

1. I write to express my disagreement with one important part of this determination of Claimants' damages, and that is the element of damages related to the comparison of the Actual and Counterfactual scenarios in the Forecast Period for the Beta and Gamma companies.
2. The Parties disagree with respect to the Actual Scenario that should be assumed for the Forecast Period. In the Joint Memorandum, Claimants' expert, Mr. Edwards, assumes that Beta and Gamma will sell all their available GCs through GCPAs at an effective discount below the minimum price, achieved by bundling sales of GCs with sales of electricity. As an alternative, Mr. Edwards suggested in his first report that the Tribunal assumes that Beta and Gamma would sell as many of their GCs as they could at the minimum price and bank their remaining GCs for future sale at the minimum price.
3. Dr. Flores assumes in the Joint Memorandum that Beta and Gamma would sell all their GCs each year at the minimum price via GCPAs.<sup>1</sup> In his first and second reports, Dr. Flores rejected any DCF comparison of Actual and Counterfactual scenarios as "speculative" but applied Mr. Edwards' alternative assumption – that the companies would sell as many GCs as they could at the minimum price and bank any remainder – as a means of correcting Mr. Edwards' model. Dr. Flores did not correct Mr. Edwards' model in the manner he now proposes, that is, by assuming that all of the companies' GCs would be sold each year at the minimum price.
4. The majority has concluded that Dr. Flores' assumption for the Actual Scenario in the Forecast Period – "that Beta and Gamma will sell all available GCs each year at the minimum price via GCPAs" – "is the most reasonable and conservative assumption ...."<sup>2</sup>
5. That conclusion is contradicted by the record of this case, most directly by the testimony of Dr. Flores.

### **The Most Reasonable and Conservative Assumption**

6. The most reasonable assumption is the alternative proposed by Mr. Edwards and used by Dr. Flores in his first two reports: damages should be calculated on the assumption that Beta and Gamma would sell as many of their GCs as they could each year and bank the rest. This certainly was Dr. Flores' view. In his second report, Dr. Flores had this to say:

“Because FTI's assumption [sale of GCs at a discount] continues to be unsupported, I continue to conclude that FTI's other option (that is, selling as many GCs as possible on the spot market in any given year and stockpiling the remaining unsold GCs until later) is *the only*

---

<sup>1</sup> Award at paragraph 130, fourth bullet point; Joint Memorandum at paragraphs 73 i. and 78.

<sup>2</sup> Award at paragraph 134.

*reasonable approach*, though subject to significant uncertainty and speculation.”<sup>3</sup>

Lest one think that Dr. Flores saw anything unusually uncertain about this assumption, he clarified his view a few paragraphs later:

“Given that FTI presents another option in which Beta and Gamma sell GCs on the spot market which requires no assumptions about speculative discounted electricity transactions, I maintain that it is the only reasonable approach to calculate damages in this case, *if a DCF methodology is to be used.*”<sup>4</sup>

7. Thus, Dr. Flores makes it clear that it is the use of a DCF methodology in this case, not Mr. Edwards’ alternative assumption, that is the source of the “uncertainty and speculation” to which he refers in paragraph 126. Having decided to use a DCF methodology, “the only reasonable approach” available to the Tribunal is to assume that Beta and Gamma sell as many of their GCs as they can in the year these are earned and bank the rest for future sale. At least that is the way Dr. Flores saw it in his reports.
8. But whatever Dr. Flores said, is this in fact the most reasonable assumption to make in forecasting the Actual Scenario? There are three possibilities: one might assume that Beta and Gamma would sell their GCs at an effective discount through bundling, as Claimants assert they did in the past; one might assume, as Dr. Flores does now, that they would have sold all of their GCs in the year earned at the minimum price; or, one can adopt Mr. Edwards’ alternative assumption.
9. The problem with the first assumption is that the Tribunal has determined that there is insufficient evidence of past discounted GC sales achieved through bundling to warrant calculating historical damages on that basis. This makes it difficult to assume that discounts asserted to have been achieved in the past through bundling would continue into the Forecast Period.
10. The problem with Dr. Flores assumption that all GCs would be sold in the year earned at the minimum price is two-fold. First, it assumes an Actual Scenario in the Forecast Period that is identical with the Counterfactual (or “But For”) scenario that we instructed the Parties to assume in determining damages.<sup>5</sup> Second, it is inconsistent with testimony on the record to the effect that there would be an over-supply of GCs beyond 2026.
11. Addressing the second point first, Mr. Roques, Claimants’ expert, testified that the contested measures (which define the Actual Scenario) would result in an oversupply of

---

<sup>3</sup> Flores II, para. 126 (emphasis added).

<sup>4</sup> *Id.*, para. 137 (emphasis added).

<sup>5</sup> See Award at para. 26, *supra* (third bullet point) (“In the But For Scenario the Operating Companies must be assumed (i) to have received from 2013 through 2028 the income from the sale of six GCs per MWh (with no deferral), (ii) to have been able to sell all these GCs either through GCPAs or in the GC market in the same year they obtained said GCs, (iii) at the minimum price of EUR 27/GC, adjusted yearly for European inflation since 2013 (or at a higher price, if so established in a GCPA)...”)

GCs until 2026.<sup>6</sup> Mr. Jones, Respondent's expert, testified that Mr. Jones was being unduly optimistic in that GCs likely would remain in an oversupplied state until 2031.<sup>7</sup> If the experts agree that GCs would be oversupplied in the Actual Scenario, it is unclear what basis the majority could have for viewing as reasonable an assumption that Beta and Gamma would be able to sell all of their GCs in the year earned at the minimum price. This simply could not happen in a situation in which there was a persistent oversupply of GCs, and no one has ever argued that it could.<sup>8</sup> Nonetheless, the majority adopts this assumption.

12. It is also unclear how it can be reasonable to, in effect, assume away the problem, which is what Dr. Flores does in assuming that Claimants could sell their GCs in the Actual Scenario to the same extent and at the same price as they could in the Counterfactual Scenario. To be sure, there can be cases in which the actual scenario in fact produces the same result as the counterfactual scenario, but that cannot be the situation in the present case, not when we have expert agreement that there would be an oversupply of GCs in the Actual Scenario.
13. As for Dr. Flores' assumption being conservative, it is conservative only in the sense that, by assuming away this particular problem – that is, by assuming that the Actual and Counterfactual Scenarios are the same – one reduces damages. Of course, if one assumed away all of the differences between the Actual and Counterfactual Scenarios in this case, damages would be nil.
14. This leaves Mr. Edwards' alternative assumption, which both Parties' experts view as reasonable. It clearly is the most reasonable of the assumptions the Parties have offered, and it therefore is the assumption that the Tribunal should have adopted.
15. Adopting Mr. Edwards' assumption, however, is easier said than done, because – as is noted in the Award at paragraph 136 -- the parties did not provide the Tribunal with a "switch" that would adjust the damages calculation to reflect this assumption. I would remedy this situation by asking the parties' experts to provide the Tribunal with the necessary switch. In my view, one should not adopt a wrong conclusion for want of the "switch" needed to implement the correct conclusion.

---

<sup>6</sup> Roques I, paras. 2.33, 6.53 – 6.56.

<sup>7</sup> Jones I, paras. 6.127 – 6.128. *See also*, Flores II, n. 208.

<sup>8</sup> Nothing in the Joint Report, or in any of the other expert reports, attempts to reconcile the evidence of GC oversupply with the proposition that Beta and Gamma could sell all of their GCs at the minimum price.