at the merits hearing, Spain's counsel argued, "the ECT of course allows states to make changes in the regulatory regimes, always provided that those changes are reasonable and proportional . . . ."[23]

20. Thus, in furtherance of its defense that the measures were reasonable and proportional, Spain consistently sought to minimize the impact of the Hours Cap, CPI Amendment, and TVPEE. Only now, after the Tribunal has found no jurisdiction or liability with respect to those measures, does Spain claim that those measures were in fact extremely harmful. According to its Request, the future losses attributable to these measures are €31.2 million.[24] To put that in perspective, the Tribunal accepted FTI's Counterfactual valuation of €70.4 million, subject to a reduction of €11.2 million based on the assumption of a 30-year operating life, resulting in a Counterfactual valuation of €59.2 million.[25] Thus, according to Spain's new quantum case, the measures that Spain previously attempted to minimize as

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[20] *Id.*, ¶ 823.

[21] *Id.*, ¶ 1045 n. 647, ¶ 1242 (*citing Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015).

[22] Spain's Rejoinder, ¶ 1156.

[23] Tr., Day 1 at 156:4-7 (Ms. Moraleda).

[24] Spain's Request for Correction of the Final Award, Dec. 14, 2018 ("**Spain's Request**"), ¶¶ 54-55.

[25] Final Award, ¶¶ 448, 517.

reasonable, time-limited, and insignificant in scope actually reduced the value of Claimants' investments by nearly 53 percent:

Counterfactual Value Calculated by FTI [a]	€70.4 million
Reduction in Counterfactual Value for 30 Year Life [b]	€11.2 million
Counterfactual Value Accepted by Tribunal [c]=[a]-[b]	€59.2 million
Loss Spain Now Attributes to Future Impact of Hours cap, CPI amendment, TVPEE [d]	€31.2 million
Percent of Counterfactual Value Destroyed by Future Impact of Hours cap, CPI amendment, TVPEE Under Spain's New Quantum Case [e] = [d]/[c]	52.7%

21. Spain's new quantum case is plainly inconsistent with its prior positions in the case. Spain cannot have it both ways, seeking to minimize the impact of these measures for purposes of assessing liability, but then after the Tribunal finds no liability, emphasizing (and indeed exaggerating) the impact of these measures.

C. Spain's New Quantum Case is Inconsistent With the Tribunal's Findings on Liability

22. For similar reasons, Spain's new quantum case is inconsistent with the Tribunal's findings on liability. In the Award, the Tribunal made the following findings regarding the Claimants' legitimate expectations and the legality of Spain's various measures:

> The Tribunal has decided that the Claimants did not have legitimate expectations that they would receive the precise FiT specified in RD 661/2007 for the entire lifetime of their PV plants. However, the Tribunal, does find that the Claimants had the legitimate expectation that the legal and regulatory framework would not be fundamentally and abruptly altered, thereby depriving investors of a significant part of their projected revenues.
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> * * *
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> The Claimants' legitimate expectation that the remuneration and benefits their PV facilities received would not be radically changed were based foremost on the express language of RD 661/2007, which sets out fixed FiTs to be paid for entire operating life of a PV facility.
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> * * *

> As explained above, the Tribunal considers that the Claimants had a legitimate expectation that the regulatory framework would not be fundamentally and abruptly altered so as to deprive investors of a significant part of their projected revenues. The Claimants did not, however, have a legitimate expectation that there would be no regulatory changes to RD 661/2007 at all. In the Tribunal's view, none of the changes enacted by RD 1565/2010, RDL 14/2010 or RD 2/2013 meet the threshold requirement of a fundamental change to the regulatory framework. Accordingly, the Tribunal finds that neither RD 1565/2010, RDL 14/2010 nor RD 2/2013 breached the FET standard.[26]

23. Thus, the Tribunal found that the Claimants had a "legitimate expectation that the remuneration and benefits their PV facilities received would not be radically changed," and that the "regulatory framework would not be fundamentally and abruptly altered so as to deprive investors of a significant part of their projected revenues." Accordingly, the Tribunal's decision that the Hours Cap and CPI Amendment did not violate the ECT rests on the conclusion that those measures did not deprive the plants of a significant part of their projected revenues or radically change the remuneration and benefits the plants would receive.

24. Spain's new quantum case is completely inconsistent with that conclusion. According to Spain's Request, the Hours Cap and CPI Amendment reduced the value of Claimants' investments by €22.3 million, in addition to the €8.9 million impact that Spain now attributes to the lawful future impact of the TVPEE.[27] Thus, under Spain's new quantum case, the Hours Cap and CPI Amendment reduced the value of Claimants' investments by more than 44 percent:[28]

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[26] *Id.*, ¶¶ 365, 378, 388.

[27] Spain's Request, ¶ 55.

[28] Because the Tribunal found no jurisdiction with respect to the TVPEE, this analysis of whether Spain's new quantum case is consistent with the Tribunal's liability findings must look only at the Hours Cap and CPI Amendment. Thus, the analysis in the table above incorporates the assumption in Spain's new quantum case that the TVPEE lawfully reduced the Counterfactual value of Claimants' investments by €8.9 million. If Claimants are correct that this €8.9 million loss is in fact attributable to the New Regulatory Regime rather than the TVPEE (as described in paragraphs 6 and 11-12 above), then Spain's new quantum case attributes a 37.6% reduction in the Counterfactual Value of the Claimant's investments to the Hours Cap and CPI Amendment ([g]=[f] /[c] in the table above) – still a very substantial reduction in the revenues of the Claimants' plants.

Counterfactual Value Calculated by FTI [a]	€70.4 million
Reduction in Counterfactual Value for 30 Year Life [b]	€11.2 million
Counterfactual Value Accepted by Tribunal [c]=[a]-[b]	€59.2 million
Loss Spain Now Attributes to Lawful Future Impact of TVPEE [d]	€8.9 million
Counterfactual Value Implicit in Spain's New Quantum Case [e]=[c]-[d]	€50.3 million
Loss of Value Spain Now Attributes to Future Impact of Hours Cap and CPI Amendment, TVPEE [f]	€22.3 million
Percent of Counterfactual Value Destroyed by Future Impact of Hours Cap and CPI Amendment Under Spain's New Quantum Case [g] = [f]/[e]	44.3%

25. That is a very significant decline in the plants' revenues. Indeed, it is nearly three times the €8 million impact that the Tribunal attributed to those measures (including the TVPEE), and accounts for more than 60% of the losses that the Tribunal found to be an impermissible reduction of a significant part of the Claimants' revenues.

26. In fact, assuming for the sake of argument that Spain's calculations are correct, the only appropriate correction to the Award would be to find that the Hours Cap and CPI Amendment *did* violate the ECT, and thus that damages should be *increased* by the historical losses attributable to those measures. According to Spain's new argument, the Hours Cap and CPI Amendment caused a substantial majority of the harm that the Tribunal found "crossed the line from a non-compensable regulatory measure to a compensable breach of the FET standard." If that is indeed the case, then those measures were the ones that "crossed the line," and the Tribunal should find that they violated the ECT as well.

27. Indeed, Spain's new argument illustrates one of the difficulties in applying a proportionality or reasonableness approach to liability in this case – the lines between the different measures are not distinct. As Claimants argued in their Post-Hearing Brief:

> Finally, in a balancing exercise, the Tribunal should consider the Disputed Measures and their impact on Claimants' investments cumulatively, rather than analyzing each measure separately. Otherwise, a state could substantially or totally destroy an investment through a series of small measures, each one of which might seem reasonable and proportionate by itself (*i.e.*, "death by a thousand cuts"). A cumulative analysis is particularly appropriate in a case like this one, in which the measures all caused the same kind of harm (reduction of the incentives), were enacted in a fairly

> short period of time as part of a single program to address the same issue (the tariff deficit), and had interrelational effects (*i.e.*, the New Regulatory Regime superseded the earlier measures).[29]

28. The Tribunal's approach of assessing the impact of each measure during the time period in which it was in effect and excluding those losses for the measures that it found not to "cross the line" is a reasonable approach. But if (as Spain now argues) the Tribunal must also exclude from damages the future losses that were "subsumed" within the harm caused by the measure that the Tribunal found to be illegal, then the distinction between the measures disappears. In that case, the only logical approach is to assess the reasonableness and legality of the measures cumulatively.

D. Spain's New Quantum Case is Inaccurate

29. For the reasons outlined above, the premises of Spain's new quantum case are flawed. Even assuming the validity of those premises, however, Spain's new quantum case is riddled with errors.

30. For example, BDO's new calculations omit the fact that Royal Decree-Law 14/2010 and Law 2/2011 extended the tariff at the full level from 25 to 30 years.[30] If Spain is correct that the Counterfactual position must assume the permanence of the changes that Spain made to the RD 661/2007 framework prior to completely repealing that framework in the New Regulatory Regime, then the Counterfactual valuation must include the beneficial changes that Spain implemented in conjunction with (and to partially temper) the harmful regulatory changes. FTI's Counterfactual valuation did not include the effect of extending the tariff at the full level from 25 to 30 years, because FTI calculated the Counterfactual value based on the terms of RD 661/2007 before Spain enacted any of the regulatory changes that began in 2010.[31] Thus, by failing to include the extension of the tariff at the full level from 25 to 30 years, BDO's adjustment of FTI's calculations is incomplete.

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[29] Claimants' Post-Hearing Brief, May 18, 2018, ¶ 99.

[30] *See* RDL 14/2010, of December 23, 2010, establishing urgent measures for the correction of the tariff deficit of the electricity sector, published in the Official Gazette no. 312 of 24 December 2010, Preamble paragraph 4 and First Final Provision ("… In parallel and for the sake of the reasonableness of remuneration the references to the period of first 25 years established in Royal Decree 661/2007 for installations of type.1.1 …" extends the original remuneration rate under RD 661/2007 to year 28), C-102; Law 2/2011, of March 4, 2011, on Sustainable Economy, published in the Official Gazette no. 55 of 5 March 2011, 44th Final Provision (which amends First Final Provision of RDL 14/2010 and extends the remuneration rate under RD 661/2007 to year 30), C-95.

[31] First FTI Quantum Report, Sept. 30, 2016, Section 6.1.

31. Additionally, there is no basis at all for BDO's assumption that the core CPI would be one percentage point lower than CPI. That figure is pulled out of thin air, and is completely inconsistent with the following observation in BDO's first report:

> [A]s FTI itself mentions in its report, this impact may not be permanent, as from 2015 the evolution of the previous index is lower than the new index. In any case, as FTI asserts, the evolution of this impact is uncertain. What's more, the first index evolving to a level lower than the second index can be seen in specific periods in 2013, 2014, 2015 and 2016.[32]

32. Moreover, BDO appears to apply the wrong Hours Cap to two of the Claimants' three plants (La Castilleja and Fotocampillos).

33. In short, Claimants strongly disagree with the calculations in Spain's new quantum case, even assuming the validity of its premises. Thus, to consider Spain's new quantum case at all, the Tribunal would need to conduct an entirely new quantum proceeding, considering new evidence from FTI as well as BDO. For the reasons discussed in the next section, Claimants believe that the Tribunal lacks the power to do so. In the event that the Tribunal entertains Spain's Request, however, Claimants' reserve the right to present a response to BDO's calculations from FTI.

E. The Relief Spain Requests is Beyond the Scope of the Tribunal's Authority

34. While Claimants address this issue last because it benefits from the context of the preceding sections, it in fact is a threshold question that is dispositive of Spain's Request. The simple fact is that the Tribunal lacks power to grant the relief Spain seeks.

35. Article 40 of the SCC Rules states that "[a]n award shall be final and binding on the parties when rendered."[33] Spain invokes an exception to this finality provision found in Article 41 of the SCC Rules, which states that a party may "request that the Arbitral Tribunal correct any clerical, typographical or computational errors in the award, or provide an interpretation of a specific point or part of the award," and a parallel provision in Section 32 of the Swedish Arbitration Act that enables the Tribunal to correct "any obvious inaccuracy as a consequence of a typographical, computational, or other similar mistake."[34] This exception to the finality of the Final Award, however, is very limited. It only permits the

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[32] First Report of BDO, Feb. 17, 2017, ¶ 442.

[33] 2010 SCC Arbitration Rules, art. 40, C-183.

[34] Spain's Request, ¶¶ 10-13.

correction of a clerical, typographical, or computational error; it does not permit Spain to request reconsideration of the Tribunal's decision, much less based on new arguments and calculations that it did not present in the arbitration.

36. Numerous commentators confirm that the power to modify a final award under SCC Article 41 and the Swedish Arbitration Act is limited to the correction of "obvious" errors, and does not include reconsideration of the merits of the decision. For instance, the commentary to the SCC Rules published on the SCC website states that "the opportunity to correct an award [under SCC Art. 41] is restricted to errors that have the unambiguous character of 'slips.'"[35] Similarly, the CMS Guide to Arbitration in Sweden states, "[t]he power of correction is limited to irregularities which are obvious oversights (*i.e.* clerical, typographical or computational errors), and does not include inaccuracies which can be traced back to errors in the application of the law or incorrect reasoning."[36] Likewise, the Global Arbitration Review guide to arbitration in Sweden states, "[a]ccording to the Swedish Arbitration Act as well as the SCC Rules, the tribunal may correct obvious errors in the award…. Beyond this scope, an award is final and binding, and cannot be appealed under Swedish law."[37]

37. Spain's Request does not seek to correct any "obvious error" in the Final Award. Rather, Spain seeks reconsideration of the merits of the Tribunal's decision regarding the quantum of damages. For the reasons set out in the preceding section, the Tribunal's decision on that issue was not an error at all. But even if it were, it is not an "obvious error" of a clerical, typographical, or computational nature, having the unambiguous character of a "slip." This fact is confirmed beyond doubt by the fact that Spain's Request is based on an entirely new quantum case, including new calculations from BDO and new arguments that Spain never advanced during the arbitration.[38] The Tribunal has no power to reconsider the

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[35] Marie Öhrström, *Institutional Arbitration - SCC Rules (Chapter XII)*, p. 850 ¶ 211, CL-190 (*available at* https://sccinstitute.com/media/30000/ohrstrom-2.pdf). As stated on page 817, this commentary addresses the SCC Rules in the context of an arbitration seated in Sweden governed under the Swedish Arbitration Act.

[36] Harald Nordenson and Marie Öhrström, *Arbitration in Sweden*, ¶ 8.4.2, CL-191.

[37] Sverker Bonde and Advokatfirman Delphi, GAR European, Middle Eastern and African Arbitration Review 2016 – Sweden, CL-192. As this article notes in the omitted portion, the SCC Rules also permit the Tribunal to "supplement the award on request of a party in case the tribunal, due to an oversight, has neglected to determine some issue." That is a separate provision found in Article 42 of the SCC Rules. Spain does not invoke that provision, because its Request seeks reconsideration of an issue that the Tribunal *did* address in the Final Award, not to address an issue that the Tribunal neglected to consider at all.

[38] Spain never argued during the arbitration that the Tribunal should assess the reasonableness of these measures based on their permanent effect assuming they had not been superseded by the New Regulatory

merits of its decision, particularly based on new arguments and computations, under the guise of correcting a "computational error."

38. Notably, Spain made an identical attempt to request reconsideration of the final award in *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, which also was governed by the SCC Rules and seated in Sweden. The tribunal in that case, however, correctly concluded that Spain's request fell outside of its post-award powers under the SCC Rules and the Swedish Arbitration Act. That tribunal's reasoning is equally applicable to the issue presented here, and thus Claimants quote the relevant portions at length:

> As the Parties are no doubt well aware, a fundamental principle of arbitration is that once the arbitral award has been rendered it becomes final and binding and vested with res judicata effect. At the same instance, the arbitral tribunal is considered to have completed its assignment and, as a consequence, the arbitral tribunal's jurisdiction over the dispute is terminated. In other words, upon rendering of the final award the arbitral tribunal becomes *functus officio* with no lingering power to determine any issues in dispute between the parties. Certain exceptions apply to this rule that provide an arbitral tribunal with limited post-award authority. The arbitral tribunal's post-award authority is determined by the rules and laws applicable at the seat of the arbitration – in this case the 2010 SCC Rules (the "SCC Rules") supplemented by the Swedish Arbitration Act (the "SAA")….
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> Pursuant to Article 41 of the SCC Rules, an arbitral tribunal has post-award authority to "correct any clerical, typographical or computational errors" or "provide interpretation of a specific point or part of the award". This is supplemented by Article 32 of the SAA which provides an arbitral tribunal with authority to "correct or supplement" the award if the "arbitrators find that the award contains any obvious inaccuracy as a consequence of a typographical, computational, or other similar mistake by the arbitrators". The same provision gives an arbitral tribunal the mandate to interpret a decision in the award or supplement the award "if the arbitrators by oversight have failed to decide an issue which should have been dealt with in the award".

Regime. It had every opportunity to do so. The closest argument that it presented was a "sensitivity analysis" in BDO's second report of what damages would be excluding the TVPEE and CPI amendment (which itself was untimely because it was responsive to the calculations in FTI's first report, and thus should have been presented in BDO's first report). *See* Second Report of BDO, 251. That sensitivity analysis, however, presents different calculations for the TVPEE and CPI Amendment than Spain presents now, and no calculation for the Hours Cap at all.

> The Respondent's Request must be analysed with reference to the limited authority that the above referenced rules give the Tribunal.
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> The Respondent requests a correction of alleged errors in the damages calculation in the Final Award. To further prove its point, the Respondent has submitted another expert report on damages from Accuracy containing new, alternative, calculations which, according to the Respondent, would be more consistent with the Tribunal's findings on jurisdiction and merits than the result which the Tribunal has arrived at in the Final Award. The Claimant has on 6 April 2018 commented on the merits of the alleged errors and availed itself of the opportunity to file a reply expert report from Compass Lexecon.
>
> It is clear from the Request that the Respondent does not agree with the Tribunal's assessment of the damages flowing from the Respondent's breaches of the ECT, however, the Respondent fails to point to any clerical or computational errors or miscalculations committed by the Tribunal that may be within its authority to correct. The Tribunal also notes that the arguments and figures now raised by the Respondent in its Request, suggesting that the but-for scenario relied upon by the Claimant and adopted by the Tribunal in the Final Award is erroneous, have not been presented before. This is despite the fact that the Respondent has had ample opportunity during the arbitration proceedings to do so. It is clearly beyond the scope of the Tribunal's mandate to correct any damages calculation based on a re-evaluation of the substantive issues or evidence in dispute, and much less so to consider and base such evaluation on new arguments and evidence presented after the Final Award has been rendered. In the Tribunal's opinion, this is what Respondent's Request C sets out to do. Respondent's Request C is therefore dismissed.[39]

39. The *NovEnergia* tribunal's reasoning applies equally to Spain's Request in this case, and the Tribunal should not hesitate to reach the same conclusion.

40. For all of the foregoing reasons, the Tribunal should deny Spain's Request for Correction of the Final Award.

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[39] *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, Procedural Order No. 17, Apr. 9, 2018, CL-193.

Respectfully submitted,

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