STATE LEGAL SERVICE
BUREAU OF THE STATE LEGAL SERVICE

GENERAL SUB-DEPARTMENT OF
LITIGATION SERVICES

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

AND

UNDER THE ENERGY CHARTER TREATY

(ICSID ARBITRATION CASE No. ARB/15/44)

BETWEEN:

WATKINS HOLDINGS S.À.R.L. AND OTHERS
Claimants

- and -

KINGDOM OF SPAIN
Respondent

RESPONDENT´S REPLY POST HEARING BRIEF

ARBITRATORS:

Tan Sri Dato' Cecil W.M. Abraham
Michael C. Pryles
Hélène Ruiz Fabri

Presented on behalf of the Respondent by:

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

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I. INTRODUCTION

1. Pursuant to paragraph 22.1 of Procedural Order No. 1, dated 26 May 2016, and paragraph 34 of Procedural Order No. 6, dated 24 April 2018 (as amended on 26 April 2018), and following the Arbitral Tribunal´s instructions, the Kingdom of Spain hereby submits its Reply Post Hearing Brief (hereinafter **"Reply PHB"**) in the ICSID Arbitration No. ARB/15/44.

2. In this Reply PHB the Kingdom of Spain responds to the main arguments submitted by the Claimants in their PHB. The fact that the Respondent may not address in this Reply PHB all the specific issues addressed by the Claimants in their PHB must not be construed as an acceptance by the Respondent of Claimants´ submissions on said issues. Moreover, the content of this Reply PHB should be complemented with all the allegations and supporting documentation that have been submitted by the Kingdom of Spain throughout the various phases of this arbitration.

3. In addition, following the Arbitral Tribunal´s invitation contained in its communication of 22 October 2018, the Kingdom of Spain provides in this Reply PHB comments on the "Decision on the Achmea Issue" dated 31 August 2018 rendered in the case of Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12) (hereinafter the "**Vattenfall Decision**") as well as on the Final Award dated 8 May 2018 rendered in the case of Antaris Solar GmbH and Dr Michael Göde v. Czech Republic (PCA Case nº 2014-01) (hereinafter the "**Antaris Award**").

4. The considerations contained in the present Reply PHB in addition to all what has been previously stated by the Respondent in its pleadings and during the hearing leads to the conclusion that the Arbitral Tribunal does not have jurisdiction to hear the present dispute and, in any case, that the Kingdom of Spain has not breached its obligations under the Energy Charter Treaty (hereinafter "**ECT**") towards the Claimants and their investment.

II. EU LAW IS APPLICABLE LAW TO DECIDE ALL THE ISSUES IN DISPUTE

5. As was expressed in the PHB, EU Law is applicable to the present dispute not only for purposes of the intra-EU Jurisdictional Objetion raised by the Kingdom of Spain but also for purposes of the merits of the case. In view of Claimants´ PHB, the Respondent wishes to emphasize some points in that regard.

A. EU Law must be applied to an Intra-EU dispute as International Law

6. First of all, we shall address Claimants´allegations regarding Article 16 of the ECT. Accepting that EU Member States consented to intra-EU arbitration under Article 26 of the ECT would generate a conflict between the ECT and the principles of autonomy, primacy and mutual trust of EU Law that must be resolved in favour of the latter pursuant to EU Law, which is the international law applicable according to Article 26(6) of the ECT.

7. That is to say, the conflict arises precisely due to the application of Article 26(6) of the ECT, which requires the Tribunal to apply EU law when ruling on all issues under dispute in this intra-EU conflict. Articles 267 and 344 of the TFEU prevent the Respondent from consenting to an arbitral tribunal interpreting and applying EU law.

8. Thus, Article 26(6) of the ECT becomes the "disconnection clause", since the ECT, promoted and signed by the EU, safeguards EU Law and its autonomy.

9. The Respondent, therefore, does not aim for the ECT not to be applied. The Respondent intends for it to be applied with all its consequences, which include the lack of jurisdiction of the Arbitral Tribunal to hear intra-EU disputes concerning a key institution in European law: State Aid.

10. Furthermore, the requirements established for application of Article 16 of the ECT are not present in this case. The reason for this is that the EU law that the Tribunal must apply does not concern Parts III or V of the ECT. It concerns issues of competence of Article 6 of the ECT—regarding which the ECT and EU Law fully coincide—and the principles of primacy and autonomy of EU law.

11. In addition, there is no provision in the ECT that leads the Tribunal to conclude that according to the ECT, the investment arbitration set forth under its Article 26(4) is more favourable to the Claimants than the judicial system of the EU. In fact, Article 26(2) of the ECT also stipulates that the contracting party has recourse to courts of justice as a mechanism for solving disputes in conditions that are equally favourable to the investor as investment arbitration. Interpreting that the EU judicial system is less favourable to the investor than arbitration leads to an objective lack of confidence in said judicial system that is incompatible with the Law of the EU, which promoted the ECT.

12. Moreover, we must highlight that the correct application of article 26(6) of the ECT leads to conlude that the Contracting Parties did not want to make an offer to arbitrate in intra

EU-disputes and thus Arbitral Tribunals lack jurisdiction to hear such intra-EU disputes.

13. Article 26(6) incorporates the *"iura novit curia"* principle in the ECT, ordering the Arbitral Tribunal to determine and specify the international regulation applicable to the proceedings to settle, not only the issues on the merits, but also the "*issues under dispute*", thus including any issues under dispute, whether related to jurisdiction, merits and/or quantum. This applicable international regulation does not stop with the ECT itself but rather includes *"other principles and rules of international law"*.

14. In intra-EU disputes, EU Law is the applicable Law to issues regarding jurisdiction in its threefold nature as a) international law, b) domestic law and c) fact. This was highlighted by the Tribunal in the Electrabel Case, in its comprehensive Decision on Jurisdiction from 2012:

> *"the possible laws applying to the arbitration agreement invoked by the Claimant and to the Parties' rights and obligations under the ECT may include: international law, EU law and Hungarian law, with EU law (also called by the Parties and others "EC law" and "EEC law") operating at three possible levels: (i) as international law, (ii) as a distinct legal order within the European Union, separate both from the national laws of EU Member States, and international law and (iii) as part of Hungary's national law."*[1] *(emphasis added)*

15. The criterion of the Electrabel Tribunal was shared by other arbitral tribunals in cases involving Spain such as Isolux[2], Charanne[3] and Masdar[4].

16. In the same vein, the Award of the Blusun v. Italy case of 27 December 2016 established: "*as the Tribunal has already ruled, it has an obligation to determine its jurisdiction, and the rules of EU law relevant in the matter are part of the applicable law for this Tribunal* (…) *this does not exclude any relevant rule of EU law, which would fall to be applied either as part of international law or as part of the law of Italy.*"[5]

17. The nature of EU law as applicable International Law to decide on the jurisdiction of the Tribunal has also been recognised in the Award Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, Ms. Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic of 11

[1] Electrabel S.A v. Hungary. Decision on Jurisdiction. 30 November 2012, para. 4.20. RL-0002
[2] Isolux v. the Kingdom of Spain. Award 12 July 2016, paras. 654 and 655. RL-0072
[3] Charanne v. the Kingdom of Spain. Final Award de 21 January 2016, paras. 444 et seq. RL-00849
[4] Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain ICSID Case No. ARB/14/1, Award 16 May 2018), paras. 339 to 341. CL-0175
[5] Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award 27 December 2016, paras. 277 and 278. RL-00582

October 2017[6]. This Award does not apply to the ECT, but the BIT signed between the Republic of Germany and the Czech Republic, which did not provide for the application to the dispute of any other International Law different from the BIT itself. The Arbitral Tribunal concluded that EU law was International Law applicable to the dispute under the principle of proximity enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (hereinafter, "VCLT").

18. Furthermore, according to the Electrabel Tribunal, the specific circumstances of the ECT require an interpretation that must necessarily be in harmony with EU Law. According to the Tribunal in the Electrabel Case: "*the ECT's historical genesis and its text are such that the ECT should be interpreted, if possible, in harmony with EU law.*"[7] According to the same Tribunal, the ECT and EU Law "*should be reconciled if possible, for three important legal reasons. The first derives from the ECT's genesis: it would have made no sense for the European Union to promote and subscribe to the ECT if that had meant entering into obligations inconsistent with EU law. The second derives from one of the ECT's objectives: it is an instrument clearly intended to combat anti-competitive conduct, which is the same objective as the European Union's objective in combating unlawful State aid. The third derives from the ECT's implicit recognition that decisions by the European Commission are legally binding on all EU Member States which are party to the ECT*."[8]

19. For Electrabel, it is clear that in the event of an irreconcilable conflict between the ECT and EU Law, the latter must prevail:

> *"[…] the Tribunal concludes that Article 307 EC precludes inconsistent pre-existing treaty rights of EU Member States and their own nationals against other EU. Member States; and it follows, if the ECT and EU law remained incompatible notwithstanding all efforts at harmonisation, that EU law would prevail over the ECT's substantive protections and that the ECT could not apply inconsistently with EU law to such a national's claim against an EU Member State."*[9]

20. In the Electrabel case and in others that have followed the same criteria, the conflict between the ECT and EU Law did not exist because Article 344 of the TFEU is not applicable to private disputes between investors. According to Article 344 of the TFEU:

[6] Wirtgen v. Czech Republic. PCA Case No. 2014-03. Award 11 October 2017, para. 174. RL-0096
[7] Electrabel S.A v. Hungary. Decision on Jurisdiction. 30 November 2012, para. 4,130. RL-0002
[8] Electrabel S.A v. Hungary. Decision on Jurisdiction. 30 November 2012, para. 4,133. RL-0002
[9] Electrabel S.A v. Hungary. Decision on Jurisdiction. 30 November 2012. Paragraph 4,189. RL-0002

"*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*."[10]

21. However, contrary to what is maintained in the Electrabel Decision and by other arbitral tribunals, the application of Article 344 of the TFEU is what prevents EU member States from submitting to arbitration matters relating to the internal electricity market. Otherwise, the principle of autonomy of EU Law would be violated. As we shall see below, the mistake made by the tribunal in the Electrabel case, as by many others, was evidenced by the Achmea Judgment by the CJEU[11], the highest authority with power to interpret Article 344 of the TFEU.

22. Claimants allege that the Achmea Judgment is not applicable to the present case because EU Law is allegedly not applicable.[12] However, as we expounded in the Respondent´s PHB, EU is is indeed applicable and hence so is the Achmea Judgment, which lead to the Tribunal´s lack of jurisdiction to hear the present dispute.

B. EU Law shall be applied to a dispute that concerns State Aid within the internal electricity market

23. Moreover, as we explained in our PHB, importantly, EU Law shall be applied to the present dispute because, regardless of the country of origin of the investor, the core of the dispute affects to a key institution of EU Law, State Aid, created by EU Law to ensure the efficiency of the internal market in the territory of the EU.

24. The Claimants maintain the idea that UE is not an international law applicable to decide the current dispute.

25. Firstly there is no distinction between public international law and EU Law. It is evident that EU law come from international Treaties and in consequence is international law fully applicable to the present case particularly when the Claimants are nationals of EU member States and the Respondent is a member of the UE.

26. Secondly the applicability of EU law to disputes rise under ECT has been declared in

[10] EU Treaty, Treaty on the Functioning of the EU and Charter of Fundamental Rights of the EU. 26 October 2012. Consolidated. RL-0001

[11] Judgment of the CJEU (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018. CL-0162

[12] Claimants´ PHB, paragraph 276: "this Tribunal is not being called upon to apply EU law in any shpe or form".

multiples Awards such as Electrabel[13], Isolux[14] Blusun[15] and Wirtgen[16].

27. Moreover it shuld not be forgotten that EU Law is part of Spanish law.

28. In addition the Claimants forget that Directive 2001/77/EC allowed members States to achieve the renewable objectives pursued by the Directive in the way that they considered more appropriated but always respecting one limit: EU law on State Aid. That is the reason why article 4(1) of Directive 2001/77/EC subjected the Members States´ support systems to such EU law on State Aid.

29. This is so because EU law on State Aid is matter of public order in the EU territory. The Member States are fully subject to that Law and have no margin of appreciation on it at all.

30. Finally, regarding the binding nature for the Member State of the EU Guidelines we have to remember that such Guidelines shall be applied by the Commission when verifying if a Member State´s support scheme, whether notified or not, is in conformity with EU law on State Aid. This has been constantly expressed by the EU guidelines on State Aid for environmental protection of the years 2001, 2008[17] and 2014[18].

31. For instance the EU Guidelines on State Aid for environmental protection of the year 2001 stated:

> *"The Commission will apply these guidelines to all aid projects notified in respect of which it is ca lled upon to take a decision after the guidelines are published in the Official Journal, even where the projects were notified prior to their publication.*
>
> *In the case of non-notified aid, the Commission will apply:*

[13] Electrabel S.A v. Hungary, Decision on Jurisdiction of 30 November 2012, paragraph 4.122. RL-0002.
[14] Isolux Infrastructure Netherlands, B.V. v. the Kingdom of Spain (SCC Arbitration V2013/153), Award of 12 July 2016, paragraph 787. RL-0072
[15] Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award of 27 December 2016), paragraph 278, RL-0082:
"*The Parties in effect agree that the applicable law in determining this issue is international law, and specifically the relevant provisions of the VCLT. The Tribunal agrees, but would observe that this does not exclude any relevant rule of EU law, which would fall to be applied either as part of international law or as part of the law of Italy. The Tribunal evidently cannot exercise the special jurisdictional powers vested in the European courts, but it can and where relevant should apply European law as such*."
[16] Wirtgen v. Czech Republic, PCA Case No. 2014-03, Award of 11 October 2017, paragraph 174. RL-0096.
[17] R-0065, paragraphs 204 and 205.
[18] C-0066, paragraphs 246 to 251.

(a) these guidelines if the aid was granted after their publication in the Official journal of the European Communities:

(b) the guidelines in force when aid is granted in all other cases.".[19]

32. Further proof that these Guidelines are mandatory rules applicable by the European Commission is the fact that the object of the EU Commission´s Decision of 10 November 2017 on the Spanish support scheme was to evaluate whether such support system complies with those Guidelines.[20]

III. THE ONLY COMMITMENT GIVEN BY SPAIN WAS TO PROVIDE A REASONABLE RETURN ON THE INVESTMENT

33. Claimants argued in their PHB that the Respondent had committed to maintain unchangenchable RD 661/2007 during the whole life of the plants. However the Kingdom of Spain has proved that the only commitment was to provide a reasonable return on the investment. This has been proved by the evolution of the regulatory framework that had occurred prior to the Claimants´investment in Spain.

A. RD 661/2007 worsened the incentives granted by RD 436/2004 to existing plants.

34. The Claimants in their PHB strongly argued that Regulatoy changes previous to Claimants investment, especially RD 661/2007, did not worsen the economics of existing plants. This is unfounded.

35. Firstly, this argument is contradictory with Claimants´ own argument on paragraph 76 of Brattle Rebuttal Regulatory Report. In such Report Claimants´experts acknowledge that RD 661/2007 was aimed at eliminating the "feed back" loop caused by the TMR under RD 436/2004 and, therefore, at avoiding the "wind fall profits" that such regulation was causing. If RD 661/2007 was enacted to avoid wind fall profits it makes no sense to argue at the same time that RD 661/2007 was aimed at improving the remuneration under RD 436/2004.

36. In the same vein, it shall be not forgotten that the regulatory measures adopted in 2006 and 2007 were also aimed to tackle the tariff deficit problem that was then in formation because of the TMR[21]. Claimants avoid dealing with this issue but it has been clearly

[19] R-303, paragraph 82.
[20] RL-0081.
[21] See page 100 Respondent´s opening PPT on Fundamental facts. In that slide it shown that the tariff deficit on year 2005 rised in the amount of 4098M euros.

proved during this hearing through Mr. Ayuso´s witness statement[22], and through different documentary evidence as 2007 Pöyry Report[23].

37. If RD 661/2007 was enacted with the purpose to correct the tariff deficit situation it makes no sense to argue at the same time that RD 661/2007 was aimed to increase one of the major regulated cost of the SES, the incentives to renewables.

38. Secondly, the economic comparison between the incentives granted under RD 436/2004 before delinking remuneration from the TMR and RD 661/2007 is not an argumentative issue, it is a factual one. The Claimants could have easily made the calculations but they preferred to omit this question to the Tribunal. The Respondent did its job and presented those calculations to the Tribunal. Those calculations were made by Mr. Ayuso and have not been contested by the Claimants.

39. The Claimants try to generate confusion on this issue by referring to the press release on RD 661/2007[24] which mentions that this Royal Decree increased the regulated tariff to wind plants by 12%. However what Claimants do not explain is that the comparison that the press release made is between RD 661/2007 and the regulation in force before its approval: RD 436/2004 after delinking the incentives from the TMR, that is to say RD 436/2004 after the enactment of RD-Act 7/2006. The same comparison was made by CNE Report on Draft RD 661/2007[25]. If we examine such CNE Report 3/2007 it can be easily seen that the comparison is not between RD 436/2004 as it was initially enacted and RD 661/2007[26]. In this comparison the CNE how the TMR woud have evolved.

40. If the comparison had been made between RD 661/2007 and RD 436/2004 before delinking the incentives from the TMR (i.e. before the enactment of RD-Act 7/2006), it would have been clear that RD 661/2007 worsened the remuneration of existing plants both the tariff and market plus premium options. In this regard if this simple calculations had been made for wind technology the result would have been that in tariff option the reduction was of 8,38% and in pool plus premium option the reduction was of 34%[27].

41. This matter was addressed by the Spanish Supreme Court in its Judgment of 3 December 2009[28]. In that procceding the claimant, a PV installation, requested that the regulated

[22] Mr. Ayuso´s first Witness Statement, paragraphs 31 to 38.
[23] Respondent PPT opening presentation on fundamental facts, slide 81.
[24] Claimants´ PHB, paragraph 103.
[25] Ibid
[26] R-128, Anex III PDF page 242.
[27] Respondent PPT opening presentation on fundamental facts, slides 20 and 21.
[28] R-141, Legal Ground No. Four second to last paragraph.

tariff applicable in 2007 had to be updated according to RD 436/2004 (TMR) or subsidiary according to RD 661/2007 (CPI). However the Spanish Court states:

> *"Ultimately, it shall be considered that the claim that the Administration be sentenced to update the tariffs for 2007, applying the updating methodology resulting from Royal Decree 436/2004, or from Royal Decree 661/2007, must be rejected, since the criterion of not raising the values of the regulated tariff for photovoltaic technology installations is justified in that the profitability of the generation activity from this technology was higher than that considered as sufficient and reasonable remuneration."*

42. Moreover Claimants introduce a desperate last minute argument before the delinking of the incentives from the TMR the annual increase from the TMR was capped at 2%. The Claimants should have known that such cap existed but it also had an exception which allowed increases above the 2%. This exception was established in article 8.4 of RD 1432/2002[29].

43. Claimants should have also known that, in application of that exception, the TMR for 2006 increased above the 2 %, specifically a 4.48%. This is a fact that is publicly available as it referred by Mr. Ayuso[30]. Moreover Claimants forgot to say that article 8 RD 1432/2002 was repealed by RD 809/2006[31]. Consequently after RD 809/2006 there was no limit to the increase of the TMR. That is the reason why for 2007 the increase of the TMR was 14.38%, as ascertained by CNE[32]. That is not an "illusion", it is simply a fact.

44. Thirdly if Claimants argument that RD 661/2007 did not worsen remuneration to existing facilities was true it is hard to understand why the all the existing installations registeréd under RD 436/2004 decided during a transitory period of six years to remain under RD 436/2004 (without any kind of updating, neither TMR nor CPI) instead of moving to an alleged "more beneficial" framework[33]. This is nonsense.

45. Moreover, if Claimants´s theory was right, why did the Spanish major wind technology association, AEE, make the following statement in 2008?:

> *"The remuneration of wind power decreased in 2007 to the levels of 2003 and 2004. In the seven months of validity of the new RD 661/2007, the premium has been lower*

[29] R-99
[30] Mr. Ayusos´s Second Witness Statement, Table 1.
[31] W-1135 Paragraph 2 of the Sole Repealing Provision of RD 809/2006, of 30 june 2006,
[32] W-0336
[33] Mr. Ayusos´s Second Witness Statement, paragraphs 27 to 34

than that of RD 436/2004 at 5.07 E/MWh. All parks have remained in the RD 436/2007 with an average remuneration of 77.62 E/MWh throughout 2007, since having passed to RD 661/2007 would have been 74.11 E/MWh"[34]

B. <u>RD 661/2007 did not provide more stability than RD 436/2004 did.</u>

46. In their PHB Claimants reiterate their argument that RD 661/2007 provided more stability than RD 436/2004. The Claimants support their argument about the greater stability of RD 661/2007 in base to the following articles of the referred Royal Decree: Art, 14 (RAIPRE registration), Art 17 (rights to producers under special regime), art. 36 (tariffs and premiums for facilities in Category b), and article 44 (3) (Revisions)

47. Claimants forget that those same alleged stability commitments existed in Royal Decree 436/2004: Art 14 RD 661/2007 is identical to art 15 RD 436/2004; article 17 RD 661/2007 is very similar to article 18 RD 436/2004, article 33 RD 436/2004 is very similar to article 36 RD 661/2007 and article 44 RD 661/2007 is very similar to article 40 (3) RD 661/2007). Notwithstanding those hypothetical "stability commitments" did not prevent that RD 436/2004 was modified, in first place, by RD-Act 7/2006, and derogated afterwards by RD 661/2007 affecting all the existing installations worsening their economics.

48. Claimants are not able to explain the different wording introduce by RD 661/2007 in some vital articles upon which Claimants build their theory on "stability". A clear example of the above is the impossibility for Claimants or their regulatory experts to explain why article 44 (3, paragraph 1) RD 661/2007 introduce the sentence: "*a reasonable rate of profitability shall always be guaranteed with reference to the cost of money in the capital markets*", and why in such sentence the adverb always is used or why the express reference to "*non retroactivity*" stated in art. 40 RD 436/2004 disappeared in the wording of art 44 (3) RD 661/2007.

49. Moreover, Claimants do not pay enough attention to article 17 RD 661/2007. This article, as it was set in article 18 RD 436/2004, does not establish that the rights to producers under special regime are unlimited or unconditioned, as it is Claimants´ theory. Those articles expressly set that the rights to producers under special regime are recognised *"without prejudice to the provisions of Article 30.2 of law 54/1997"*. In consequence, the wording of article 17 means that none of the rights to producers under special regime can

[34] The remuneration of wind power decreased in 2007 to the levels of 2003 and 2004." AEE press release of 10 January 2008. R-0163

be assessed in an isolated way, as the Claimant pretends. Those rights shall always be interpreted taking into account ("without prejudice") the limits set in Act 54/1997: the principle of reasonable return and the principle of economic sustainability of the SES to which the incentives to renewable are subject as cost of the system.

50. Claimants could have detected all those relevant issues if they had conducted a proper legal due diligence. If Claimants had conducted a proper due diligence they would have detected that RD 661/2007 was enacted because it was required by the second final provision of RD-Act 7/2006.

51. Moreover, in such due diligence they would have been warned that the purpose of the new regulations (RD 661/2007) was not to provide more stability, understanding the term stability as opposed to flexibility as it is used by Claimants. In that case Claimants would have detected that the RD –Act 7/2006, that it is the base of RD 661/2007-, expressly established that[35]:

> *"The development of the policy of promoting energy efficiency, in line with the principles and criteria of Directive 2004/8 / EC (...) and the full effectiveness of the actions to support the generation of electricity from renewable sources of energy makes it necessary to adequately remunerate all the cogenerated electricity irrespective of the size of the facilities and* ***that the policy of establishing premiums and incentives for the production of electric energy under the special regime be given greater flexibility."***

52. Notwithstanding Claimants decided not to pay attention to that clear mandate of flexibility stablished by the Law. Claimants only pay attention to some opinions of the CNE rendered on 2007. In this regard it shall be remembered that the CNE is a simple consultant body whose opinions are not binding on the Government. As any player of the SES knows and as the consulting firm Pöyry expressly reflects, the role of the CNE in the energy policy making is of "low influence"[36]. A clear example of the above is that CNE´s opinion 3/2007 regarding the regulatory changes that were finally implemented by RD 661/2007 was not accepted by the Government. It is a fact that the RD 661/2007 affected existing installations worsening their economics.

53. Moreover that legal mandate of flexibility was expressly recognised and applied by the Spanish Supreme Court, when it had to analysed the legality of the regulatory changes

[35] RD-Ley 7/2006. R-88.
[36] R-268, PDF page 116.

introduce by RD 661/2007. In particular in its judgment rendered on 3 December 2009[37] the Supreme Court had to decide if such RD 661/2007 harmed the Spanish legal principles of legal certainty, legitimate expectations and the warranty of no retroactivity set in article 40 (3) RD 436/2004. The Spanish Supreme Court denied that such harm existed, following its already consolidated case-law and also introduced a new argument:

> *"In this sense, Royal Decree-Law 7/2006, of June 23, by which urgent measures are adopted in the energy sector, advocates, expressly, in favour of "giving more flexibility to the policy of establishment of primiums and incentives to the production of electric power under the special regime."*

54. In consequence it is proved that RD 661/2007 did not provide greater stability than RD 436/2004. It is also proved that a Royal Decree could be repealed by another one and that none of the articles of the repealed Royal Decree could not prevent the regulatory change, even if the new regulation worsened the incentives of the previous one.

55. In this vein article 5 of RD 1614/2010 did not provide more stabilitity than article 40(3) RD 436/2004 and article 44 (3) of RD 661/2007. If we read that article five it can be seen that it only refers "*to the revisions of the tariffs, premiums and upper and lower limits within the scope of article 44 (3) of the aforementioned Royal Decree (RD 661/2007)*"[38]. It does not refer to any revisions as articule 40(3) of RD 436/2004 and article 44(3) RD 661/2007 did not refer either. Cosequently art. 5 did not provide greater assurance than that provided by articles 40(3) of RD 436/2004 and article 44(3) RD 661/2007.

56. Claimants also forget that RD 1614/2010 as were RD 436/2004 and RD 661/2007 were all regulations. This means that they can be changed within the limits set by Electricity Secto Act as it was clear and repeatedly stated by Spanish Supreme Court since 2005.

57. Moreover as explained during the hearing[39] the Claimants confuse an alleged "agreement" with the ordinary process of elaborating regulations. In adition if the alleged agreement of inmutability existed it cannot be understood how the Spanish Wind Association (AEE), which was part of that alleged agreement, expressly admitted, after the date of the hypothetical agreement (july 2010) that the regulatory framework could be amended for existing installations (State "ius variandi") as long the "requiermentes of the Law on the Electrical Sector are observed with regarda to the reasonable return of investments" as it

[37] R-141, Legal Ground No. Four paragraph three.
[38] R-105 Art. 5(3)
[39] Respondents opening PPT on Merits Slides 48 and 49.

was declared by the Spanish Supreme Court Jurisprudence since 2006[40].

58. In the vein if the Claimants` alleged agreement was so it would be difficult to understand how one of the main consultant firms in the Spanish Energy Market as Pöyry is established in 2011 before Claimant investment that:

> *"Considering the Government behaviour, it is likely that future changes might be implemented if considered needed. RDL 14/2010 is aimed at tackling the lack of funds in the Electricity System reducing the revenue of renewable generators as well as introducing additional revenue sources (i.e., grid tolls). We feel that the Government is in a position to continue with the same energy policy if considered a requirement, including implementation of further reductions in remunerations to renewables and non renewable technologies"*[41]

59. Furthermore, if the Claimants` alleged agreement was so it would be difficult to understand how AEE, part of that alleged agreement, did not claim its existence whe challaenging the disputed measures before the Spanish Supreme Court:

> *"In this case, of course there does not exist, or at leat it is not invoked in the claim, any kind of commitment or external sign, directed by the Administrative authority to the applellants in relation to the inmutability of the regulatory framework in place at the time when the renewable energy production activity begun"*[42]

IV. CLAIMANTS CONFUSE THE CAUSES OF REGULATORY CHANGES WITH THE LIMITS TO THOSE CHANGES

60. By the time that Claimants decided to invest in Spain, it was a fact that the regulatory framework could change worsening the economics of existing installations. The 2006, 2007 and 2010 regulatory changes were clear examples of that.

61. The issue is, firstly to determine when those regulatory changes could take place and secondly to define what were the limits to those regulatory changes

62. Regarding the first issue it has been proved that the regulatory changes could take place for two reasons: correcting windfall profits and ensuring financial sustainability threatened by tariff deficit.

63. Those two reasons were the leiv motiv of the regulatory changes in the Spanish

[40] Respondents opening PPT on Merits Slide 31.
[41] R-309.
[42] R-265 PDF page 11. Respondents opening PPT on Merits Slide 49.

framework before the Claimants made their investment. As we proved during the hearing the regulatory changes of 2006-2007[43] and 2010[44] took place because of those two reasons.

64. As the Respondent has proved during this arbitration those two reasons existed in 2013. It is an undisputed fact that in 2013 the SES was unsustainable because of the tariff deficit and regulatory changes were necessary[45]. As it has been proved the tariff deficit situation of 2013 was due to the exceptional fall in the demand for electricity caused by the deepe economic crisis that Spain sufferd durning 2009 to 2014[46].

65. Claimants propose through their experts that there were alternative measures to address the tariff deficit that would not cost harm to reanowable investors. However these alternative measures consisted in increases of the tariffs paid by consumers or the taxes paid by the taxpayers, the consumers. This proposal would increase the tariffs paid by the Spanish consumers by more than a 10%

66. The alternative measures lack of any viability study. Brattle surprisingly established that the Spanish CNE itself share those same alternative measures. What Brattle foget is that the CNE expressly stated that[47]:

> *"If a path of toll increases were contemplated to achieve a null deficit in 2015, an annual increase in tolls would be necessary, in nominal terms, of 10% between 2012 and 2015. However, this path would be difficult to be sustained for consumers and, in addition, would leave a accumulated deficit pending funding, because it is not included in toll increases, around 7,142 M €."*.

67. Moreover the CNE detected wind-fall profits in the updating mechanisim established by Royal Decree 661/2007[48] that affected the system as a whole

> *"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),*

[43] Respondents opening PPT on Fundamental Facts slides 77 to 84.
[44] Respondents opening PPT on Fundamental Facts slide 87
[45] Respondents opening PPT on Fundamental Facts slides 91 to 102.
[46] Respondents opening PPT on Fundamental Facts slide 101.
[47] CNE March 7, 2012 Report, page 9/150 PDF. R-0131 SP
[48] Respondents opening PPT on Fundamental Facts slide 106

due to which updating the entire premium ***was disproportionate (only 15% should be updated)****.*"[49].

68. If that wind fall profit situation did not exit it would be nonsense that one of the main features of the current support scheme is precisely aimed at correcting that "disproportionate" situation. In this regard in the current framework the investment cost once it has been set it cannot be modiy. This implies that the current subsidy directed to recover the investment cost (part of the Ri) cannot be updated.

69. In consequence the Respondent ´s case has never been that changes in the cost of money in the capital markets were the reason that motivated regulatory changes. This is simply a Claimans self constructed theory. What the Respondent has repetidly said is that the regulatory changes worsening the existing installations only coul take place for the above mentioned two reasons (wind-fall profits and risk to the sustainability of the SES) that have nothing to do with the cost of money in the capital markets.

70. The cost of money in the capital market, as the Respondent has always said, is the benchmark set by the Act 54/1997 in order to evaluate whether a certain return provided by a specific regime is reasonable or not[50].

71. Thus, as the Spanish Supreme Court has stablished in its consolidated case law, the Spanish legal framework "does not guarantee to special regime electricity producers that a certanin level of profits or revenues will be unchanged relative to those obtained in previous years or that the formulas for fixing the premiums will stay unchanged"[51]. The only guarantee provide by the Spanish legal framework is a reasonable return according to the cost of money in the capital markets.

72. In view of the above in the Spanish case it is necessary to determine whether the 7,398 IRR provide by the current support scheme is reasonable according to the cost of money in the capital markets. In this regard Claimants have not provided in this arbitration a single that such IRR is not reasonable according to the costo of money in the capital markets.

73. On the contrary the Respondent has proved that said IRR is reasonable. This has been the conclusion reached by the European Commission on its decisison of November 2017[52]. In

[49] CNE March 7, 2012 Report, page 31. R-0131
[50] Respondents opening PPT on Fundamental Facts slides88 to 95
[51] Spanish Supreme Court Judgment of 25 october 2006. R138, Respondents opening PPT on Fundamental Facts slide 89.
[52] Decision C (2017) 7384 final of the European Commission issued in the aid file SA.40348 (2015 / NN) - Spain. Paragraph 120 RL-008. Respondents opening PPT on Fundamental Facts slide 161.

adition the Respondent has proved that the 7,398 IRR is on line with the return provided by other European countries as Italy, France, Latvia or Estonia[53].

74. Furthermore, as it was stated by Claimant consultant Pöyry during the selling of the assets in 2016, the new regulatory framework improve the remuneration of the 81.5% of the Claimants wind farms installed capacity. In this regard Pöyry stated that the remuneration of IT -00657 (Windfarms Marmellar, Lodoso, La Lora I and La Lora II), IT-00658 (Windfarm Sargentes) and IT-00659 (Windfarm Arroyal) has been increased by the current support scheme in comparation to the previous one[54]:

Figure 37 – Impact on remuneration per standard facility code for wind

Standard facility code	Technology type	Unit capacity (MW)	Entry into commer-cial operation	Equivalent net operating hours	Revenue 2014 per unit capacity	Revenue 2012		2014 vs 2012	
						Regulated feed-in tariff, per unit capacity	Wholesale market + premium, per unit capacity	Regu-lated feed-in tariff (2012)	Whole-sale market + premium (2012)
					(€ mill/MW)	(€ mill/MW)	(€ mill/MW)		
IT-00657	P > 5MW	1	2007	2,100	0.18	0.17	0.15	2%	17%
IT-00658	P > 5MW	1	2008	2,100	0.21	0.17	0.15	17%	30%
IT-00659	P > 5MW	1	2009	2,100	0.22	0.17	0.15	20%	33%
IT-00660	P > 5MW	1	2010	2,100	0.23	0.17	0.15	24%	35%

75. In consequence when the Claimant tried to sell its Spanish assets their Consultants, Pöyry, established that the current regulatorory framework improve the remuneration between 2% and 24% in the regulated tariff option and between 17% to 35% in the premium option. This maybe the reason why the current regulatory framework allowed the Claimant to sell their assents obtaining an Equity IRR of 11.2%[55], which is above Claimants´cost of equity calculated at the time they made their investment[56].

V. THE CURRENT REGULATORY FRAMEWORK ALSO INCETIVES THE PRODUCTION OF THE PLANTS

76. The Claimants tried to create an artificial distinction between the current and the past regulatory framework. They say that the current framework has gone from a tariff structure that incentivices high production to a support scheme based on capacity. This is

[53] Ibid footnote 57. Respondents opening PPT on Fundamental Facts slide 161.
[54] R- 373 Pöyry page 54/140 PDF.
[55] Respondents opening PPT on Quantum slide 11
[56] Ibid slide 12.

totally unfouded and contrary to the evidences that are in the record of this proceeding.

77. Firslty if Claimant assertion was true it would be impossible to justify the production data of the plants. It is a fact that the windfarms of this arbitration are producing more in 2015 under the disputed measures than in 2011 under the previous regime[57]:

Wind Farm	Power (MW)	IT	Production IT 2011 (MWh)	Production REAL 2011 BQR-39.3 (MWh)	Production IT 2012 (MWh)	Production REAL 2012 BQR-39.3 (MWh)	Production IT 2013 (MWh)	Production REAL 2013 BQR-39.3 (MWh)	Production IT 2014 (MWh)	Production REAL 2014 BQR-39.3 (MWh)	Production IT 2015 (MWh)	Production REAL 2015 BQR-39 (MWh)	Average 2011-2015 IT Vs CCAA
El Perul	49.60	IT-00656	101,035	115,904	112,146	134,029	118,098	143,698	109,269	131,748	109,269	124,175	85%
La Lastra	11.69	IT-00656	23,813	20,896	26,431	25,126	27,834	27,490	25,753	25,673	25,753	24,015	105%
TOTAL	61.29		124,848	136,800	138,577	159,155	145,931	171,188	135,022	157,421	135,022	148,190	88%
Marmellar	49.50	IT-00657	98,010	89,600	104,594	97,438	115,187	110,145	103,950	101,735	103,950	94,661	107%
TOTAL	49.50		98,010	89,600	104,594	97,438	115,187	110,145	103,950	101,735	103,950	94,661	107%
Lodoso	49.50	IT-00657	98,010	92,734	104,594	103,941	115,187	117,991	103,950	108,561	103,950	100,679	100%
La Lora I	49.60	IT-00657	98,208	75,367	104,805	89,932	115,419	101,978	104,160	97,775	104,160	90,421	116%
La Lora II	49.60	IT-00657	98,208	73,277	104,805	89,439	115,419	103,974	104,160	99,807	104,160	92,104	115%
Sargentes	24.00	IT-00659	46,104	47,211	50,256	50,861	54,864	57,332	50,400	53,964	50,400	51,607	97%
Arroyal	46.50	IT-00660	91,233	81,651	104,207	102,664	107,787	113,444	97,650	104,622	97,650	98,434	100%
TOTAL	219.20		431,763	370,240	468,666	436,837	508,676	494,719	460,320	464,729	460,320	433,245	106%
TOTAL CLAIMANTS WIND FARMS	329.99		654,621	596,640	711,836	693,430	769,794	776,052	699,292	723,885	699,292	676,096	102%

SOURCE: Real production data, Claimants' plants obtained from Exhibits BQR-39. IT Data obtained from Order IET/1045/2014.

TABLE 09. Claimants' wind farms production. Comparison of Order IET/1045/2014 vs. Real Production. Period 2011-2015

78. Moreover if Claimant assertion was true it is hard to understand how the European the European Commission qualifies the state aids given by the current regulatory regime as "*operating aids*"[58]. If the Commission would have had Claimants´ understanding of the current state aids it would have had qualify the current regulatorory regime as *"investment aids"* but it did not. The reason is very simple, in the current regulatory regime the aid is granted in the form of a premium on top of the market price. In others word if the plant does not produce the plant will not receive any state aid[59]. Consequently the current system keeps incentivaicing high production plants.

79. Moreover in both frameworks the state aids maintain the same aim. In both support systems, the current and the previous one, the state aid has been designed in order to complete the market price for allowing the plants to recover their investment cost, their operational cost and to achive a reasonable return. This is an undisputed fact between the parties.

[57] Mr Ayuso second WS table 9.
[58] RL-0081Decision UE Commision SA.40348 (2015/NN) paragraphs 31 and 115 and R-32 Guidelines on State aid for environmental protection and energy 2014-2020, 2014/C 200/01, Communication of the European Commission, published in the Official Journal of the European Union of 28 June 2014 paragraph 124 (a).
[59] Respondents opening PPT on Fundamental Facts slide 154.

80. The main critic rised by the Claimans on the current regulatorory regime is that the current main state aid from a quantitative point of view, the return on investment (Ri), is aimed to allow the plants recover their investment costs. That is the reason why the Claimants maintain the wrong idea that the current framework is a support scheme based on capacity. In doing so, the Claimants forget that, from a quantitative point of view, the main part of the Regulated Tariff and the Premium in the previous regulatory framework had the same aim that the current Ri: to recover the investment costs. As the CNE said:

> *"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).*"[60].

VI. CLAIMANTS MISCHARACTERIZE ACCURACY´S TESTIMONY

81. In an attempt to find support for their unproved case on regulatory and quantum matters, the Claimants misleadingly quote in their PHB certain statements made by the Accuracy experts, Mr. Saura and Mr. Barsalou. As shown below, when presented complete and within context, each and every one of those excerpts states the opposite of what the Claimants' contend. For the sake of efficiency, we shall only refer to those that are more relevant to the case.61

82. With respect to regulatory matters, Claimants absurdly pretend that Accuracy agreed with the Claimants that (a) RD 661/2007 was designed to attract investments, (b) investors were isolated from demand risk, (c) Tariff Deficit could not justify the Measures because consumers had to pay for it, (d) that the economic support system was never meant to be dynamic and (e) the new system is substantially different from the previous one. This is a complete distortion of Accuracy experts' declaration, as we explain below.

83. Firstly, regarding Claimants´ allegations on the need for incentives to attract

[60] CNE March 7, 2012 Report, page 31. R-0131

[61] For instance, Counsel for Claimant states that "Spain's expert confirmed at the Hearing that nobody knows how this revision will be done (Saura/HT/4/138:3-18)" (Claimants' PHB, paragraph 105). The Tribunal will notice that the real discussion was about the level of return after the first regulatory period, not "how" the revision would be made, which is regulated in the law.

investments[62], Claimants omit to explain that Mr. Saura's response was not referring specifically to RD 661/2007 but to the general need to provide subsidies for Renewable Energy in the minimum amount necessary to allow them to compete on a level playing field, something that is undisputed and that the Respondent continues to do with the Disputed Measures. Most importantly, Claimants surprisingly omit the rest of the sentence, which is the cornerstone of Accuracy's regulatory view:

> *"Economically, we say that the remuneration needs to be sufficient, because you need to achieve certain regulatory goals: you need to attract renewable energy. But it cannot be excessive, to avoid market distortions. This concept is called "reasonable return" in Spanish regulation; you could call it "fair return"; economists call it "the cost of capital". There's no disagreement between Brattle and us that this is the concept of "reasonable return": the cost of capital."*[63]

84. Secondly, regarding the protection against demand risk, Claimants seek to confuse the Tribunal. Mr. Saura explained that the Plants were protected and continue to be protected against demand/volume risk. However, this does not mean that the regulator should not eliminate windfall profits precisely in a context where electricity demand has substantially decreased[64]. As a matter of fact, the Plants will continue to sell 100% of the electricity they can produce, albeit with a different level of subsidies.

85. Thirdly, regarding the consequences of the Tariff Deficit for the Claimants, Claimants extracted a sentence from Mr. Saura's direct presentation and used it to incorrectly imply that the expert accepted that the imbalance of the Tariff Deficit had to be borne only by consumers.[65] In fact, Mr. Saura contended the exact opposite during his presentation. He clearly explained that it was logical to reduce windfall profits instead of getting more and more revenues from consumers that were already paying the highest prices in Europe, because the problem was "a problem of demand and a problem of cost".[66]

86. Fourthly, Claimants try to bring the discussion on dynamism to a discussion on changes in interest rates[67]. Spain has never contended that a change in interest rates justified the

[62] Claimants' PHB, paragraph 105.
[63] Hearing Transcript Day 4, page 8, lines 22-25, and page 9, lines 1-5 (Mr. Saura).
[64] Hearing Transcript Day 4, page 13, lines 4-5 (Mr. Saura).
[65] Claimants' PHB, paragraph 146.
[66] Hearing Transcript Day 4, page 13, lines 2-15 (Mr. Saura). In the same line, when Claimants state that Mr. Saura agreed that raising tariffs eliminates the deficit (Claimants' PHB, para. 146), they fail to explain that Mr. Saura's said that that would be mathematically true but in no way was he acknowledging that was a feasible or recommended policy.
[67] Claimants' PHB, paragraph 19.

Disputed Measures. As previously explained in this Reply PBH, the Respondent´s case has never been that changes in the cost of money in the capital markets were the reason that motivated regulatory changes. The Respondent´s case is that the reasons that motivate regulatory changes are tackling windfall profits and ensuring the sustainability of the Spanish Electricity Sector. The cost of money in the capital market is just the benchmark set by the Act 54/1997 to evaluate whether a certain return provided by a specific regime is reasonable or not.

87. Spain´s case is that the economic support is dynamic, as opposed to static or, as the Claimants contend, "petrified". Growing regulated costs, an exceptional fall in the demand for electricity in a context of deep economic crisis and windfall profits were objective circumstances that justified a change in the economic support. In this situation, Spain had the obligation and the regulatory power and to address the situation and reassess the economic support scheme accordingly, taking into consideration all the relevant variables: costs of the system, risk (of the SES and the investments), funding resources available, and the cost of capital[68], always within the framework of the 1997 Electricity Law and with a view of accounting for all stakeholders.

88. Finally, contrary to what Claimants purport[69], Accuracy did agree with Respondent's contention that the economic support after the Disputed Measures is, in substance, the same as with RD 661/2007. Mr. Saura agreed with Brattle that the Plants now also receive a FIT, i.e. "subsidies in addition to market prices"[70]**,** that "compensate operating costs, pay back the investment over the life of the wind farm and offer a reasonable return"[71].

89. On the other hand, with respect to the quantification of damages, in their PHB Claimants try to discredit Accuracy's solid proofs that the Claimants´ claim is absolutely unreasonable (as it is based on windfall profits) by, once again, quoting incomplete extracts of Accuracy experts´ testimony.

90. In this regard, first of all, Claimants desperately state that the reconciliation to the purchase price is a "red herring"[72] because Mr. Barsalou accepted that neither the purchase price of an investment nor the date of the acquisition have any impact whatsoever on a DCF damages valuation. Claimants simply want to mislead the Tribunal and induce them

[68] Hearing Transcript Day 4, page 77, lines 7-13 (Mr. Saura).
[69] Claimants' PHB, paragraph 10.
[70] Hearing Transcript Day 4, page 13, line 22 (Mr. Saura).
[71] Hearing Transcript Day 4, page 13, line 22 (Mr. Saura), referring to slide 12 of Accuracy's direct presentation on regulation.
[72] Claimants' PHB, paragraph 246.

to forget that precisely the purchase price between a willing buyer and a willing seller is the best objective way to check if the result of the DCF is really a fair market value, because it is actual, factual and fully independent from any model containing hundreds of assumptions. As Mr. Barsalou explained "these really are beacons in the night which flash continuously, and to which we should refer to in any kind of but-for or actual analysis".[73]

91. Secondly, Claimants state that Accuracy accepted that the investment in the Plants was "low-risk"[74] in an attempt to portray that Accuracy's assessment of the regulatory risk premium in its DCF was overstated. Aside from "forgetting" to point out in its comparison that the these two different assessments of risk refer to two different dates (2012 and 2014), Claimants knowingly omit the rest of Mr. Barsalou's statement simply because it is the key point of the quantum that the Claimants and their experts have failed to justify: low-risk investments go together with low returns. A "low-risk" investment is inconsistent with a 24.7% Equity IRR post-tax and a But-For scenario showing a value that triples the equity investment[75]. As declared by Mr. Barsalou:

> *"That's what they say, and that's why I have issues with what they wrote in their paper at the time. As I said, there's no such thing as a free lunch. Having a low-risk investment and a very good deal at the same time, there's something wrong. And that's why I have issues with the expected return which they write here, which I don't believe – and even more so in hindsight – that they were correct at the time."*[76]

92. Moreover, as expounded below, Claimants' PHB engages in confusing the Tribunal over four essential topics: (a) the relevance of an Asset Based Valuation (ABV), (b) the existence of windfall profits proved by the excessive IRR, (c) interpretation of Accuracy's valuation, and (d) the effects of the Disputed Measures in the Fair Market Value.

93. Firstly, in relation to the ABV method, Claimants challenge the validity of the ABV on the basis that the method is contingent on liability and does not allow to model the "petrification" of the RD 661/2007 tariffs. Indeed, the ABV does not consider it possible to petrify RD 661/2007 because no Tribunal has accepted this legal premise. However it does not deny liability. The ABV is relevant to verify if the Disputed Measures have undermined the investors' legitimate entitlement to earn at least the opportunity cost of capital, as Mr. Barsalou stated: "the ABV is a proper tool to assess whether there is

[73] Hearing Transcript Day 4, page 26 (Mr. Barsalou).
[74] Claimants' PHB, paragraph 229.
[75] Accuracy Direct presentation to the Tribunal, pages 4 to 6.
[76] Hearing Transcript Day 4, page 160 (Mr. Barsalou)

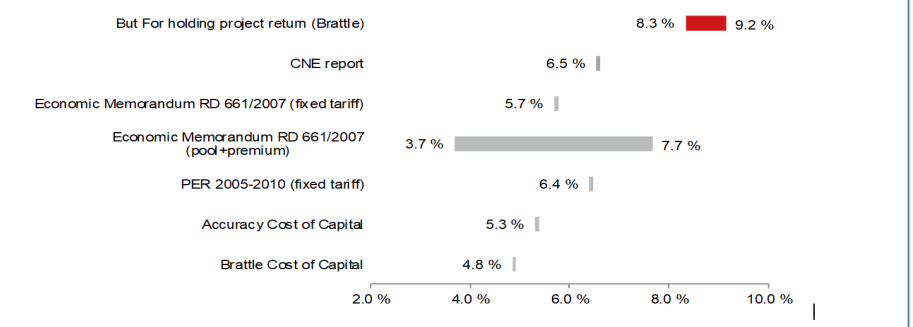
damage or not".

94. Secondly, Claimants also misrepresent Accuracy's analysis of the internal rates of returns with the objective of undermining the fact that such excessive returns are evidence of windfall profits. They state that Accuracy compares IRRs without identifying the type of IRR being considered[77]. They are wrong. Accuracy has performed a consistent comparison of the different returns, as explained below.

95. In this regard, in paragraph 248 of their PHB, Claimants state that: "The return implicit in the RD 661/2007 tariffs was therefore based on a project-level holding IRR whereas the 11.2% return figure identified by Accuracy is an equity exit IRR".

96. Well, on one hand, Accuracy has never compared equity to project IRR, let alone mistaken the project returns implicit in the RD 661/2007 for equity returns. Comparisons are fully consistent throughout the two Accuracy reports, the direct presentation and the responses of Mr. Barsalou and Mr. Saura in cross-examination. In particular, Table 4 from Accuracy Second Economic Report shows the comparison of the But For holding project return obtained from 2014 Brattle's DCF to the correct references, as shown below:

Figure 4 – References of project returns (June 2014 equivalent) compared to Brattle's But-For IRR



Sources: Brattle Second Economic Report – Tables O: Updated Financial Model, section IV.A.6, Capital IQ database (Exhibit ACQ-0056) and Accuracy analysis

97. On the other hand, the 11.2% return referred to in paragraph 248 of Claimants' PHB was clearly and beyond any doubt identified by Mr. Barsalou as equity IRR in his direct presentation:

> *"(...) which results in an 11.2% <u>return on equity</u> on their investment."*[78]

98. Moreover, it must be noted that this 11.2% return is not an expectation of return but the equity IRR that the Claimants <u>have already obtained</u>, and which would rise up to 24% if

[77] Claimants' PHB, paragraph 247.
[78] Hearing Transcript Day 4, page 37, lines 13-14 (Mr. Barsalou)

the claim is accounted for. Claimants attack Accuracy´s analysis and compare incorrect IRR references to try to dismount Accuracy's reasoning that such excessive But For IRRs are evidence of windfall profits. They state that results shows that the returns implied by Brattle's But-For valuation (that they sustain is 8.3% while Accuracy proves that it reaches 9.2% as per the table above) are in line with Spain's targets (7-8% project holding IRR), which is mistaken since Accuracy has proven that 7%-8% is not Spain's benchmark and in any case, a consistent comparison would require use the equivalent value in June 2014.

99. Finally, Counsel for the Claimants qualify the results of Accuracy's valuation as counterintuitive and argue that Accuracy failed to provide an explanation. They however deliberately omit Mr. Barsalou's detailed response to explain that there is no value destruction when cashflows (even if reduced) are subject to lower uncertainty.[79]

100. Claimants' PHB contends that "*because it relies on hindsight, Accuracy's valuation is not a fair market valuation*"[80]. This is yet another crucial mischaracterization because Accuracy' performed a valuation at a certain date with all the information available at that time, including the positive outlook on the evolution of the Tariff Deficit securitization according Moody's as of the date of valuation, which the experts have been able to corroborate *a posteriori*. Had the prospect not been confirmed it would have been unreasonable to quantify damages on the basis of variables divorced from reality in order to stick to a technicality. In no case this implies an inappropriate use of hindsight let alone invalidates the results obtained by Accuracy, which is a fair market value calculated at the date of valuation using the Claimants' DCF model.

VII. THE ANTARIS AWARD

101. On 8 May 2018 the Final Award in the case of Antaris Solar GmbH and Dr Michael Göde v. Czech Republic (PCA Case nº 2014-01) was rendered (the Antaris Award).

102. With regard to Jurisdictional matters concerning taxation measures, in the Antaris case, the Czech Republic claimed that the Tribunal did not have jurisdiction to hear on the dispute with regard to three fiscal measures adopted by it: i) the Solar Levy, ii) the repeal of the Tax Exemption for renewable energy producers and iii) the repeal of favourable

[79] Hearing Transcript Day 4, pages 17 and 18 (Mr. Barsalou)
[80] Claimants' PHB, paragraph 237.

depreciation allowances.[81]

103. The Antaris claim against the third said measure was abandoned by the Claimants. With regard to the claim against the second said measure, the Antaris Tribunal declared that it lacked jurisdiction to hear on it pursuant to the taxation carve-out of Article 21 of the ECT:

> *"The Claimants have abandoned their claim concerning the depreciation measures and stated explicitly that they do not dispute that the repeal of the Income Tax Exemption constitutes a "Taxation Measure" under Article 21(7) of the ECT. The Respondent emphasized this at the Hearing interpreting this as an "admission by Claimants that they do not contest that their ECT claims based on the repeal of the Income Tax exemption are barred by the Article 21 carve out," and the Claimants did not comment on it. The Tribunal agrees. It cannot be disputed that the repeal of the Income Tax Exemption constitutes a "Taxation Measure" for the purposes of the ECT. The Tribunal therefore concludes that it has no jurisdiction to entertain the Claimants' claims arising out of this measure."*[82]

104. With regard to the claim against the first mentioned measure, the Solar Levy, the Antaris Tribunal declared that it did have jurisdiction to hear such claim.

105. It must be highlighted that the Antaris Tribunal´s ruling that it held jurisdiction over the Solar Levy that was introduced by the Czech Republic in 2011 by Act 402/2010 is in no way transposable to the present case against the Kingdom of Spain in relation to the TVPEE.

106. Without prejudice to the Respondent´s arguments already expounded in the present case that the bona fide analysis of the TVPEE that the Claimants intend is not pertinent, it must be stated that the cases of the Solar Levy introduced by the Czech Republic and the TVPEE introduced by the Kingdom of Spain are radically different.

107. Firstly, as the Antaris Award reflects, the Czech Republic´s Solar Levy was a measure addressed only to solar power plants[83]. On the contrary, as the Respondent has proved in the present arbitration, the TVPEE introduced by the Kingdom of Spain by Act 15/2012 is

[81] Antaris Solar GmbH and Dr Michael Göde v. Czech Republic (PCA Case nº 2014-01), Final Award, paragraphs 96 to 100 and 102. CL-0178
[82] Antaris Solar GmbH and Dr Michael Göde v. Czech Republic (PCA Case nº 2014-01), Final Award, paragraph 217. CL-0178
[83] Antaris Solar GmbH and Dr Michael Göde v. Czech Republic (PCA Case nº 2014-01), Final Award, paragraph 96. CL-0178

levied on all energy producers, both renewable and conventional.[84]

108. As has also been proved, Act 15/2012 treats all TVPEE taxpayers in the exact same manner and in no way can it be sustained that renewable producers are discriminated by comparison to conventional producers in relation to the TVPEE.[85]

109. Secondly, in the case of the Czech Republic´s Solar Levy, the Czech Republic´s own Supreme Administrative Court, in its Decision of 10 July 2014, came to the conclusion that the Solar Levy was not a genuine tax.[86]

110. On the contrary, in the case of Spain´s TVPEE, the Spanish Constitutional Court itlsef, the supreme interpreter of the Spanish Constitution, through its Judgment of 6 November 2014, has confirmed that the TVPEE is perfectly valid and in accordance with the Spanish Constitution.[87]

111. In addition, it must not be forgotten that the TVPEE is a genuine tax not only under Spanish Law but also under international law.[88] In this regard we must remember for instance that the European Commission has ratified the taxation nature of the TVPEE and its conformity with EU law, which is applicable international law, through EU Pilot procedure 5526/13/TAXU.[89]

112. Finally, thirdly, in the case of the Czech Republic, the aim of the introduction of the Solar Levy was to reduce tariffs to solar producers in a way that could not be formally contested, as expressly acknowledged by the Czech Republic Ministry of Finance itself.[90]

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[84] Respondent´s Counter- Memorial on the Merits and Memorial on Jurisdiction, of 10 February 2017, section III.B(2).
[85] Respondent´s Rejoinder on the Merits and Reply on Jurisdiction, of 9 January 2018, section II.B(3.1) and section II.B(3.2).
[86] Antaris Solar GmbH and Dr Michael Göde v. Czech Republic (PCA Case nº 2014-01), Final Award, paragraph 233: "*The Tribunal concludes instead that the Czech Supreme Administrative Court decision of July 10, 2014 – and the various other Czech court decisions – are authoritative on the issue of the characterisation of the Solar Levy. In that case, the Czech Court made the finding that the Solar Levy is not a tax for purposes of the prohibition against double taxation under Czech law. […]"* CL-0178
[87] Respondent´s Counter- Memorial on the Merits and Memorial on Jurisdiction, of 10 February 2017, paragraphs 165 to 169.
[88] Respondent´s Counter- Memorial on the Merits and Memorial on Jurisdiction, of 10 February 2017, paragraphs 170 to 206.
[89] Respondent´s Counter- Memorial on the Merits and Memorial on Jurisdiction, of 10 February 2017, paragraphs 195 to 206.
[90] Antaris Solar GmbH and Dr Michael Göde v. Czech Republic (PCA Case nº 2014-01), Final Award, paragraph 243: "*that the Solar Levy does not constitute a tax in substance, finds further support in the evidentiary record. Firstly, the Respondent itself argued, through its Ministry of Finance, that the Solar Levy was materially not a tax in proceedings before the Czech Constitutional Court. In those proceedings, the Finance Ministry formally took the position that, "from the material perspective, the*

113. However the aim of the introduction of the TVPEE in Spain was undoubtedly and radically different. As has been thoroughly proved by the Respondent, the aim of Spain in the introduction of the TVPEE was to obtain public income to use it for public purposes.[91]

114. It must be remembered that the TVPEE is a public income of the Spanish State that is integrated into the General Budgets of the State.[92] Therefore, the TVPEE, along with the rest of State income, contributes to form the State resources with which public expenditures are financed.

115. Additionally, it should also be recalled that in accordance with the Fifth Additional Provision of Act 17/2012[93], an amount equivalent to the estimate of the annual revenue derived from the taxes included in Act 15/2012[94], such as the TVPEE or new taxes on nuclear producers that were also created by such Act, is destined every year in the General State Budgets Acts to finance the costs of the electricity system related, precisely, to the promotion of renewable energies.

116. That is why the Spanish Minister for Industry, Energy and Tourism stated that the fiscal measures adopted through Act 15/2012 were intended "to defend the general interest,

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introduced measures [of the Solar Levy] are considered a reduction of subsidy," which is "aimed to decrease the economic feed-in tariffs." Secondly, the
legislative history of the Solar Levy also supports this conclusion as the Czech Government stated in connection with the measure's enactment that it was "necessary to find a formally correct mechanism for reduction of the support of RES from photovoltaic plants, such that it cannot belegally contested." CL-0178

[91] Respondent´s Rejoinder on the Merits and Reply on Jurisdiction, of 9 January 2018, mainly paragraphs 215 to 220.

[92] (R-0079 Extract from the General Budget of the Spanish State for 2013)
(R-0080 Extract from the General Budget of the Spanish State for 2014)
(R-0081 Extract from the General Budget of the Spanish State for 2015)
(R-0010 Extract from the General Budget of the Spanish State for 2016)
(R-0293 Extract from the General Budget for the Spanish state for 2017)

[93] (R-0079 Extract from the General Budgets of the Spanish State for 2013), Fifth Additional Provision of Act 17/2012, of 27 December, on General State Budgets for the year 2013:
"Five. Contributions for 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 provided for in the Electricity Sector Act ***relating to the promotion of renewable energy****:*
a) The estimate of the annual collection derived from taxes included in the Act on fiscal measures for energy sustainability [Act 15/2012].
b) 90 percent of the income estimated by the auction of greenhouse gas emission rights, with a maximum of 450 million euros.
2. The 10 percent of the income estimated by the auction of greenhouse gas emission rights, with a maximum of 50 million euros, is affected by the policy of combating climate change". (emphasis added)

[94] It should be remembered that R-0030 Act 15/2012 of 27 December, on fiscal measures for energy sustainability, also establishes other taxes as the Tax on the production of spent nuclear fuel and radioactive waste resulting from generation of nuclear power, the Tax on the storage of spent nuclear fuel and radioactive waste in centralized facilities and the Levy on the use of inland waters for the production of electrical energy.

which is to have an electricity system that is environmentally, economically and financially sustainable".[95]

117. Claimants in the present case have not provided one single piece of evidence to support their allegation that the TVPEE was introduced in bad faith as a disguised cut to remuneration of renewable producers. Claimants have only used purely speculative arguments to try to support their unfounded and false theory. Said Claimants´ arguments have also been used in other arbitrations against the Kingdom of Spain and they have failed before all the Arbitral Tribunals that have ruled so far on this issue.

118. In this regard, we should remember that all the five Arbitral Tribunals that have ruled on the TVPEE so far (namely, Isolux, Eiser, Novenergia, Msadar and Antin) have, unanimously, declared that the TVPEE is a taxation measure for purposes of the ECT and that therefore the Tribunals do not have jurisdiction to hear a claim regarding the alleged breach of article 10(1) of the ECT though the introduction of the TVPEE.

VIII. THE VATTENFALL DECISION

119. On 31 August 2018 the Arbitral Tribunal in the case of Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12) issued the "Decision on the Achmea Issue" (the Vattenfall Decision).[96]

120. The first key point that arises from the Vattenfall Decision is that the Federal Republic of Germany, an important Member State of the EU, considers that intra-EU investment arbitration is not possible under the ECT, especially after the Achmea Judgement. Therefore, this position of the Federal Republic of Germany with regard to intra-EU investment arbitration under the ECT is the same as the opinion of the Kingdom of Spain and the EU Commission.

121. The second key point is that the Vattenfall Decision does not invalidate or even affect the Respondent's position regarding the Achmea Judgement that has been clearly set out in the present case.

122. As we will see below, the arguments contained in the Vattenfall Decision do not invalidate the Objection raised to the Jurisdiction of this Arbitral Tribunal to settle an intra-EU investment dispute like the case at hand, and thus, it should bear no relevance for

[95] Interview with the Spanish Minister of Industry, Energy and Tourism. Newspaper "La Gaceta", 14 October 2012. C-0131.
[96] Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12), "Decision on the Achmea Issue", of 31 August 2018. CL-0177

the consideration of that Objection by the Arbitral Tribunal in the present case.

123. In this regard, it will be shown: 1) that the Vattenfall Decision simply misses the whole point of the relevance of the Achmea Judgement by starting from premises radically flawed under international law, and 2) that the Vattenfall Decision actually has not even addressed the relevance of the Achmea Judgement.

(1) <u>The Vattenfall Decision misses the point by starting from premises radically wrong under International Law</u>

124. The Tribunal in Vattenfall starts its reasoning by analyzing the law applicable to the Tribunal's assessment of its own jurisdiction[97]. In such section the Vattenfall Tribunal concludes the following: "*the law applicable to the assessment of its jurisdiction is the ECT, in particular Article 26 thereof, in conjunction with Article 25 of the ICSID Convention. These treaties are to be interpreted in accordance with general principles of international law, in particular as set out in the VCLT*"[98].

125. In this first stage of its analysis, the Vattenfall Tribunal surprisingly rules out the application of EU Law to the assessment of its own jurisdiction, by means of a sui generis interpretation of Articles 26(6) and 42(1) of the ICSID Convention. In this regard, it must be noted from the outset that the Vattenfall Tribunal concurs with the parties and the EU Commission in considering EU Law as genuine International Law as defined in Article 38(1) of the Statute of the International Court of Justice99. The Vattenfall Tribunal most clearly expresses the view that "*there is no dispute in investment arbitration decisions, or in the Tribunal's mind, that EU law, to the extent that it is rooted in the EU Treaties, constitutes international law*"[100].

126. However, and despite the references in the Vattenfall Decision to arbitral precedents like Electrabel V. Hungary, the Vattenfall Tribunal most shockingly takes the view that even qualifying EU Law as International Law, it would not be applicable to the determination of the Tribunal's own jurisdiction pursuant to Articles 26(6) ECT and 42(1) of the ICSID Rules[101]. The Vattenfall Decision states quite clearly its starting point in this manner: "*In conclusion, Article 26(6) ECT, either viewed through Article 42(1) ICSID Convention or interpreted independently of the ICSID Convention, applies only to the*

[97] Ibid, (CL-0177, para 108 and seq.
[98] Íbid, para. 166.
[99] Íbid., para. 140 and subsequent.
[100] Íbid, para. 147 *in fine*.
[101] Íbid, para. 113-122.

merits of a dispute between the Parties. It does not apply to issues or questions relating to the Tribunal's jurisdiction"[102]. Therefore, the Vattenfall Tribunal is of the view that the law applicable to the Tribunal's jurisdiction is "*the ECT, interpreted and applied in accordance with international law*"[103] and that *"[e]vidently, (...) EU law does not constitute principles of international law which may be used to derive meaning from Article 26 ECT, since it is not general law applicable as such to the interpretation and application of the arbitration clause in another treaty such as the ECT*"[104].

127. At a first glance, the inconsistency of this conclusion seems obvious. How can the Vattenfall Decision state that the law applicable to jurisdiction is the ECT interpreted and applied in accordance "with international law" and then dismiss the relevance of the very same EU Law that the Tribunal is characterizing undoubtedly "in its mind" as international law?

128. Furthermore, and besides this obvious and unsolvable inconsistency, the reasoning of the Vattenfall Tribunal when concluding that Articles 26(6) and 42(1), which refer to the applicable rules of international law, do not determine the law applicable to the jurisdiction but only to the merits of the case, is unsupported and in stark contradiction with consolidated arbitral case-law and doctrine.

129. The interpretation proposed by the Vattenfall Tribunal for Article 26(6) of the ECT and Article 42(1) of the ICSID Convention is contrary to the most basic principles of interpretation of treaties of Articles 31 and 32 of the VCLT and to reputed arbitral precedents such as Electrabel, Blusun, AES Summit, Charanne or Isolux.

130. Indeed, as the Electrabel Tribunal declared: "the possible laws applying to the arbitration agreement invoked by the Claimant and to the Parties' rights and obligations under the ECT may include: international law, EU law and Hungarian law"[105]. This position has been shared by other Tribunals in the arbitrations against Spain such as Isolux106, Charanne107 or even Masdar[108].

131. Finally, merely to quote another example, the Tribunal of AES Summit v. Hungary, when considering Articles 26(6) of the ECT and 42(1) of the ICSID Convention,

[102] Íbid, para. 121.
[103] Íbid, para. 129.
[104] Íbid, para. 133.
[105] Electrabel S.A v. Hungary. Decision on Jurisdiction. 30 November 2012, para 4.20. RL-0002.
[106] Isolux c. España. Laudo de 12 de julio de 2016), paras. 654 and 655 RL-0072.
[107] Charanne v. Spain. Final Award de 21 January 2016), para. 444 and subsequents. RL-0049 SP.
[108] Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain ICSID Case No. ARB/14/1, Award 16 May 2018), paras 339-341. CL-0175. https://www.italaw.com/cases/6608

concludes that "*the applicable law to this proceeding is the ECT, together with the applicable rules and principles of international law*"[109], referring to "this proceeding" and not only to the merits of the dispute as the Vattenfall Tribunal considers.

132. From this point on, the reasoning of the Vattenfall Decision is simply erroneous, as it is completely alien to the EU Law that it has previously considered inapplicable.

133. Furthermore, the Vattenfall Tribunal rejects the application of EU Law as an interpretative parameter according to Article 31(3)(C) of the VCLT, once again despite its own consideration of it as genuine International Law[110]. It particularly rejects an interpretation "harmonious" or "systemic" between the ECT and the relevant provisions of EU Law[111]. This is once again completely opposite to the very same wording and purpose of the interpretative criteria of article 31 VCLT and to the prevailing view in arbitral case-law.

134. As the Vattenfall Decision avoids EU Law by excluding both its direct application and its application as an interpretative guide, the Vattenfall Decision interprets the ECT in complete isolation and with no reference whatsoever to EU Law and to the relevant provisions contained therein that necessarily apply to every EU Member State[112].

135. Finally, the Vattenfall Decision rules out that Articles 16 ECT and 351 TFEU should lead to a different conclusion, even if it does not accept that a conflict exists[113]. However, this analysis is fundamentally flawed since it considers Article 16 ECT as a conflict rule when it is nothing more than an interpretative provision and since it clearly misinterprets Article 351 TFEU.

136. This isolated and biased interpretation of the ECT with no relationship whatsoever with EU Law is completely improper and renders the Vattenfall Decision useless for this Tribunal. As the Electrabel Tribunal properly reasoned, the starting point must be a harmonious or systemic interpretation of the ECT: *"the ECT's historical genesis and its text are such that the ECT should be interpreted, if possible, in harmony with EU law. […] [F]or three important legal reasons. The first derives from the ECT's genesis: it would have made no sense for the European Union to promote and subscribe to the ECT if that had meant entering into obligations inconsistent with EU law. The second derives from*

[109] AES v. Hungary. Award 23 September 2010, RL-0039 paras 7.6.1-7.6.4
[110] CL-0177 Vattenfall, para. 152 and subsequents.
[111] Íbid., para. 158.
[112] Íbid, para. 168 and seq.
[113] Íbid. Para. 225 and subsequents.

one of the ECT's objectives: it is an instrument clearly intended to combat anti-competitive conduct, which is the same objective as the European Union's objective in combating unlawful State aid. The third derives from the ECT's implicit recognition that decisions by the European Commission are legally binding on all EU Member States which are party to the ECT."[114] The Vattenfall Tribunal mistakenly starts from an isolated and biased interpretation that renders its analysis completely flawed.

137. Moreover, in the case that a conflict between the provisions of the ECT and EU Law arises, the latter must prevail. This was highlighted by the Electrabel Tribunal: "*if the ECT and EU law remained incompatible notwithstanding all efforts at harmonization, that EU law would prevail over the ECT's substantive protections and that the ECT could not apply inconsistently with EU law to such a national's claim against an EU Member State*."[115]

(2) <u>The Vattenfall Decision does not address the Achmea issue</u>

138. In addition, it seems almost ironic that the Decision rendered by the Tribunal of Vattenfall AB and Others v. Federal Republic of Germany on 31 August 2018 has been called "Decision on the Achmea Issue" when it devotes so little reasoning to this essential Judgment of the Court of Justice of the European Union (ECJ) and it addresses it in such an inconclusive manner. This is the best proof of the fact that the Vattenfall Decision simply misses the point, as stated supra. Indeed, the ratio decidendi of the Decision barely devotes a few paragraphs directly to the Achmea Ruling but relies on the opinion of the Advocate General Wathelet which was been rejected by the ECJ.

139. It is also remarkable how the Tribunal in the Vattenfall Decision leaves the analysis of the Achmea Ruling of the ECJ so open to discussion. In this regard, it states: "*It remains unclear what alleged rule of international law arising from the ECJ Judgment exists and is of application to the present case. The ECJ's reasoning was not specifically addressed to investor-State dispute settlement under the ECT. While there is a certain breadth to the Court's wording, addressing provisions "such as" the dispute resolution provision of the BIT in that case, it is an open question whether the same considerations necessarily apply to the ECT*"[116]. Plain and simple, the so-called "Achmea Decision" of the Vattenfall Tribunal simply does not address the implications of Achmea.

[114] RL-0002 Electrabel S.A v. Hungary. Decision on Jurisdiction. 30 November 2012., para. 4.130 and 4.133.
[115] RL-0002 Electrabel S.A v. Hungary. Decision on Jurisdiction. 30 November 2012.), paras. 4.178 a 4.189.
[116] CL-0177 Vattenfall Decision, para. 161.

140. In this regard, first of all, the Vattenfall Tribunal has failed to consider whether EU Law is applicable to the resolution of the dispute. However, this is quite clearly implicit in its reasoning: as it has been seen, the Vattenfall Decision concurs with the prevailing view that EU Law is International Law and also concludes that Article 26(6) ECT, referred to applicable rules of international law to solve the dispute, concerns the merits of the dispute. If this Tribunal completed the analysis of this issue, it would conclude that the EU Law is undoubtedly applicable to the merits of the dispute, not only because investment within the EU concerns the fundamental freedoms, as the Achmea ruling analyses[117], but also because State Aid issues are at stake.

141. The Vattenfall Tribunal has also failed to consider whether an ICSID Arbitral Tribunal is part of the EU Judicial System. Had it performed that analysis, it would have answered negatively, since it is not subject to mechanisms capable of ensuring the full effectiveness of the EU Rules and particularly it cannot refer to the ECJ for a preliminary ruling, as Achmea analyses[118.]

142. The Vattenfall Tribunal has also failed to analyze if the effectiveness of EU rules could be ensured in the phases of enforcement and execution of the arbitral award. In an ICSID Arbitration like Vattenfall or like the case at hand, it must unequivocally be concluded that no such control is possible given the applicable rules on annulment and enforcement of the ICSID Convention, which determine that such phases escape completely of the control of EU Courts[119].

143. Finally, and most importantly, the Vattenfall Tribunal has failed to really analyze whether an arbitration mechanism in the conditions set out above would be in accordance with EU Law and its autonomy. And to this purpose, if the Vattenfall Tribunal had truly dealt with the core issues at stake, it would have noted that the reasoning of Achmea is not formalistic and referred to a specific BIT but substantive and referred to any international

[117] CL-0162 Judgement of EUCJ Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018), para. 39-42.
[118] Íbid, para. 43-49.
[119] Íbid, para. 50-55. It should be noted that even the Opinion of the Advocate General Wathelet stated: "The same applies, in the Commission's submission, to the intra-EU BITS which designate the International Centre for Settlement of Investment Disputes (ICSID), established in Washington DC, as the institution acting as Registry in the arbitration. In such a case, the arbitral award would be binding on the parties and could not be subject to any appeal or any other remedy except those provided for in the ICSID Convention. It follows that there would be no legal means that would allow the courts and tribunals of the Member State to review the compatibility of ICSID arbitral award with EU law. (…) I consider that the Member States should avoid the choice of ICSID in their BITs (…)". CL-177 para. 252-253.

agreement concluded even by the EU itself[120], and therefore its conclusions are identically applicable to that case as they are also to this arbitration. It would particularly have concluded that such a dispute settlement mechanism in the case of the ECT is not compatible with Articles 267 and 344 of TFEU, provisions which the Vattenfall Decision does not even consider or analyze, even if it expressly acknowledges the special nature of EU Law and its autonomy[121].

IX. REQUEST FOR RELIEF

144. In view of the arguments set forth throught the arbitral proceeding, including in this Reply PHB, the Kingdom of Spain respectfully requests the Arbitral Tribunal to:

a) Declare that it lacks jurisdiction to hear the Claimants' claims.

b) Subsidiarily, dismiss all the Claimants´claims regarding the merits of the case, since the Kingdom of Spain has not in any way failed to comply with the ECT;

c) Subsidiarily, dismiss all the Claimants´claims for compensation as they are not entitled to compensation; and

d) Order that the Claimants pay all costs and expenses arising from this arbitration, including administrative expenses of the ICSID and the fees of the Arbitrators, as well as the fees of the legal representation of the Kingdom of Spain, its experts and advisers, and any other costs or expenses that may have incurred, all of which include a reasonable interest rate from the date these costs are incurred until the date of their actual payment.

145. The Kingdom of Spain reserves the right to supplement, modify or complement these allegations and to present any additional arguments and documents that are necessary in accordance with the ICSID Convention, the ICSID Arbitration Rules, the Procedural Orders and the Arbitral Tribunal's directives in order to respond to all claims made by the Claimants in connection with the present case.

Respectfully submitted,

[120] CL-0162 Judgement of EUCJ Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018), para. 56-60.
[121] CL-0177 Vattenfall Decision, para. 144.