GOVERNMENT ATTORNEY'S OFFICE
DIRECTORATE FOR STATE LEGAL SERVICES

SUBDIRECTORATE-GENERAL OF LITIGATION SERVICES

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

AND

PURSUANT TO THE ENERGY CHARTER TREATY
(ICSID ARBITRATION No.ARB/14/1/)

BETWEEN:

MASDAR SOLAR & WIND COOPERATIEF U.A.

Claimant

- and –

THE KINGDOM OF SPAIN

Respondent

COUNTER-MEMORIAL ON THE MERITS AND MEMORIAL ON JURISDICTION

ARBITRATORS:

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I. LIST OF MAIN ABBREVIATIONS

"**Accuracy Expert Report on the incentives**": Economic-financial report on the incentives to the thermosolar sector issued on September 15th 2015 drawn up by Accuracy which accompanies the present Counter-memorial of Claim, Jurisdictional objections and Request for Bifurcation.

"**Accuracy expert report on the Claimant and its claim**": Economic and financial expert report on the Claimant, its claim and the thermosolar plants issued on September 15th 2015 and drafted by Accuracy which accompanies the present Counter-memorial of Claim, Jurisdictional objections and Request for Bifurcation.

"Act 54/1997" or "LES 1997": Law on the Electricity Sector, of 27 November 1997, approved by Act 54/1997, of 27 November.

"Act 15/2012": Act 15/2012, of 27 December 2012, on taxation measures for energy sustainability.

"Act 24/2013": Law 24/2013, of 26 December 2013, on the Electricity Sector.

"**BIT**": Bilateral investment treaty.

"**Brattle expert regulatory report**": expert report on changes to Spanish regulations regarding concentrated electrical energy installations issued on January 21st 2015, drafted by The Brattle Group and accompanying the Claimant's Memorial presented by the Claimant in the present arbitration.

"**Brattle Expert report on damages":** expert report on financial damage produced by The Brattle Group accompanying Claimant's Memorial submitted by the Claimant in the present arbitration.

"**Cabinet Agreement 2009**": Agreement of the Spanish Council of Ministers of November 19th 2009 which organised the projects or installations submitted to administrative registration for the pre-assignment of remuneration for electrical energy production installations, foreseen in Royal Decree-Law 6/2009 dated April 30th which adopted certain measures in the energy sector and approved the social bonus.

"**CNC**": National Competition Authority.

"**CNE**": National Energy Commission. This is the Regulatory Body for energy systems in Spain (since October 7th 2013 its duties have been carried out by the National Commission for Markets and Competition).

"**CNMC**": National Commission for Markets and Competition.

"Contracting Party": State or regional economic integration organisation which has consented to be bound by the Energy Charter Treaty and for which the Treaty is in force, according to the definition of "Contracting Party" set out in Article 1(2) of the Energy Charter Treaty.

"DCF": discounted cash flow, the present value of future cash flows.

"**DGPEM**": Directorate-General for Energy Policy and Mining of the Spanish Ministry of Industry, Energy and Tourism.

"**EC Directive 2001/77**": EC Directive 2001/77 issued by the European Parliament and Council on September 27th 2001 pertaining to the promotion of electricity generated from renewable energy sources on the internal electricity market.

"**EC Directive 2009/28**": EC Directive 2009/28 issued by the European Parliament and Council on April 23rd 2009 pertaining to promoting the use of energy from renewable sources and modifying and revoking EC Directives 2001/77 and 2003/30.

"**ECJ**": European Court of Justice.

"**ECT**": The Energy Charter Treaty carried out in Lisbon on December 17th 1994.

"Emirate of Abu Dhabi": Emirate which forms part of the Federation of Emirates, United Arab Emirates.

"EU": European Union.

"FET": Fair and Equity Treatment

"IDAE": Institute for Energy Saving and Diversification**.**

"Intra-EU dispute": A dispute between an EU investor and an EU Member State.

"Intra-EU investment": an investment made in the EU by an EU investor.

"IPC": Consumer Price Index.

"IPC-IP": Consumer Price index at constant taxes without unprocessed foods and energy products.

"LE": Legitimate Expectations.

"Masdar": Abu Dhabi Future Energy Company (ADFEC)

"Masdar Solar": Masdar Solar&Wind Cooperatief U.A., shell company claiming investment which must be assigned to the Emirate of Abu Dhabi through Mubadala Company and Masdar.

"OMEL": Spanish Electricity Market Operating Company.

"PANER": National Renewable Energies Action Plan.

"RD 2818/1998": Royal Decree 2818/1998 enacted on December 23rd 1998 on electrical energy production by installations supplied by renewable energy resources or sources, waste or generation.

"**RD 1432/2002**": Royal Decree 1432/2002 enacted on December 27th regarding average reference Price methodology.

"RD 413/2014": Royal Decree 413/2014, of 6 June 2014, regulating the activity of electricity production from renewable energy sources, from cogeneration and from waste products.

"**RD 436/2004**": Royal Decree 436/2004 enacted on March 12th 2004 setting out the methodology for updating and systematising the legal and economic regime governing electrical energy production activity under a special regime.

"**RD 661/2007**": Royal Decree 661/2007 enacted on May 25th 2007 regulating electrical energy production activity under a special regime.

"**RD 1578/2008**": Royal Decree 1578/2008 enacted on September 26th regarding the remuneration of electrical energy production activity by means of solar photovoltaic technology for installations subsequent to the deadline for the maintenance of remuneration under Royal Decree-Law 661/2007 enacted on May 25th for said technology.

"**RD 1565/2010**": Royal Decree 1565/2010 enacted on November 19th 2010 regulating and modifying certain aspects pertaining to electrical energy production activity under a special regime.

"**RD 1614/2010**": Royal Decree 1614/2010 enacted on December 7th regulating and modifying certain aspects pertaining to electrical energy production activity from solar thermoelectric and wind technologies.

"**RD-L 6/2009**": Royal Decree-Law 6/2009 enacted on April 30 2009 which adopted certain measures in the energy sector and approved the social bonus.

"**RD-L 1/2012**": Royal Decree-Law 1/2012 enacted on January 27th 2012 which proceeded with the suspension of pre-assignment of remuneration procedures and the removal of economic incentives for new electrical energy production installations from cogeneration, renewable energy sources and waste products.

"RD-L 2/2013": Royal Decree-Law 2/2013, of 1 February 2013, on urgent measures to be adopted, affecting the electricity sector and the financial sector.

"RD-L 9/2013": Royal Decree-Law 9/2013, of 12 July 2013, on urgent measures to be adopted to ensure the financial stability of the electricity sector.

"**RD-L 14/2010**": Royal Decree-Law 14/2010 enacted on December 23rd setting out urgent measures to correct the tariff deficit in the electrical sector published in the Official State Gazette on December 24th 2010.

"**RD-L 20/2012**": Royal Decree-Law 2/2013, - the Kingdom of Spain approved Royal Decree-Law 20/2012 enacted on July 13th regarding measures to ensure the budget stability and increased competitiveness.

"**RE**": Renewable Energies.

"**Respondent**": the Kingdom of Spain.

"**RO**": Ordinary Regime.

"**SES**": Spanish Electric System.

"**SPV**": Special purpose vehicle.

"SR": Special Regime

"**This arbitration**" or "**the present arbitration**": ICSID arbitration NO.ARB/14/1 formally filed by Masdar Solar & Wind Cooperatief U.A. against the Kingdom of Spain.

"**This Memorial**" or "**the present Memorial**": Counter-memorial on the Merits and Memorial on Jurisdiction of the Kingdom of Spain dated September 16th 2015.

"TVPEE": Tax on the value of the production of electrical energy. This tax was created with effect from 1 January 2013 by Act 15/2012 and is regulated by Articles 1 to 11 of the same Act.

"TFEU": Consolidated version of the Treaty on the Functioning of the European Union published in the Official Journal of the European Union on October 26th 2012.

"Vienna Convention": The Vienna Convention on the Law of Treaties, of 23 May 1969.

II. INTRODUCTION

1. The Kingdom of Spain submits its Counter-Memorial on the Merits and Memorial on Jurisdiction in accordance with the Schedule set out in Section 2.2, option 2 annexed to Procedural Order No.1 dated 20 November 2014.

2. The Claimant argues that the Kingdom of Spain has failed to meet the obligations assumed under the Energy Charter Treaty (hereinafter "**ECT**"). In this regard, it asserts that Spain's conduct has resulted in: (a) the approval of measures which have thwarted the legitimate expectations of the Claimant; (b) failure to meet the obligation to create a stable, foreseeable legal and commercial framework for the Claimant's investments (c) an alleged lack of transparency in Spain's conduct; (d) an alleged unreasonableness of the measures taken by Spain; and (e) the alleged disproportionate nature of the measures taken by Spain.

3. The Kingdom of Spain will request the Arbitral Tribunal to wholly disregard the claims by the Claimant on the merits and to sentence it to pay the costs of this Arbitration. Notwithstanding, and beforehand, it is subjecting to the analysis of the Honourable Tribunal, the existence of a set of Objections which, in the Respondent opinion, determine its lack of Jurisdiction, with all due respect, to hear the present dispute. These have been set out below.

4. Firstly, as **Preliminary Objection A**, the Kingdom of Spain is arguing that there is a lack of jurisdiction *ratione personae* of the Arbitral Tribunal according to Article 25 of the ICSID Convention and Article 26 of the ECT. It believes that the dispute is not between a Contracting State of the ICSID Convention and a national of another Contracting State, but rather between two Contracting States: the United Arab Emirates – to be precise, the Emirate of Abu Dhabi – and the Kingdom of Spain. Furthermore, the alleged investment is imputable to a State and does not meet the requirement of constituting a private investment. As will be argued, the Claimant is a shell company acting according to the instructions of a State, is controlled by a State through its Sovereign fund and serves for the accomplishment of the Public objectives of a State. Hence, the investment must be attributed to the Emirate of Abu Dhabi, a country which is not a Contracting Party of the ECT.

5. Secondly, as **Preliminary Objection B**, it is argued under Articles 26 (1) and 1 (6) of the ECT that there is a lack of Jurisdiction of the Arbitral Tribunal to hear the disputes raised by the Claimant as the latter has not made an investment in the objective sense of the word. As will be proven in this Memorial, the Claimant is a shell company, without the structure nor resources to undertake the alleged investment whose protection is claimed in this arbitration. Said circumstance prevents the Arbitral Tribunal, pursuant to Article 26 (1), from having jurisdiction to hear the disputes raised with regard to said assets.

6. As **Preliminary Objection C** the Kingdom of Spain believes that there is no protected investor in accordance with the ECT. Both the Netherlands and the Kingdom of Spain were Member States of the European Economic Community, today the European Union (hereinafter "**EU**"), when they subscribed to the ECT. The EU is the Contracting Party of the ECT and hence the Claimant does not derive from "another Contracting Party" as is required by Article 26 of the ECT in order to be able to seek arbitration. The arbitration dispute settlement mechanism foreseen in Article 26 of the ECT is not applicable to an intra-EU dispute like the present one, determining the lack of Jurisdiction of the Arbitral Tribunal to hear it.

7. Fourthly, as **Preliminary Objection D**, in the event that the Tribunal regards the Netherlands and Spain as "different Contracting Parties" for the purposes of Article 26 of ECT, the lack of Jurisdiction *ratione voluntatis* is submitted to the Arbitral Tribunal owing to the lack of consent by the Kingdom of Spain to submit the dispute to arbitration. In this Memorial the Kingdom of Spain exercises its right to deny the application of the benefits of part III of the ECT to the Claimant, owing to the proven presence of the circumstances set out in Article 17 thereof. As will be argued in this memorial, the Claimant is a pure shell company owned and controlled in the final analysis by the Sovereign fund Mubadala from Abu Dhabi, United Arab Emirates, a country which is not a Contracting Party of the ECT. The principle of reciprocity and the need to prevent mere Shell companies from benefitting from ECT protection allow the Respondent to deny the Claimant its application for benefits under part III of the ECT. The Kingdom of Spain is exercising its right in this act as the ECT fails to set a time to do so and because it is now that it was able to do so in view of the allegations set out in the Claimant's Memorial on the Merits, the documentation provided by the Claimant as well as that obtained by the Respondent in the course of the litigation. Accordingly, the Kingdom of Spain has not given its consent to the arbitration, determining the lack of Jurisdiction, with all due respect, of the Arbitral Tribunal.

8. Fifthly, **Preliminary Objection E** refers to the lack of Jurisdiction of the Arbitral Tribunal to hear the claim filed against the Kingdom of Spain for an alleged breach of Article 10(1) of the ECT through the introduction by Act 15/2012 of the Tax on the Value of the Production of Electrical Energy (hereinafter "**TVPEE**"). The Kingdom of Spain has not given its consent to submit such issue to arbitration given that, pursuant to Article 21 of the ECT, Article 10(1) of the ECT does not impose any obligations regarding taxation measures of the Contracting Parties. The provisions on the TVPEE of Act 15/2012 constitute a taxation measure for the purposes of the ECT as Article 21(7) of the ECT provides that term *taxation measure* includes any provisions relating to taxes of the domestic law of the Contracting Party, and the provisions on the TVPEE of Act 15/2012 are provisions relating to a tax of the domestic law of the Kingdom of Spain.

9. Finally, **Preliminary Objection F** refers to the fact that the Claimant has failed to meet its obligation under Article 26 of the ECT to request an amicable solution from the Kingdom of Spain and the three-month cooling-off period to try and reach an amicable solution before submitting the dispute to arbitration with regard to Royal Decree-Law 9/2013, Law 24/2013, Royal Decree 413/2014 and Ministerial Order IET/1045/2014.[1]

10. In the event that the Tribunal deems there to be grounds to hear the substance of the dispute raised by the Claimant, the Kingdom of Spain will set out arguments as to why its claims should be disregarded.

11. The Claimant is founding its claim on the fact that at the time of making its investment it had the expectation that the economic regime providing a subsidy to production from renewable sources could not be changed.

[1] The Respondent is no longer sustaining the Objection to the Indirect Investment set out in Request for bifurcation, Section III.5, nor the Objection Ratione Temporis set out in the Request for bifurcation, Section III.6

12. This allegation, which is key for the Claimant, is based on incorrect facts:

    - The Claimant argues that the only regulations of Spanish Law which regulated the economic regime pertaining to production from renewable sources were the Royal Decree 661/2007 and the Royal Decree 1614/2010.

    - The Claimant also argues that the previous regulations contained specific commitments to remain intact: (1) the remuneration system ("regulated tariff" or "pool plus premium") for the production activity, (2) the specific amounts deriving from the application of said system and (3) other non-remuneratory measures such as the possibility of producing energy by burning gas.

13. The Kingdom of Spain has not assumed any commitment with the Claimant deriving from a contract, a concession or a license. The Kingdom of Spain merely regulated the Spanish Electric System (hereinafter "**SES**") in line with the provisions of the Law, maintaining the economic Framework on which it is based at all times.

14. The purpose of the present arbitration is not the loss of the Claimant's investment. The SES guarantees the investor recovery of the investment made in the construction of Plants, the recovery of its operating costs and it also ensures that receipt of a reasonable return. Hence, the purpose of the present arbitration is merely to determine whether this guarantee is fair and equitable or not.

15. The Claimant intends to convey to the Tribunal a skewed vision of the electricity generation activity from renewable sources. In particular, that the CSP installations could be on an "island" outside the system they are part of. The Claimant also argues that the Spanish Government could have passed costs on to consumers, without any limitation. None of these arguments are correct nor reasonable.

16. The Claimant ignores the fact that electricity generation activity from renewable sources is part of the SES. Hence, this activity shares the objectives of the SES and is also subject to its governing principles.

17. When the Claimant made its alleged investment, it was aware that the supply of electricity is a service which is in the general economic interest. It was also aware that the main purpose of the SES is to ensure that all consumers have access to electrical energy on an equal footing and with quality. This means that access to electricity must be gained at the least possible cost, also bearing in mind the protection of the environment.

18. The Claimant deliberately omits to mention the basic principle on which the legal remuneration regime of the Claimant is founded: "the Principle of a reasonable return". In this way, it devises its thesis on the alleged unmodifiability of the measures of RD 661/2007, omitting their coordination with this principle.

19. The principle of a "reasonable rate of return" is initially set out in Article 30.4 of Act 54/1997 and maintained in Article 14.7 of Act 24/2013. Said principle ensures the investor, as a measure to stimulate these technologies, a return on its investment, the operating costs and the obtaining of profitability.

20. Since 1997 the Kingdom of Spain has applied the legal principle of a "reasonable rate of return" through various regulations, bearing in mind the different economic and technical circumstances in place at any time.

21. The scope of said principle has been reiterated in more than one hundred rulings by the Supreme Court. This Case law is prior to the time when the Claimant's investment was made. A diligent investor could not have been unaware of it.

22. When the Claimant planned its investment, it was aware of the existence of a regulatory risk. The alleged investment was planned in 2008 without requesting any legal Due Diligence. The Claimant was aware in 2008 that the Government corrected any possible remuneration imbalances in the photovoltaic and wind Sector.

23. Before making its investment, the Claimant was aware of the measures set out in RD 436/2004. The mentioned RD 436/2004 set out a regime for mandatory revisions similar to the one stipulated in Article 44.3 RD 661/2007. The Claimant was aware in 2008 that RD 436/2004 was revoked without such revisions being legally binding on or limiting the regulatory power of the Government that modified the regulatory regime in accordance with Article 30.4 LSE 54/1997.

24. The Claimant held political meetings with the Government in 2008, but the Government did not issue any commitment or guarantee to maintain the measures of RD 661/2007 unchanged during the working life of the CSP Plants.

25. In 2009 the Claimant knew, by dint of the regulatory Due Diligence requested, that the Government was committed, with a 2020 horizon, to guarantee investors a reasonable remuneration. This regulatory Due Diligence did not affirm that the Government was committed to not modifying RD 661/2007.

26. The credit agreements subscribed in due time by the Plant promoters specifically set out provisions in the event of regulatory changes which would reduce the subsidies to be received by the Plants. The evaluation carried out by the Claimant's Investment Committee accepted the clauses, admitting the existence of a regulatory risk.

27. The Claimant intends to use the ECT as a kind of insurance policy, covering the risk that the Spanish regulatory framework would be modified by the Kingdom of Spain.

28. The Kingdom of Spain adopted some measures to reform the Electric Sector which had been announced publicly in advance since December 2011. These measures are reasonable and proportionate and they affected all parties to the SES. In particular, the measures affected Consumers whose electricity invoice increased in disproportionate fashion between 2003 and 2012. Measures were also adopted which affected the ordinary Carriers, Distributors and Producers. Furthermore, for the first time it was decided to charge SES costs to the State Budget which were borne by Spanish taxpayers for the sum of 4,206 million Euros.

29. However, this reform maintained the guarantee of reasonable rates of return to Renewable Energy producers under a premium regime. Furthermore, it raised the regulatory range of recognised profitability to a regulation with the range of a parliamentary Law.

30. All the regulations included in the new regulatory economic framework were adapted to the procedure foreseen by Spanish Law. All the necessary reports were obtained to ensure the full compliance of the new regulatory text with Spanish legislation. Reports were requested, including non-compulsory ones, and various periods to submit Public Comments were allowed. In this periods any stakeholder on RE was able to participate and provide inputs. All these proceedings lasted almost a year so that all the parties concerned had the chance to take part.

31. The Kingdom of Spain will prove that the Company in which the Claimant has a stake, Torresol, acknowledges that they were well aware of the details of the Drafts and thise procedure. Torresol also acknowledges that it and its CSP Plants took part; submitting Public Comments, and the reform even benefited the profitability obtained by the Gemasolar Plant. The Arcosol and Termesol Plants have acknowledged that the measures challenged endow them with more economic security, because incomes depend on fixed items, such as investment and operating costs.

32. The measures adopted by the Kingdom of Spain are, as set out above, reasonable. The FET standard has not been breached owing to the adoption of excessive and discriminatory measures. The present Counter-memorial makes clear the relevance and applicability of the different tests proposed by arbitral Case law. These tests prove that the measures adopted by the Kingdom of Spain were neither arbitrary, nor incoherent nor lack of transparency, nor excessive. On the contrary, the Kingdom of Spain has acted in a Fair and Equitable manner bearing in mind (1) what the Claimant knew when it made its alleged investment, (2) the lack of commitments by the Spanish State to the Claimant, (3) the economic circumstances owing to which they had to be adopted and (4) the purpose of public policy followed.

33. Hence, and as set out in this Counter-memorial, the Kingdom of Spain did not breach the obligations set out in Article 10.1 of the ECT.

34. Finally, in subsidiary basis, this Counter-memorial demonstrates that the alleged damages are wholly and absolutely speculative. The Claimant has not complied with the burden of proof required of it so that its claim can be examined.

35. In the present case, the DCF method is unsuitable owing to the circumstances in place in accordance with doctrine: the long projection timeframe of the predictions, the innovative nature of the technology, the scant track record, the disproportion between investments and the damages claimed, etc.

36. In addition, the Expert report accompanying the Claimant's Memorial is unclear and the information provided is incomplete. It places the Respondent in an unfairness position for this reason.

37. Two Expert reports have been attached to the present Memorial dated 15 September 2015.

38. The first is an economic and financial Expert report about incentives to the thermosolar sector in Spain (henceforth "Accuracy Expert Report on the incentives") in which matters of regulatory relevance to the present case are analysed: the Spanish electric system, its configuration and present state; Renewable Energies and the thermosolar sector in Spain and in

the rest of the world; the incentives' system for Renewable Energies; and the reasonable rates of return.

39. The second Expert report is focused on the economic and financial aspect regarding the Claimant, the Thermosolar Plants and its claim (henceforth "Accuracy expert report on the Claimant and its claim") in which the following aspects are analysed: the strategy of the Emirate of Abu Dhabi and the mandate of Mubadala; the lack of economic activity of the Claimant, its lack of a presence in the Netherlands and its status as a mere *shell company*; the Thermosolar Plants related with this arbitration, carrying out, amongst other analysis, a comparison between the investment costs of the Plants and the standard cost laid down by Ministerial Order IET/1045/2014; and certain aspects of the Brattle report provided by the Claimant, in particular regarding the valuation method deployed.

40. In the light of the above arguments, set out in greater detail in this memorial, the Kingdom of Spain will request the Arbitral Tribunal to wholly disregard the claims of Masdar Solar and to sentence it to pay the costs of this Arbitration.

III. PRELIMINARY OBJECTIONS

A. Lack of Jurisdiction ratione personae of the Arbitral Tribunal under Article 25 of the ICSID Convention and Article 26 of the ECT. The dispute is not between a Contracting State and a national of another Contracting State, but rather between two States: United Arab Emirates, to be precise the Emirate of Abu Dhabi, and the Kingdom of Spain.

(1) Introduction

41. The jurisdiction of an Arbitral Tribunal within the remit of the ICSID is delimited by Article 25 of the ICSID Convention. Hence, one of the requirements for the Arbitral Tribunal to hold jurisdiction over a dispute is for said dispute to be between a Contracting State and the national of another Contracting State[2].

42. Article 25 of the ICSID Convention requires the dispute to arise between a Contracting State and the national of another Contracting State. Thus, it makes clear that the jurisdiction of ICSID does not stretch to disputes between two States. This was the view of the Arbitral Tribunal in the case *Ceskoslovenska Obchodni Banka A.S. v. the Slovak Republic* which stated that:

> *"The language of Article 25(1) of the Convention makes clear that the Centre does not have jurisdiction over disputes between two or more Contracting States. Instead, the dispute settlement mechanism set up by the Convention is*

[2] Article 25 of the ICSID Convention: *"(1) the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (...)and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre*.[…]" (emphasis added). RL-0001.

designed to deal with disputes between Contracting States and nationals of other Contracting States."[3] *(emphasis added)*

43. The ECT shares the same approach as the ICSID Convention: only claims lodged by a private investor against a Contracting Party of the ECT may be submitted to the dispute solution mechanism of Article 26 of the ECT. Hence, the first paragraph of said Article 26 indicates that:

> *"Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably"*[4] *(emphasis added)*

44. It should be pointed out that ECT seeks to stimulate private initiative in the energy area. This can be gleaned from the European Energy Charter, which stipulates the political objectives on which the ECT is based:

> *"In implementing this joint or co-ordinated action, they undertake to foster private initiative, […]"*[5] *(emphasis added)*

45. The Claimant, by resorting to the arbitral Jurisdiction of ICSID under the ECT, must comply with the so-called Double Check test to determine the Jurisdiction of the Arbitral Tribunal to hear the lodged claim. The Claimant must comply with all requirements, both of Article 25 of the ICSID Convention and Article 26 ECT. If its acts are attributed to a Sovereign State, the Claimant will have breached said Articles 25 and 26. The same will occur if it concludes that it is a State company making a public investment.

46. This is precisely what happens in the present case. The Claimant is nothing more than a *shell company* that acts as a tool of the Government of Abu Dhabi, controlled and run by Mubadala as the main Agent of the Government. This Agent develops the strategic government initiative of Abu Dhabi, set out in the public programme *"Abu Dhabi Economic Vision 2030"*[6]. For this reason the Claimant cannot regard itself as a "national of another Contracting State" for the purposes of Article 25 of the ICSID Convention nor of Article 26 ECT.

(2) Assertions shared by the parties to the present arbitration.

47. The Kingdom of Spain shares some assertions that have been made by the Claimant in its Memorial. This will facilitate the work of the Arbitral Tribunal by resolving the present objection.

48. In actual fact, the following Claimant's assertions are not contested in order to settle the present Objection:

[3] *Ceskoslovenska Obchodni Banka A.S. v. the Slovak Republic*, ICSID no.ARB/97/4, Decision regarding the Jurisdiction Objections issued on May 24th 1999, paragraph 16. RL-0007.
[4] Energy Charter Treaty, Document RL-0002.
[5] Concluding Document of the Hague Conference on the EEC, page 216. C-0026
[6] The Abu Dhabi Economic Vision 2030, the Government of Abu Dhabi, November 2008, R-0002

(a) The Kingdom of Spain shares with the Claimant the belief that the objective and purpose of the ECT is to promote private investment, not public. To be precise, the Respondent shares the Doctrine that is invoked by the Claimant under the Heading "*Context, object and purpose of the ECT*":

> *"In fact, it is beyond doubt that, in order to address the specific sectoral needs of energy investments, the ECT offers a "higher" or more robust level of protection than most bilateral investment treaties. As Professor Wälde explains:*
>
> *" … [T]he overriding purpose of the Treaty [ECT] is the encouragement of **private** investment by stable, equitable, transparent conditions at a "high level" of protection … The tools – the 'investment disciplines' in part III of the Treaty – have to be seen as instruments to implement the overall emphasis on promotion of **private** investments. […]"*[7] *(emphasis added)*

This purpose is even clearer through the wording of International Energy Charter[8]. In its text, the following provisions stand out:

> *"In implementing this joint or coordinated action, they* [the signatories] *decide to foster private initiative […]"*[9]
>
> *"They* [the signatories] *also recognise the importance of the avoidance of double taxation to foster private investment."*[10]

Hence, both parties agree, according to the Doctrine that has been quoted by the Claimant, that the purpose and objective of the ECT and of the means set out in its Part III is to serve as tools to promote private investment, not public.

(b) The Kingdom of Spain agrees with the Claimant's reasonings regarding Investspain. According to them, the acts of a private-law entity, even if this is of a commercial nature, must be attributed to a State.

The following assertion by the Claimant is uncontested: "*an entity that has its own legal personality may still be an organ of a State in international law. In the instant case,* [Masdar Solar] *subsists entirely on funds budgeted by the Government of* [Abu Dhabi, through its Sovereign fund Mubadala] *and it is directly and fully controlled by the* [Government of Abu Dhabi]. *It lacks any genuine independence and is therefore properly considered an organ of the State*".[11] This shared argument by the parties must lead the Tribunal to regard Masdar Solar "*as an organ of the State*".

The Respondent also agrees with the Claimant that "*The fact that* [an entity] *may **nominally** be **private** and its conduct commercial in nature does not detract from that conclusion*: *the*

[7] Claimant's Memorial, parag. 318 and Document CL-0036.
[8] International Energy Charter signed on May 21st 2015 with a view to updating the undertakings of the European Energy Charter (The Hague II). RL-0018.
[9] Title II of the International Energy Charter. RL-0018.
[10] Title II of the International Energy Charter. RL-0018.
[11] Claimant's Memorial, paragraph 334, although the names provided by the Claimant have been changed, the meaning of the assertion is identical.

attribution to a State of activities of a private, commercial entity where that entity is acting under State instruction is widely accepted in international law." [12]

Self-evidently, the concept of "organ of a State" in International Law cannot extend or restrictdepending on whether we are dealing with obligations or rights. In line with the Claimant's own arguments, the Arbitral Tribunal must attribute to the Emirate of Abu Dhabi the activities of the Claimant, despite its commercial nature, provided that "*it acts in line with instructions*" from the Emirate of Abu Dhabi through Mubadala. The only thing that the Arbitral Tribunal should resolve then is whether, based on this consensual assertion, *Masdar Solar* is totally following the instructions of a State body, such as *Mubadala* or the *Emirate of Abu Dhabi*.

(3) Although the Claimant is private, it follows the instructions of the Emirate of Abu Dhabi.

49. A reading of the facts reported by the Claimant[13] shall suffice to conclude that the Claimant itself acknowledges compliance with instructions from Mubadala and full control, including the receipt of capital, by the Sovereign fund Mubadala:

- ADFEC is owned by the Sovereign fund Mubadala (Mubadala Development Company, henceforth Mubadala) and the latter is owned by the Government of Abu Dhabi.

- Mubadala accepted the investment proposal put forward by ADFEC, whose managers are the same as those of the Claimant.Mubadala approved the financing and provided the Claimant, through ADFEC, with the capital that was later invested in the Company Torresol.

- The Claimant made the investment with an identity of management bodies between the Claimant and ADFEC. In other words, not only does it follow instructions from Mubadala, but these instructions are also implemented by the same parties at ADFEC and at the Claimant[14].

50. The facts that the Claimant puts forward lead us to clearly conclude that the control, capital and decisions related to its alleged investment correspond to the Sovereign fund Mubadala. The Claimant also recognises the control of Mubadala by the Government of Abu Dhabi[15] and that it acts as the main Agent of the Emirate,serving for the economic diversification of Abu Dhabi.

51. As argued by both parties, the fact that Masdar Solar may nominally be private and its actions may be commercial does not prevent the assignment to Abu Dhabi of its activities if the Claimant has acted in line with instructions from Abu Dhabi through Mubadala. It is worth highlighting the link between the Government and Mubadala whose Chairman is the Crown Prince of the Emirate and Minister of State of the Government of Abu Dhabi.

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[12] Claimant's Memorial, paragraph 336.
[13] Claimant's Memorial, paragraphs 143, 144, 145, 160, 163, 178 and 179.
[14] "*ADFEC's Director of Innovations and Investments, Mr Tassabehji, and the Chief Executive Officer of ADFEC, Dr Sultan, were the primary decision-makers in respect of the Claimant's investments in the CSP Plants*." Paragraph 145 of the Claimant's Memorial.
"The Claimant was incorporated on March 19th 2008 with Dr. Sultán and Mr. Tassabehji as the directors." Paragraph 162 of the Claimant's Memorial.
[15] Claimant's Memorial, paragraph 143.

52. The facts acknowledged by the Claimant and its own arguments lead us to conclude that its activity must be attributed to the Emirate of Abu Dhabi. It cannot be regarded as the "national of another Contracting State" for the purposes of Article 25 of the ICSID Convention. Neither does it comply with the requirement of Article 26 ECT as said mechanism is not applicable to the Emirate of Abu Dhabi which is not even part of the ECT.

(4) The Claimant is controlled by the Emirate of Abu Dhabi in order to achieve a result.

53. It has already been set out by both parties that the action of a private entity, even of a commercial nature, must be attributed to a State if said entity acts in line with the instructions of said State.

54. The Kingdom of Spain also agrees with the Doctrine supported by the Claimant:

> *"where there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State"*[16]*. (emphasis added)*

55. An examination of the facts and the real activity of the Claimant allows us to conclude that the Claimant does not carry out any economic activity as it is nothing more than a *Shell Company*. It is a legal personality under the total control of Mubadala through ADFEC that has been incorporated in order to achieve the results sought by the Government of Abu Dhabi[17]. This conclusion also allows an examination of whether the Claimant's action must be regarded as a public investment imputable to the Sovereign fund of Mubadala, an Agent of the Government of Abu Dhabi.

56. The Accuracy expert report on the Claimant and its claim has examined the action undertaken by AFDEC and Mubadala, observing that:

(a) Mubadala is a main Agent of the Emirate of Abu Dhabi geared towards the pursuit of the economic policy of Abu Dhabi through its economic diversification. This was set in motion by the Government, as a key sector, for the development of Renewable Energies[18]. Mubadala's action can clearly be identified as an action geared towards achieving a result laid down by the Emirate of Abu Dhabi.

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[16] *J. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), pp. 112-113, CL-0030, invoked by the Claimant in paragraph 336 of the Claimant's Memorial.

[17] An expert economic report about the Claimant and its claim has been attached, issued by Accuracy, dated September 15th 2015 which has examined the action of Mubadala, ADFEC and the Claimant. Said examination ratified facts recognised by the Claimant, though it reached the following conclusions (paragraph 325):

"*We can conclude that the Claimant, the entity Masdar Solar & Wind Coöperatief U.A.:*

- *Does not carry out any economic activity.*
- *Is nothing more than a mere mailbox company or shell corporation.*
- *Has no material presence or footprint in The Netherlands.*"

[18] Accuracy expert report on the Claimant and its claim, pages 9 to 13.

(b) ADFEC acted in compliance with the mission attributed by Mubadala as an Agent of the Government of Abu Dhabi. As the Accuracy Report concludes, the purpose of the investment was clearly not the obtaining of trading profits as it would have been in the case of a private investor. The purpose was to obtain know-how in the Renewable Energies' sector by associating with specialised players and to train nationals from Abu Dhabi to promote the political-economic, social and energy development of the Emirate of Abu Dhabi[19]. This entails the discharging of duties of a public or government nature. An examination of the Preamble to the Joint Venture Agreement provided by the Claimant suffices to ascertain that it is assuming and implementing the interests of the diversification policy put into place by the Government of Abu Dhabi[20].

In the same way, the Accuracy's Expert report rejects any commercial nature as regards the possible obtaining of economic income by the Claimant in view of the fact that: "*no commercial nature is noted in the possible returns derived from the investment, given that the returns are to go entirely to Mubadala Sovereign Fund whose mandate is to serve the Emirate's economic policy. Therefore, any possible return will also contribute to the purpose of developing the public policy of the Emirate of Abu Dhabi*."[21] In other words, as far as obtaining economic income is concerned, this would have a specific, beneficial purpose solely for the Emirate of Abu Dhabi and its public objectives to achieve economic diversification.

57. Hence, all the activity carried out by Mubadala, ADFEC and the Claimant has, in any case, one sole beneficiary: the Sovereign State of Abu Dhabi in view of the fact that it has been carried out to:

(1) Achieve its economic diversification objective through Renewable Energies.

(2) Strengthen ADFEC's position on the Renewable Energies' market.

(3) Train national students to develop this technology in the Emirate.

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[19] "• *Masdar's aim or goal with its investment in Spain was obviously not to gain commercial benefits in the sense that a private investor would seek, but to develop and operate the renewable energy facilities in order to enhance the political, economic, social and energy development of the Emirate of Abu Dhabi.*
• *From the modus operandi described, it can be deduced that Masdar has acted to perform a function that is essentially governmental. This role of Agent of the Emirate is unequivocally confirmed by the fact that Masdar's goal is to ensure that 7% of the Emirate's Energy be produced by means of renewable energies in 2020.*" Accuracy expert report on the Claimant and its claim, paragraph 227.

[20] *"(A) ADFEC is a company wholly – owned by Mubadala Development Company PJSC, and has launched the Masdar Initiative, which has as its main objectives: (i) helping drive the economic diversification of Abu Dhabi, (ii) maintaining and expanding Abu Dhabi's position in the evolving global energy markets in the long term, (iii) positioning Abu Dhabi as a developer of technology, as well as (iv) making meaningful contribution towards human development. (B) Whereas ADFEC recognises that, to achieve the above objectives, it needs to openly engage with partners who share the vision, the resources and the commitment necessary for the progress in the area of cleaner energy and more sustainable use of natural resources."* (emphasis added) Sections A and B of the Preamble to the "*Joint Venture Agreement*" signed by ADFEC and Sener (which Masdar Solar would later enter into under a novation agreement dated June 9th 2008), C-0044 of the Claimant's Memorial.

[21] Accuracy expert report on the Claimant and its claim, paragraph 227.

(4) Obtain funds to allow Mubadala to accomplish its mission as a Main Agent of the Emirate in accordance with the economic policy aims of the Emirate of Abu Dhabi.

58. The Kingdom of Spain does not argue, as the Claimant asserts, that *Masdar Solar* indirectly belongs to the Government of Abu Dhabi[22]. The Kingdom of Spain argues that from the perspective of International Law, Masdar Solar is a mailbox company of the Government of Abu Dhabi as it is controlled by the Emirate to achieve a specific result. This assertion is based on the Claimant's own arguments in its Claimant's Memorial with regard to InvestSpain. The same arguments should also apply to Masdar Solar.

59. Self-evidently, in accordance with those assertions which are consensual between the Claimant and this party, the dispute is not between a Contracting State of the ICSID Convention and a national of another Contracting State, but rather between two Contracting States of the ICSID Convention: United Arab Emirates – to be precise, the Emirate of Abu Dhabi – and the Kingdom of Spain. Consequently, the Arbitral Tribunal lacks the jurisdiction to hear the dispute by dint of Article 25 of the ICSID Convention and Article 26 ECT.

(5) Under International Law Masdar Solar makes a public investment.

60. As has been set out above, we agree with the Claimant in the Doctrine which states that the ECT seeks to protect private investment. It has already been affirmed, in accordance with two different arguments of the Claimant, that its activity must be attributed to the Emirate of Abu Dhabi. There are also grounds to state that the Claimant, as it is just a *shell company* of Mubadala, has not made a private investment, but rather a public one. Consequently, it cannot be protected as an investor under the ECT (Article 26 of the ECT) nor resort to Arbitration pursuant to Article 25 of the ICSID Convention.

61. In the Bifurcation Request of the Kingdom of Spain, it was stated that in the event of companies wholly or partially owned by a State, they are not excluded from protection in the context of International Law on investment provided that they act commercially and not as a governmental instrument. In the work *Principles of International Investment Law,* it is asserted that:

> *"International investment law is designed to promote and protect the activities of private foreign investors. This does not necessarily exclude the protection of government-controlled entities as long as they act in a commercial rather than in a governmental capacity."*[23] *(Emphasis added)*

62. Following the same line, the Arbitral Tribunal of the case *Ceskoslovenska Obchodni Banka A.S. v. the Slovak Republic* pointed out that in the event of a company wholly or partially owned by a Government, it must act as an agent for the Government or carry out an essentially governmental function in order to consider that such Company is not a "national of another

[22] Observations of the Claimant regarding the bifurcation request of the Respondent, paragraphs 41 and 45.
[23] *Principles of International Investment Law*, Second Edition 2012, Oxford University Press, Rudolf Dolzer and Christoph Schreuer. Page 44. RL-0008.

Contracting State" for the purposes of Article 25 of the ICSID Convention and hence that it is not included within the jurisdiction of ICSID[24].

63. It can be gleaned from the proven facts that the actions carried out by the Claimant under the total control of Mubadala and ADFEC go beyond a simple investor-State commercial relationship. In this regard, there have been proper international relations between the States of Spain and Abu Dhabi. These actions were prior and subsequent to the investment:

(a) Prior to the investment, Mr. Tassabehji held meetings with the Government "*The meetings at government level were largely **political** cheerleading sessions e.g. could Abu Dhabi do more business in Spain, could Etihad fly to Madrid etc. The Spanish Ambassador to the UAE played a key role, he arranged a number of delegations."*[25] It is clear that the purpose was more characteristic of international relations between two sovereign States rather than the mere relations of a private investor. In actual fact, the Claimant failed to prove what "commercial" representation or capacity ADFEC had to talk or negotiate about an area with a Minister from the Spanish Government or about any other investments of Emirate of Abu Dhabi in Spain.

(b) Subsequent to the investment, different facts bear testimony to the performance of essentially governmental functions by the Claimant, Masdar and Mubadala:

(i) Worthy of special mention is the inauguration of the Gemasolar Plant in 2011, attended by major political figures from both Governments, including the Head of State of the Kingdom of Spain, the Crown Prince of the Emirate of Abu Dhabi and the Foreign Office Ministers of both countries[26]. There is no other equivalent act, with such distinguished international representation, at any of the other inaugurations of CSP Plants in Spain. The political relevance of this Act for both States was clear. It clearly goes well beyond mere relations between a private investor – host State.

(ii) ADFEC was able to lead the construction in the Emirate of Abu Dhabi of the CSP 100 MW Plant Sham 1. The Emir himself, the President of the UAE stressed that this had been possible thanks to the "*expertise* [the Emiratis workers] *gained, working closely with international companies*"[27]. The Joint Venture of ADFEC with Sener pertains to the acquisition of this know how.

(iii) The engineering students from Abu Dhabi had internships at plants of the Torresol Group to be trained during their stays. This educational training to strengthen the competitiveness of the Abu Dhabi company also corresponds to

[24] *Ceskoslovenska Obchodni Banka A.S. v. the Slovak Republic,* ICSID no. ARB/97/4, Decision on Jurisdiction Objections issued on May 24th 1999, paragraph 17. "[…] *for purposes of the Convention a mixed economy company or government owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function."* RL-0007.
[25] Statement by Mr. Tassabehji, paragraph 30.
[26] Accuracy expert report on the Claimant and its claim, paragraph 218.
[27] Accuracy expert report on the Claimant and its claim, paragraph 222.

an essentially governmental function. This training is also one of the priority economic and social targets of Abu Dhabi[28].

64. This activity carried out before and after the investment clearly goes beyond the action of a private investor and an investment of a purely commercial nature. It goes deep within the realm of international relations between two States and the discharging of essentially public or governmental functions of Abu Dhabi.

65. Hence, the Claimant's activity must not only be attributed to the Government of Abu Dhabi in accordance with the arguments of the Claimant. It has been proven that it is a public investment in view of (1) the origin of the capital from the Sovereign fund Mubadala; (2) the aim to pursue the public economic policy of Abu Dhabi and (3) the public earmarking of the obtained income. In other words, such income, if any, would serve the development of the economic policies of Abu Dhabi with the same purpose as income under public law.

66. It must thus be concluded that the Claimant, under the total control of Mubadala and ADFEC, has performed essentially public or governmental functions laid down by the Government of Abu Dhabi. Moreover, further emphasis should be given to the relationship at an international political level between two States which has been evident in the actions of Masdar and the Claimant.

67. This political and government activity clearly goes above and beyond the *object* and *purpose* for which Article 26 of the ECT was drawn up. It also breaches the investor requirement set out in Article 25 of the ICSID Convention.

68. In view of the above, if a State which is a signatory to the ECT fails to meet its commitments to another signatory State, this must be subjected to the dispute settlement mechanisms foreseen in Article 27 of the ECT[29]. By contrast, if a State which is not a signatory to the ECT carries out actions contrary to the terms of the Treaty, it would not be obliged to be subjected to the dispute settlement mechanisms and consequences foreseen in the Treaty. To put it simply, it is not bound by the ECT.

69. Paradoxically, in the present case, a mailbox company of a State which is not party to the ECT is claiming that the rights that it supposedly has under the ECT should be respected. However, said State, by exercising its Sovereignty, has not wished to sign and hence has no obligation with regard to said ECT. To put it another way: a State does not offer this protection framework to investments in its territory and, nevertheless, claims that said protection framework applies to the investments of its mailbox companies in another State.

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[28] Accuracy expert report on the Claimant and its claim, paragraph 207, y *The Abu Dhabi Economic Vision 2030, the Government of Abu Dhabi*, November 2008. R-0002

[29] ECT, Article 27 on Dispute settlement between the Contracting Parties: "*1. Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.*
2. If a dispute has not been settled [...]*either party thereto may, except as otherwise provided in this Treaty or agreed in writing by the Contracting Parties* [...] *submit the matter to an Arbitral Tribunal «ad hoc» under this Article*." RL-0002.

70. It would be contradictory for it to be more advantageous for a State not to be party to the ECT than to be party thereunto and have to be subjected to the procedure of Article 27 ECT. In other words, it would be contradictory that it could make use of the advantages of the ECT, without having to meet the obligations required under ECT. Neither is this the *objective* and *purpose* of the ECT.

(6) Conclusion

71. In view of the above, by means of three different arguments, two of them accepted by the Claimant, there are grounds to conclude that the dispute is not between a Contracting State of the ICSID Convention and a national of another Contracting State, but rather between two Contracting States: United Arab Emirates - to be precise, the Emirate of Abu Dhabi- and the Kingdom of Spain. This entails a breach of the requirement to be a *national* set out in Article 25 of the ICSID Convention.

72. The investment which the Claimant argues to have made is attributable to a State. Furthermore, it fails to meet the requirement to constitute a private investment. For both reasons it cannot claim the protection mechanism set out in Article 26 of the ECT.

73. Consequently, with all due respect, the Arbitral Tribunal lacks the jurisdiction to hear the dispute as the Claimant fails to meet the requirements of Article 25 of the ICSID Convention and Article 26 ECT.

B. Lack of Jurisdiction of the Arbitral Tribunal as Masdar Solar & Wind Cooperatief U.A. did not make an investment in the Kingdom of Spain according to Articles 26 and 1 (6) of the ECT and Article 25 (1) of the ICSID Convention.

(1) Introduction

74. Under Article 26 (5) of the ECT, the Claimant has decided to submit the present dispute to a Tribunal formed in accordance with the regulations of the ICSID Convention. This decision means that the jurisdiction of the present Arbitral Tribunal will require compliance with the requirements set down in this regard both in the ECT as well as in the ICSID Convention.

75. Article 26 of the ECT stipulates that in order for an Arbitral Tribunal to hold jurisdiction over a dispute, the dispute raised must pertain to an investment in the territory of a Contracting Party made by an investor of another Contracting Party. For the purposes of the ECT this investment concept is set out in Article 1(6).

76. According to the literal meaning of the words used in Article 1(6) ECT, its context, as well as the objective and purpose of the ECT, the concept of "*Investment*" set out in the ECT is based on the necessary existence of an investment in an objective sense. In other words, it is based on the necessary existence of a contribution of economic resources and the assumption of risks by an investor.

77. In turn, Article 25 of the ICSID Convention indicates that the Centre holds jurisdiction with regard to any differences of a legal nature which may arise directly from an *"investment*" between a Contracting State and the national of another Contracting State.

78. The term "investment" set out in Article 25 of the ICSID Convention requires the existence of a contribution of funds by the investor and the assumption of a risk. This is an investment in the objective sense of the word. This is why the Arbitral Tribunals of the ICSID, irrespective of the content of the specific Investment Treaty on which the claims of a Claimant are based, will only have jurisdiction when the Claimant has made an investment in the objective sense of the word; when it has made an effective contribution of economic resources and has assumed a risk.

79. In the present case we will prove that the contribution of funds required to make the investments related with the present arbitration were made by Mubadala and ADFEC. However, these two entities are not Claimants in this arbitration.

80. We will also ascertain how the different risks associated with the investments related to the present arbitration correspond to Mubadala and ADFEC. The commercial risk, the financial risk and the management risk deriving from the alleged investments correspond to said two entities. However, these two entities are not Claimants in this arbitration.

81. It will be proven that the Claimant is a mere shell company which lacks the minimum financial, technical and management capacity to make an investment such as the one under scrutiny in the present arbitration. We will also verify how the appearance of the Claimant did not alter the resources and risks contribution chart in line with which the investment was planned and implemented.

82. All of the above will allow us to conclude that the Arbitral Tribunal to whom we have the honour of addressing the present memorial lacks jurisdiction *"ratione materia"*.

(2) Articles 26 of the ECT and 1(6) of the ECT require the existence of an investment in the objective sense of the word to determine the Jurisdiction of an Arbitral Tribunal

83. In this regard, one of the essential jurisdictional requirements set out in Article 26 of the ECT in order to resort to arbitration is the existence of an investment.

> *"Article 26. Settlement of disputes between an investor and a contracting party.*
>
> *1. Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably*
>
> *2. If such disputes cannot be settled according to the provisions of paragraph 1[…], the Investor party to the dispute may choose to submit it for resolution: […] c) in accordance with the following paragraphs of this Article. [pertaining to international conciliation or arbitration] […]." (emphasis added)*

84. The term "investment" is defined, for the purposes of the ECT, in its Article 1(6)[30]. By reading said Article it can be concluded that the ECT demands compliance with the following requirements to determine the existence of an "investment":

i) The existence of an investment in the objective or ordinary sense of the word.
ii) Said investment activity in the objective sense of the word is made in any kind of asset within the broad list thereof set out in Article 1(6) of the ECT.
iii) Said asset is associated with an Economic Activity in the Energy Sector.
iv) Said asset is directly or indirectly owned or controlled by an investor.

85. The lack of any of these requirements means the non-existence of any investment under Article 1(6) of the ECT and hence the lack of Jurisdiction of the Arbitral Tribunal according to said Article 26 of the ECT.

86. As a first condition, Article 1(6) requires the existence of an investment in the objective sense of the word. This means the contribution of economic resources and the assumption of a risk. Said requirement can be gleaned from the different usage that Article 1(6) makes of the word investment: sometimes to identify the word which has a given meaning in the ECT in which case it uses the word investment between speech marks and on other occasions as an element that must necessarily be used to define the word between speech marks, in which case the word investment is used without speech marks.

87. When the ECT uses the word investment without speech marks, it is referring to the standard meaning of the word investment. The "Diccionario de la Real Academia de la Lengua Española" (*main Spanish language dictionary*) defines the words "inversión" and "invertir" as follows:

[30] ECT, Article 1(6): *"Investment", means every kind of asset, owned or controlled directly or indirectly by an investor and includes:*
a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
b)) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
d) intellectual property;
e) returns;
f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.
A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.
"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat..
"Investment" will refer to any investment related with an Economic Activity in the Energy Sector and to investments or classes of investment designated by a Contracting Party in its region as "Charter Efficiency Projects" and which have been notified as such to the Secretariat.". RL-0002

*"**inversión**: 1. f. Action and effect of investing. […]"*[31]

*"**invertir**. […] 2. tr. Use, expend, allocate money.*

3. tr. Use or occupy time.[…]"[32]

88. In turn, *Black´s Law Dictionary* defines "investment" and "invest" in the following way:

> *"**investment**.[…] 1. An expenditure to acquire property or assets to produce revenue; a capital outlay."*
>
> *"**invest**, […] 2. To apply (money) for profit […].*
>
> *3. To make an outlay of money for profit […]"*[33]

89. From the above definitions, it can be concluded that the ordinary meaning of the word investment essentially concerns an active behaviour, an action, which consists of making a monetary contribution with the purpose of obtaining a profit or return.

90. In particular, the Tribunal in the case *Romak v. Uzbekistan* referred to the ordinary meaning of the word "investment" as follows:

> *"177. The "ordinary meaning" of the term "investment" is the commitment of funds or other assets with the purpose to receive a profit or "return", from that commitment of capital. The term "asset" means property of any kind".* [34] *(Footnotes omitted).*

91. Accepting that the words "Investment" and investment used in Article 1(6) have these meaning would lead to absurd results. It would mean that certain provisions set out in Article 1(6) ECT would be meaningless as can be observed by reading paragraph two of Article 1(6) *in fine* and paragraph three of said same Article. It would lead to a circular interpretation without any meaning.

92. A reading of said Article 1(6) of the ECT leads us to conclude that the term "investment" for the purposes of the Treaty is undoubtedly broad. This breadth essentially derives from the listing of the assets that an investment may consist of. Hence, a standard criterion is required for the purposes of establishing, with minimum guarantees of legal certainty, a criterion standard conducive to resolving the question of whether an active potential, activity, service must be regarded as an "investment" for the purposes of the Treaty. Said "standard" can be found in the word investment in its everyday sense. Said word will be the "benchmark" against which any asset, activity or service would have to be compared for the purposes of being able

[31] RAE Dictionary of the Spanish Language, electronic version (22nd edition with amendments up to 2012): "investment". Real Academia Española. R-0019.
[32] RAE Dictionary of the Spanish Language, electronic version (22nd edition with amendments up to 2012): "invertir". Real Academia Española. R-0020.
[33] Black´s Law Dictionary, Brian A. Garner, Editor in Chief, Ninth Edition, Thomson Reuters, 2009, page 902. RL-0019.
[34] *Romak v. Republic of Uzbekistan*, UNCITRAL PCA Case No. AA280 Award of 26 November 2009. RL-0020. It should be pointed out that in the paragraph transcribed there are two footnotes in which the Tribunal provides the definition of investment and asset set out in Black´s Law Dictionary.

to settle the issue of whether the latter fit into the concept of "Investment" for the purposes of the ECT.

93. In this regard, in The Energy Charter Treaty. The Notion of Investor the following is stated:

> *"As noted by Manciaux: if a definition is necessary, it could not result from an enumerative method retained in the near totality of international treaties, if not because an enumeration, no matter how long, has never constituted a definition."*[35]

94. In the case *Romak v. Uzbekistan* the following indication is provided:

> *""First, the approach advanced by Romak deprives the term "investments" of any inherent meaning, which is contrary to the logic of Article 1(2) of the BIT. Indeed, as already mentioned, the categories of investments enumerated in Article 1(2) of the BIT are not exhaustive, and do not constitute an all-encompassing definition of "investment Both Parties agree that this is the case. Therefore, there may well exist categories different from those mentioned in the list which, nevertheless, could properly be considered investments protected under the BIT. Accordingly, there must be a benchmark against which to assess those non-listed assets or categories of assets in order to determine whether they constitute an "investment" within the meaning of Article 1(2). The term "investment" has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT"*[36]

95. The Arbitral Tribunal in the case "Caratube" against the Republic of Kazakhstan[37][38] decided in the same way. In this case the Tribunal, although it was an ICSID case, supported the decision set out in its Award in the specific interpretation of Article I (1) (a) of the BIT signed between the United States of America and the Republic of Kazakhstan. In this case, 92% of the Claimant's shares were directly held by a US citizen which, in the opinion of the Claimant, was enough to consider that they had a protected investment for the purposes of the Treaty. However, the Arbitral Tribunal stated that:

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[35] *The Energy Charter Treaty. The Notion of Investor*. Crina Baltag, Kluwer Law International BV, 2012, The Netherlands, page 171. RL-0012. In the footnote, number 19 page 171 of the aforementioned book the following is stated: "*Sebastian Manciaux "The Notion of Investment: New Controversies", Journal of World Investment and Trade 9, no 6 (2008): 6. See also, Robert Azinian and others v. United Mexican States, Award of 1 November 1999, para. 90: "Labelling is, however, no substitute for analysis". Also, the Cour D´Appel de Paris in the Decision of 25 September 2008 in the case of Czech Republic v. Pren Nreka, for the annulment of the Arbitral Award of 15 March 2007, 5:: "les dispositions du TBI (BIT) qui viennent de être rappelées ne fournissent pas de critère pour caractériser EC quëst un investissement mais donnent seulement une énumération, et encore de manière non limitative, des cas conidérés comme des investissements […]".The UNCTAD "Scope and Definition" 2011 refers to the need of precise definitions of "investment" and concludes that:: "Clear benchmarks as to what is an investment must be developed so as to assess whether a given asset or transaction is an investment or some kind of uncovered commercial transaction". (UNCTAD, Scope and Definition, 2011, 9),".*

[36] *Romak v. Republic of Uzbekistan*, UNCITRAL PCA Case No. AA280 Award dated November 26th 2009. Paragraph 180. RL-0020.

[37] *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, (Case ICSID) No. ARB/08/12. Award dated June 5th 2012. RL-0021

[38] . *Caratube International Oil Company LLP v. The Republic of Kazakhstan.* Award confirmed in all its aspects by the ad hoc Committee of the ICSID on February 18th 2014. RL-0021

> *"Article I(1)(a) of the BIT defines 'investment' from the perspective of assets, claims and rights to be protected (or accorded specific treatment, prescribed in the following provisions of the BIT). As one of the goals of the BIT is the stimulation of flow of private capital, BIT protection is not granted simply to any formally held asset, but to an asset which is the result of such a flow of capital. Thus, even though the BIT definition of 'investment' does not expressly qualify the contributions by way of which the investment is made, the existence of such a contribution as a prerequisite to the protection of the BIT is implied."*

96. As regards the term "investment" set out in Article 1(6) of the ECT and the necessary existence of a real or objective investment to be regarded as such, it is worth highlighting that indicated by Crina Baltag:

> *"The interpretation of Article 1(6) of the ECT suggests that while the definition of 'Investment' is broad enough to encompass 'every kind of asset, owned or controlled directly or indirectly by an Investor', it is not boundless. Paragraph 3 of Article 1(6) restricts the notion of 'Investment' to 'investment associated with an Economic Activity in the Energy Sector'. Besides the required association between the Investment and the Economic Activity in the Energy Sector, the Investment must be an investment within the ordinary meaning of the term. Consequently, not 'every asset' is an investment under ECT, but only those assets that are investments. For example, sale of goods and other one-off transactions, although associated with an Economic Activity in the Energy Sector, may not be construed as Investments, as they do not satisfy the requirement to be investments within the ordinary meaning of the term*." [39] (Emphasis added)

97. Following the same line The Energy Charter Treaty. The Notion of Investor stated as follows:

> *"See also, the comments of Cabrol with respect to the non-exhaustive list of assets in the definition of "investment" in BITS:*
>
> *it will not suffice for the tribunal to check that the operation matches one of the items listed in the Article. This only checks that the form of investment in question falls under the BIT. However, it will also have to consider whether the operation itself qualifies as an investment."* [40]

98. With a view to defining an objective concept of investment, Zachary Douglas states that:

> *"Rule 23. The economic materialization of an investment requires the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of commercial return."* [41]

[39] *The Energy Charter Treaty. The Notion of Investor*. Crina Baltag, Kluwer Law International BV, 2012, The Netherlands. Page 178. RLA-0012

[40] *The Energy Charter Treaty. The Notion of Investor*. Crina Baltag, Kluwer Law International BV, 2012, The Netherlands page 175, footnote to page 34. RLA-0012

[41] *The International Law of Investment Claims*, Douglas, Cambridge University Press 2009, 189. RL-0022.

99. Consequently, an Arbitral Tribunal constituted in order to hear a dispute arising from the ECT will lack jurisdiction "ratione materia" if the Claimant party has failed to make an investment in the objective sense of the word. In other words, if the Claimant party has not made any economic contributions and has not assumed the characteristic risks of the investment.

(3) Article 25 (1) of the ICSID Convention subjects the jurisdiction of its Arbitral Tribunals to the existence of an investment in the objective sense of the word

100. Article 25 of the ICSID Convention states that the dispute must arise directly from an investment. The need of an investment in the objective sense of the word was stated in multiple arbitration Awards. In the case *Saba Fakes v. Turquía*, the Arbitral Tribunal considered that:

> *"110. Second, the present Tribunal considers that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention. In the Tribunal´s opinion, this approach reflects an objective definition of "investment" that embodies specific criteria corresponding to the ordinary meaning of the term "investment", without doing violence either to the text or the object and purpose of the ICSID Convention. These three criteria derive from the ordinary meaning of the word "investment", be it in the context of a complex international transaction or that of the education of one´s child: in both instances, one is required to contribute a certain amount of funds or know-how, one cannot harvest the benefits of such contribution instantaneously, and one runs the risk that no benefits would be reaped at all, as a project might never be completed or a child might not be up to his parents, hopes or expectations."* [42] *(emphasis added).*

101. The Arbitral Tribunal followed the same line in the *case Alpha v. Ukraine*[43]. The Tribunal in the case *Toto Construzioni v. Líban* also stated that:

> *"In the absence of specific criteria or definitions in the ICSID Convention, the underlying concept of investment, which is economical in nature, becomes relevant: it implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time."* [44]

102. The latest Award in the case *KT Asia Investment Group B.V. v. Republic of Kazakhstan* indicated that both elements must be analysed together, since the purpose of obtaining a return is part of the risk element[45].

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[42] *Mr. Saba Fakes v. Republic of Turkey* ICSID No. ARB/07/20, Award dated July 14th 2010. RL-0013.

[43] *Alpha Projektholding GmbH v. Ukraine*, ICSID No. ARB/07/16, Award dated November 8th 2010. RL-0014.

[44] *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID No. ARB/07/12, Award of Jurisdiction issued on September 11th 2009 Paragraph 84. RL-0023.

[45] *KT Asia Investment Group B.V.c. Republic of Kazakhstan*, ICSID No. ARB/09/8, Award issued on October 17th 2013. Paragraph 170: "*The Tribunal agrees with the Parties that a contribution of money or assets (that is, a commitment of resources), duration and risk form part of the objective definition of the term "investment". The expectation of a commercial return is sometimes viewed as a separate component. This*

103. Consequently, the Arbitral Tribunals formed under the ICSID Convention will lack jurisdiction "ratione materia" if the Claimant party has failed to make an investment in the objective sense of the word. In other words, the Tribunal will lack jurisdiction if the Claimant party has not made economic contributions nor assumed any risks characteristic of the investment.

(4)) Masdar Solar has not made an investment either for the purposes of Article 1(6) of the ECT or of Article 25 of the ICSID Convention: Masdar Solar has not made a contribution of funds nor has it assumed the risks characteristic of an investment.

104. As we have set out above, both the ECT and the ICSID Convention subject the jurisdiction "ratione materia" of its Arbitral Tribunals to the existence of an investment in the objective sense of the word.

105. As regards the investment related with the present arbitration, the contributions of funds and the assumption of risks are only attributable to Mubadala and ADFEC. These two Entities are the only ones that have contributed the funds and assumed the risks affecting the investment related to the present arbitration. However, neither one entity nor the other are Claimants in the present Arbitration.

106. The Claimant views this opinion at different junctures of its Claimant's Memorial. To be precise:

- Paragraph 144: "Any proposed investment to be made by the Claimant had to be considered and approved by ADFEC and Mubadala before the Claimant could proceed to make the investment. This is because the equity for the Claimant's investments was ultimately provided by Mubadala and via ADFEC." (Emphasis added and footnotes omitted")

- Paragraph 163: "On 27 May 2008, Dr Sultan and Mr Tassabehji attended a meeting of the Mubadala Investment Committee, which provided Mubadala's approval of ADFEC's funding (€79.37 million) for the Claimant to make the investment in the CSP Plants by taking a 40% equity interest in Torresol Energy" (Emphasis added and footnotes omitted")

- Paragraph 166: "The financing offered by the Spanish banks was initially limited recourse but once commercial operations had started (and the performance tests completed in the case of the performance guarantee), the guarantees would fall away and the financing would be without recourse to the shareholders. During the construction and testing phases, Torresol Energy, backed by guarantees from its share-holders (and in the case of ADFEC, counter guaranteed by Mubadala), took the risk of changes to the regulatory regime (…)" (Emphasis added and footnotes omitted").

- Paragraph 178: "The proposed investment by the Claimant in the Arcosol and Termesol CSP Plants was approved by the ADFEC Investment Committee in June 2009. On 16 June 2009 Dr Sultan presented the proposal to the Mubadala Investment Committee seeking approval for ADFEC and the Claimant to make the investment in the Arcosol and

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Tribunal is rather of the opinion that such expectation is part of the risk element. Be this as it may, an investor commits resources with a view to generating profits, which necessarily implies a risk." RL-0015.

Termesol CSP Plants, to execute the EPC contract and to enter into the project finance documentation. Mubadala granted its approval subject to a requirement that the EPC contract should only be entered into on receipt of project financing" (Emphasis added and footnotes omitted").

- Paragraph 179: "In July 2009, it was necessary to obtain a further approval from the Mubadala Investment Committee because of an increase in the equity commitment required from the Claimant. The Mubadala Investment Committee granted approval for the project finance documents to be signed, but on the understanding that construction at Arcosol and Termesol plants would not commence until confirmation that they were included on the Pre-Assignment Register" (Emphasis added and footnotes omitted").

- Paragraph 180: "On 24 July 2009, Torresol Energy entered into a €540 million loan agreement with Banco Santander, La Caixa, Caja Madrid, BBVA, Banesto, Banco Popular and ICO. Torresol Energy, backed by guarantees from its shareholders (and in the case of ADFEC, counter guaranteed by Mubadala), took the risk of changes to the regulatory regime (…)" (Emphasis added and footnotes omitted").

107. With the above assertions the Claimant makes it clear that the contribution of funds to develop the investments related to the present arbitration was made by Mubadala and ADFEC. It can also be gleaned that the risks deriving from the contribution of said funds solely pertained to said Entities.

108. In line with the above, the financial feasibility of the projects at CSP Plants related with the present arbitration was guaranteed through the equity of Mubadala.

109. We should recall that one of the essential requirements to be met at the stage of promoting the Plants related with the present arbitration was their registration on the so-called Administrative Pre-Assignment Register. To obtain enrolment on said Register, the Project promotor would have to submit a request for the inclusion of the installation addressed to the Directorate-General of Energy Policy and Mining "for a specific project". According toArticle 4 (4) of RD-L 6/2009[46], it was required to prove compliance of the 9 requirements laid down in Article 4 (3) of RD-L 6/2009 at said request. To be precise, letter e) required:

> *"e) To have sufficient financing or own economic resources to commit to at least 50 per cent of the installation investment, including its evacuation line and connection to the carrier or distribution network."*

110. The way of guaranteeing the financial feasibility of the projects related with the present arbitration was to make a call on equity from Sener and Mubadala. To this end, the consolidated Balance Sheet and Income Statement audited by KPMG of Mubadala was provided. Specifically stating that:

[46] Royal Decree-Law 6/2009, April 30th, published in the Official State Gazette un. 11 issued on May 7th 2009. C-0051_ESP.

"the equity of both companies, summarised in the table below, also ensures, at the close of 2008, compliance with the requirement foreseen in section e), Article 4.3 of Royal Decree-Law 6/2009"[47]

111. In the same way, the financial feasibility of projects at Thermosolar Plants related to the present arbitration was proven by the Project finance offers that Mubadala and Sener had received from different financial institutions[48]. Firm offers that are not addressed to the Claimant. Said offers were addressed to those parties who really assumed the specific risks of the investment: Mubadala and Sener[49].

112. Before the Kingdom of Spain and the financial institutions it became clear that the contribution of funds and the assumption of risks related to the investment which is the object of this arbitration would lie with Sener and Mubadala. Under no circumstances would said role be attributed to the Claimant.

113. An important document for the purposes of proving the lack of investment by the Claimant in the present arbitration is the Joint Venture Agreement signed by Masdar and Sener[50].

114. The purpose of said Joint Venture was to satisfy the objectives and requirements of Mubadala[51]. By way of said Joint Venture and its subsequent implementation, Masdar and Mubadala assumed the commercial risks characteristic of any investor: the risk of obtaining a return in its investment. The main return that Mubadala is expecting to acquire by way of the investment related with the present arbitration was to access the technological know-how that Sener could provide it with to comply with one of the main objectives of Masdar: to become a world leader in the design and development of CSP technology[52]. Not to mention that along with said main return Mubadala aimed to benefit from the tariff level granted by the Spanish regulatory framework which favoured the development of CSP technology[53]. The Claimant does not run said commercial risk and plays no part in enjoying said returns. It is Mubadala that assumes the risk characteristic of any investor, the commercial risk: The risk of obtaining a return in Know – how and an economic return lies with Mubadala.

115. In line with the above, it is Mubadala that assumes towards Sener the obligation to make the contributions of funds required to develop the CSP projects related to the present arbitration in the proportion determined to this end: 60% Sener - 40% Mubadala through Masdar[54]. Consequently, it is Mubadala that, through Masdar and in said proportion, contributed the funds required to develop the projects related with the present arbitration, consequently assuming all the risks characteristic of said investment.

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[47] Requests for remedying and annexes submitted to the Kingdom of Spain in the procedures to enrol on the Pre-assignment Register PRE- TER 0004 and PRE –TER 0005: Annex PRE – TER 0004 points 4.9 and 4.10. Annex PRE-TER 0005 points 3.9 and 3.10. R-0021.

[48] Requests for remedying and annexes submitted to the Kingdom of Spain in the procedures to enrol on the Pre-assignment Register PRE- TER 0004 and PRE –TER 0005: Annex PRE – TER 0004 points 4.11. Annex PRE-TER 0005 point 3.14. R-0021.

[49] Firm financing offers offered to Mubadala and Sener. R-0022.

[50] Joint Venture Agreement between Mubadala and Sener. C-0044.

[51] Joint Venture Agreement between Mubadala and Sener. Preamble letters A, B, C and D. C-0044.

[52] Presentation to MDC Investment Committee. Pages 7, 9, 12. C-0042.

[53] Presentation to MDC Investment Committee. Page 10.C- 0042.

[54] Joint Venture Agreement between Mubadala (sic) and Sener. Clauses 6.2, 6.3 and 7. C-0044.

116. In this context the Claimant, as will be examined later, is nothing more than a shell company lacking any organisation and the human, technical and financial capacity to coordinate the investment project related to the present arbitration. According to the Accuracy expert report on the Claimant and its claim accompanying this Memorial[55], the annual accounts of the Claimant demonstrate that the latter is a company without any economic activity which is used as an investment vehicle of the Sovereign fund Mubadala.

117. The Claimant is just a shell company waged between the sole investor Mubadala and the Plants related to the present arbitration. Furthermore, in view of the fact that the Claimant is just a "Shell Company" the joint venture agreement between Mubadala and Sener has specifically already stipulated that the arrival on the scene of the Claimant would not affect the obligations that Mubadala had assumed under said contract:

> *"ADFEC acknowledges and agrees that following the execution of the Deed of Adherence ADFEC shall be joint and severally liable with Masdar Solar in respect of the fulfilment by Masdar Solar of its obligation under this Agreement in its capacity as a Shareholder of Torresol Energy.*
>
> *The parties hereby state that in relation to the obligations assumed by Masdar Solar under this Agreement following the Deed of Adherence, ADFEC shall where necessary procure that Masdar Solar fulfils each and all of said obligations, so in case of infringement of any of them by Masdar Solar, Sener shall be entitled to claim, indistinctively, against ADFEC and/or Masdar Solar."*[56] *(Emphasis added)*

118. The arrival of the Claimant did not reduce the contractual risks assumed by Mubadala and ADFEC to make the investment related with the present arbitration. As they were the parties responsible for compliance with said contractual obligations, Mubadala and ADFEC assumed the risk inherent therein.

(5) Conclusion

119. It can be gleaned from the paragraphs above that the contribution of the funds required to make the investment related to the present arbitration pertains to Mubadala and ADFEC.

120. It was the equity of Mubadala that was offered to the Kingdom of Spain to guarantee that the necessary economic resources were available in order to be able to carry out the implementation of the Plants related to the present arbitration.

121. It was Mubadala who negotiated with the Financial Entities the terms of the loans that were going to enable the implementation of the projects related to the present arbitration, assuming the attendant risks.

122. It is Mubadala and Masdar who assume the commercial risk of this investment: to obtain important know-how and economic returns.

[55] Economic Report on the Claimant and its claim issued by Accuracy on September 15th 2015, pages 21 to 28.
[56] Joint Venture Agreement between Mubadala (sic) and Sener. Clause 5.3.2, C-0044

123. It is Mubadala, through ADFEC, who assumes the obligations under the joint venture agreement with Sener. Assumption of obligations and the extension of responsibility for them which was not reduced nor limited by the appearance of the Claimant.

124. However, neither Mubadala nor ADFEC have lodged a claim in the present arbitration.

125. In view of all of the above, the Claimant is nothing more than a shell company lacking any organisational, technical and financial capacity to implement a project like the one analysed in the present arbitration.

126. The Claimant is a "Shell Company" without any economic activity as is proven in the expert report by Accuracy which accompanies this Memorial[57].

127. Consequently, the contribution of the funds required to make the investment related with the present arbitration was made by Mubadala and ADFEC. Furthermore, these entities assume the commercial risk, the financial risk and the management risk which characterise the investment in question. No risk can be attributed to the Claimant. This is why it must be asserted that the Claimant has not made an investment in the objective sense of the word: The Claimant has not provided funds nor has it assumed the risks characteristic of an investment.

128. The lack of any investment by the Claimant in the objective sense of the word must determine the lack of Jurisdiction of the Arbitral Tribunal both by dint of the direct application of Articles 26 (1) and 1 (6) ECT or the application of Article 25 of the ICSID Convention: lack of Jurisdiction "ratione materia" as there is no investment.

C. Lack of Jurisdiction of the Arbitral Tribunal *ratione personae* to hear the dispute raised by the Claimant owing to absence of any investor protected in accordance with the ECT. The Claimant does not come from the territory of another Contracting Party as the Netherlands, just like the Kingdom of Spain, are Member States of the European Union. The ECT does not apply to disputes pertaining to intra-EU investments.

(1) Introduction: need for the existence of an investor "from another Contracting Party"

129. The Claimant has resorted to the present arbitration under Article 26 of the ECT[58] pertaining to a dispute settlement between an investor and a Contracting Party.

130. Article 26(1) of the ECT necessarily requires a dispute between "a Contracting Party" and an "investor from another Contracting Party" which inevitably entails the exclusion of said Article from the assumptions whereby an investor from an EU State has a dispute with a State of the European Union (henceforth "EU") with regard to an investment in said State (henceforth, the "Intra-EU dispute" and the "intra-EU investment", respectively).

131. In the event that the first of the grounds for a lack of Jurisdiction set out is not considered as the Tribunal believes that what is relevant is the formally claimant entity, what is for sure is that Masdar is a legal entity based in the Netherlands. Both the Netherlands (State of the

[57] Economic Report on the Claimant and its claim issued Accuracy on 15 September 2015.
[58] ECT. RL-0002.

nationality of the Claimant) as the Respondent the Kingdom of Spain are Member States of the EU, also a Contracting Party of the ECT.

132. What's more, both the Kingdom of Spain and the Netherlands were already EU members at the time when they ratified the ECT so they could not contract with each other obligations in the context of the Internal energy market, harmonised by the EU.

133. The investment by the Claimant is an investment made in the context of the internal electricity market of the EU. Within this framework, the EU system grants the investor who is an EU Citizen a specific and preferential protection which is granted by ECT and any BIT.

134. In the event of any dispute between the ECT and EU Law, which is also the applicable international Law, the latter must prevail. EU Law forbids the existence of any dispute settlement mechanism other than that laid down by its Treaties which may interfere with the bases of the internal Market.

135. To settle the present arbitration, the Honourable Tribunal must make its opinion known about the rights of an alleged intra-EU investor vis-à-vis the Spanish State on the Internal electricity market, interfering with the competences of the EU judicial system.

136. Hence, and with all due respect, the Arbitral Tribunal lacks the jurisdiction to hear the claim submitted by the Claimant.

(2) The EU system grants the investor who is an EU Citizen an specific and preferential protection which is granted by ECT and any BIT

137. The EU is an economic integration area whose Internal Market regulations include a comprehensive system of promotion and protection for intra-EU investments, deriving from preferential application with regard to that foreseen in the ECT.

138. Said Internal Market assumes, as stated in Article 26 of the current Treaty on the Functioning of the EU (henceforth, "TFEU")[59] "*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured".*

139. The measures pertaining to the Internal Market include the Directives which have set the targets that the Member States should reach to achieve the internal electricity market[60].

[59] Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union published in the Official Journal of the European Union on 26 October 2012 (the former and the latter, henceforth, the "TEU" and the "TFEU", respectively). R-0001.

[60] Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids, published in the Official Journal of the European Union on 13 November 1990 (English version) (R-0023); Council Directive 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users, published in the Official Journal of the European Union on 17 July 1990. (Spanish version) (R-0024); Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, published in the Official Journal of the European Union on 30 January 1997. (Spanish version) (R-0025); Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the

On the other hand, energy policy has formed part of EU policies since before the signing of the ECT[61].

140. In actual fact, the promotion by the Kingdom of Spain of investment in Renewable Energies fits in with the obligations that Spain, in its status as a Member State, assumed to meet the targets laid down by EU Directives as the Claimant's Memorial itself acknowledges in paragraphs 7, 8, 69, 80 and subsequent paragraphs, 112, 189, 190, 193 and 269. One of the main targets imposed by the aforementioned Directives is investor protection. Directive 2009/28/EC states in its recital (14):

> *"The main purpose of mandatory national targets is to provide certainty for investors (…)."*[62]

141. It is these very Directives which enabled the Kingdom of Spain to incentivise investment by granting public aid as allowed by the EU with certain limitations.

142. This unique space assumed by the Internal Market is complemented by total protection of Fundamental Rights and the asset liability principle of Member States for breaches of Legislation, all guaranteed by the jurisdictional system of the EU which is assigned the monopoly as regards the final interpretation of EU Law.

143. In actual fact, the institutional and judicial framework of the EU offers the appropriate judicial actions and appeals when investor rights are impaired. The investor can always claim damages from State before the competent national courts based on the fact that it has been unfairly discriminated against compared with nationals of said Member State. It may also report any breach of European Union Law which may be invoked directly, including energy legislation. In the event that, upon settling the dispute, any doubts arise as to the interpretation of Community law, national courts may and are obliged, in the final instance, to raise pre-judicial question with the European Court of Justice in accordance with Article 267 of the TFEU. When a national court fails to meet its obligations under EU Law, the injured party may claim damages from the Member State.

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promotion of electricity produced from renewable energy sources in the internal electricity market, published in the Official Journal of the European Union 27 October 2001.(C-0022) ; Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity**,** published in the Official Journal of the European Union on 15 July 2003. (Spanish version) (R-0026), Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, published in the Official Journal of the European Union on 5 June 2009 (C-0050).

[61] At present Title XXI of the TFEU. The origins of the present EU go back to the signing of the Treaty of Paris on 18 April 1951 creating the European Coal and Steel Community (the main energy sources in the region at the time) or "ECSC". This was followed by the creation of the European Economic Community ("EEC") and the European Atomic Energy Community ("EURATOM") in the Treaty of Rome on 25 March 1957. R-0001.

[62] Directive 2001/77/EC in its recital (14) also asserts that*: "One important means to achieve the aim of this Directive is to guarantee the proper functioning of these mechanisms, until a Community framework is put into operation, in order to maintain investor confidence"* (referring to the support mechanisms for renewable energy sources). C-0022.

144. This total investment protection and promotion system means that no distinction is made within the EU between investors from one Member State or another but rather simply between EU investors and investors from third party countries. The foreign investor category in the EU thus solely pertains to the investor from third party countries.

145. The EU protection standard entails an additional obligation, which is unrivalled, not only in terms of Investment Treaties, but also in any other international Treaty, which prohibits any type of regulation that dissuades the EU investor from setting up in the Member State. As stipulated by the ECJ with regard to the predecessor of Article 54 of the TFEU:

> *"According to settled case-law, Article 43 EC precludes any national measure which, even if applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Union nationals of the freedom of establishment that is guaranteed by the Treaty (see, to that effect, inter alia, Case C‑19/92 Kraus [1993] ECR I‑1663, paragraph 32; Gebhard, paragraph 37; Case C‑442/02 CaixaBank France [2004] ECR I‑8961, paragraph 11; and Case C‑169/07 Hartlauer [2009] ECR I‑0000, paragraph 33 and the case-law cited)."*[63] *(emphasis added)*

(3) The preferential application between EU Member States of their own protection system is reflected in the wording, context and purpose of the ECT

146. The intra-EU investor protection system preferably applies over any other international Treaty. This conclusion, simply deriving from the unique nature of the EU, is also recognised in the wording of the ECT itself.

(3.1) The actual wording of the ECT envisages that between EU Member States the EU system is preferably applied.

147. In actual fact, the definition of the Contracting Parties of Article 1(2) of the ECT includes the Regional Economic Integration Organisations (henceforth, in the singular or plural "REIO") like the EU, the only REIO that forms part of the ECT.

148. Article 1(3) of the ECT also defines the REIO as "*an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters"* (emphasis added). This Article recognises the special nature of the EU as an international organisation on which its Member States have bestowed competences in certain matters in an irrevocable and legally binding manner. It is evident that if the ECT had not wished to consider the reality that part of the subject matters that constitute the object of the ECT were solely decided by the EC, it would have omitted the last section, bearing in mind that the EC is the sole REIO that has subscribed to the ECT.

149. In the same way, Article 1(10) ECT defines "Territory" of the REIO, again referring to the provisions of said organisation, in other words, of the EU.

[63] Sentence by the European Court of Justice dated 11 March 2010, Case C‑384/08, Attanasio Group [2010] ECR I‑2055, paragraph 43. R-0027.

150. Article 16 stipulates the compatibility rules between previous and subsequent Treaties with the ECT. These Treaties include those which regulate the EU which prevail over the ECT in intra-EU relations.

151. Article 25 of the ECT prevents, as a consequence of the signing of the ECT and through the most favoured nation clause, the total intra-EU investment promotion and protection system from extending to signatory States of the ECT who are not Member States.

152. This reality is also apparent in Article 36(7) of the ECT when it accepts that the EC and the Member States vote on the subject matters that fall within its respective competencies foreseeing that: "*A Regional Economic Integration Organization shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Treaty*".

153. Finally, Article 26, section (1) requires the conflict to be engendered between the Investor of a Contracting Party and another Contracting Party. Whilst section (6) requires the questions under litigation to be settled "*in accordance with this Treaty and applicable rules and principles of international law*", which means that to settle the dispute, EU Law should be considered equally as applicable International Law.

(3.2) Article 26 of the ECT prevents arbitration between an intra-EU investor and an EU Member State

154. It is specifically Article 26(6) that prevents the intra-EU investor from being able to subject an EU Member State to arbitration because of its investment. Accepting this possibility is contrary to EU Law which is the Applicable International Law. In *Electrabel S.A v. The republic of Hungary* the Arbitral Tribunal determines that:

> *"(…) 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."*[64] *(Emphasis added).*

155. Article 344 of the TFEU stipulates that: "*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."* The application of this rule prevents Spain from submitting matters pertaining to the Internal electricity market to arbitration.

156. Accepting arbitration would mean that the Arbitral Tribunal would have to decide about European investor rights on the Internal Market.

[64] *Electrabel S.A v. Hungary*, ICSID no. ARB/07/19, Decision on jurisdiction, Applicable law and responsibility, 30 November 2012 (original version in English) Paragraph 4.189 CL-0081.

157. The ECJ has already come out firmly about the impossibility of this implication. In *Opinion 1/91, Economic Area Agreement*[65] issued by ECJ, the Tribunal makes its opinion known about the *"Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*." The ECJ declares the incompatibility of the judicial system created by the draft because it places constraints on the future interpretation of EU rules on free circulation and competition.

158. To reach this conclusion, the first thing stipulated by the ECJ is that:

> *"when a dispute relating to the interpretation or application of one or more provisions of the agreement is brought before it, the EEA Court may be called upon to interpret the expression 'Contracting Party', within the meaning of Article 2(c) of the agreement, in order to determine whether, for the purposes of the provision at issue, the expression 'Contracting Party' means the Community, the Community and the Member States, or simply the Member States. Consequently, the EEA Court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement.*
>
> *[] It follows that the jurisdiction conferred on the EEA Court under Article 2(c), Article 96(1) (a) and Article 117(1) of the agreement is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that treaty to any method of settlement other than those provided for in the Treaty. Article 87 of the ECSC Treaty embodies a provision to the same effect".*[66] *(emphasis added)*

159. The ECJ also states that:

> *"It follows that in so far as it conditions the future interpretation of the Community rules on the free movement of goods, persons, services and capital and on competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community. As a result, it is incompatible with Community law."*

160. Finally, the same Opinion of the ECJ reminds us that:

> *"It must be pointed out that the agreement is an act of one of the institutions of the Community within the meaning of indent (b) of the first paragraph of Article 177 of the ECC Treaty and that therefore the Court has jurisdiction to give preliminary rulings on its interpretation. It also has jurisdiction to rule*

[65] Opinion 1/91 dated 14 December 1991 issued by the European Court of Justice regarding the "Agreement to Create a European Economic Area" (EEA) (original Spanish version). R-0028.
[66] Ibid, paragraph 34.

on the agreement in the event that Member States of the Community fail to fulfil their obligations under the agreement."[67] *(Emphasis added).*

161. On the other hand, it should be pointed out that when the ECT was signed, the Member States of the then EC were unable to contract obligations between them as regards the Internal Market as it is an area in which they had granted their sovereignty to the then European Community (henceforth the "EC"). It is for this very reason that the EU is a Contracting Party. Hence, Article 26 of the ECT does not generate any obligations between the Member States.

162. The only possible arbitration in the context application of the ECT, in an interpretation which is in harmony with the EU system (Articles 16 and 26(6) of the ECT) is, as is asserted in *Electrabel S.A v. Hungary*, that of *"a non-EU investor and an EU Member State or between an EU investor and a non-EU Member State"*[68]

163. In this way, the intra-EU investor, with a protection level provided by EU Law, is protected by the judicial system of the EU. The investor from a third party country which is a signatory to the ECT (for example, a Japanese investor) which does receive through the ECT in the EU Member States the "national" treatment which EU Citizen investors do receive because they are from the EU, may resort to arbitration to defend the rights granted to it by Article 10 (1) of the ECT. Any Arbitral Tribunal hearing this latter arbitration may not interfere with the competencies of the ECJ because the EU system does not apply to the investor from a third party country.

(3.3) The purpose of the ECT confirms our interpretation.

164. Assuming that intra-EU disputes are included within the context of the protection of the ECT would also mean giving up the objective and purpose of the ECT. To be precise, it would mean assuming that the EU and its Member States promoted, as key players, the creation and conclusion of the ECT to cover an area, that of intra-EU investments, which had been totally covered - and in a far superior manner - for years by EU Law. What's more, it would mean taking competencies away from the ECJ and mistrusting the very protection system given by the EU to its Citizens.

165. The objective of the ECT is to promote "*long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter*"[69]. In turn, the Charter was intended to "*promote East-West industrial co-operation by providing legal safeguards in areas such as investment, transit and trade*". The ECT "*is the base of an energy community amongst the regions of the world which were divided by the Iron Curtain*"[70]. (emphasis added)

[67] Ibid, paragraph 38.
[68] *Electrabel S.A v. Hungary*, ICSID no. ARB/07/19, Decision on jurisdiction, Applicable law and responsibility, 30 November 2012 (original version in English) paragraph 4.158 CL-0081.
[69] Article 2 of the ECT. RL-0002
[70] Preface of the ECT. RL-0002

166. In actual fact, the origin of the ECT lies in the wish of the Council of the then EC to speed up the economic recovery of Eastern Europe after the fall of the Berlin Wall through cooperation in the energy sector.[71]

167. Hence, the literal interpretation of Article 26 of the ECT, not only section (1) thereof but also section (6), in accordance with its context and purpose, leads to the fact that there are no grounds for submitting to arbitration disputes between an intra-EU investor and an EU Member State.

(4) Spain's position is confirmed by the European Commission and by doctrine

168. The stance defended by this Respondent Party is not trivial but rather is shared by the European Commission and by doctrine.

(4.1) Spain's position is confirmed by the European Commission

169. The position of this Respondent has been confirmed by the European Commission. In this regard, reference must be made to that stipulated by the European Commission (henceforth, the "Commission") in its "*amicus curiae*" document[72] in which it firmly states that:

> *"The Commission takes the view that the ECT does not create obligations among the Member States, but only between the Union and its Member States, on the one hand, and each of the other Contracting Parties, on the other hand (this is sometimes referred to as an "implicit disconnection clause"). That is evidenced by the text of the ECT as well as its context, its object and purpose and its drafting history (cf. for the relevance of those criteria Article 31, 32 Vienna Convention on the Law of Treaties)." (Emphasis added).*

170. These ideas are developed in the amicus curiae document submitted by the Commission on 12 February 2015 which we consider to have been reproduced herein.

171. The Commission's opinion cannot be regarded as trivial nor as immaterial in view of the specific position of said Institution within the legislation of the EU, generally speaking, and its position at the origin and signing of the ECT, in particular.

172. In this regard, the Commission is the executive body of the EU, traditionally known as "the guardian of the Treaties"[73]. The Commission is also one of the most authorised voices to interpret the ECT. It was the Commission which, at the proposal of the European Council of Dublin in June 1990, put forward the idea of the European Energy Charter and negotiated the conclusion of the ECT on behalf of the then European Communities.

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[71] Ibid.

[72] Document dated 12 November 2014 sent by e-mail on the 14th of the same month and year to the Arbitral Tribunal.

[73] Article 17(1) of the TEU: "*The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.".* R-0001.

173. The Commission's position as regards the impossibility of there being any arbitrations between intra EU investors and Member States under Article 26 of the ECT is not new nor unique in this case. For example, the Commission has already submitted this opinion to the Arbitral Tribunal in the case *Electrabel S.A v. Hungary* in 2008. It was the Commission's stance that led the Tribunal in said case to raise of its own accord its possible lack of Jurisdiction.

174. This special Commission's position was specifically recognised by the Tribunal in the case *Electrabel S.A v. Hungary* when it stated that:

> *"The Tribunal (with the assistance of the Parties and their expert witnesses) has considered at length the terms and effects of the European Commission's Submission In these arbitration proceedings. Albeit with hindsight, it is unfortunate that the European Commission could not play a more active role as a non-disputing party in this arbitration, given that (as was rightly emphasised in the European Commission's Submission), the European Union is a Contracting Party to the ECT in which it played from the outset a leading role; and, moreover, that the European Commission's perspective on this case is not the same as the Respondent's and still less that of the Claimant. In short, the European Commission has much more than "a significant interest" in these arbitration proceedings. Unlike the two Parties, the Commission has made a jurisdictional objection based on EU law as the law applicable to the Parties' arbitration agreement. Whilst that objection is addressed by the Tribunal in Part V below, it is necessary to start here with the Commission's arguments on applicable law."*[74] *(emphasis added)*

175. Furthermore, the EU's opposition to the validity of the BIT between EU Member States became clear in the Decision adopted by the Commission on 18 June 2015:

> *"the Commission has decided to request five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) to bring the intra-EU BITs between them to an end. The letters of formal notice, sent today, follow earlier exchanges with the Member States in question. This is not a new issue as the Commission has consistently and over a number of years pointed out to all Member States that intra-EU BITs are incompatible with EU law. However, since most Member States have taken no action, the Commission is now launching the first stage of infringement procedures against five Member States. At the same time, the Commission is requesting information from and initiating an administrative dialogue with the remaining 21 Member States who still have intra-EU BITs in place. It is worth noting that two Member States – Ireland and Italy – have already ended all their intra-EU BITs in 2012 and 2013 respectively."*[75]

176. Said procedure by the Commission does not extend to the ECT, nor has it been reported by the EU at the initiative of the Commission. This is the case because the Commission interprets, as is argued by the Kingdom of Spain, that the ECT is compatible with EU Law if, and only insofar, as it is considered that it does not derive from application to intra-EU disputes.

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[74] *Electrabel S.A v. Hungary*, ICSID no. ARB/07/19, Decision on jurisdiction, Applicable law and responsibility, 30 November 2012 (original version in English). CL-0081.

[75] "*Commission asks Member States to terminate their intra-EU bilateral investment treaties*" European Commission-Press release, Brussels, 18 June 2015. (original version in English). R-0029.

(4.2) The position of Spain and the European Commission is confirmed by the doctrine

177. Our opinion and that of the European Commission is also endorsed by the doctrine. In this regard, Bruno Poulain has indicated that:

> *"The [ECT] was initially concluded with the former Soviet republics to improve the safety of the energy supply from Eastern Europe. Bearing in mind the initial raison d'ètre of this instrument, we cannot do any more than have reservations about its application to purely intracommunity situations. Certain elements of its text also seem to endorse the inapplicability of [ECT] Article 26 to intra-Community situations."*[76] *(free translation) (footnote omitted)*

178. Moreover, as aptly stated by Professor Jan Kleinheisterkamp:

> *"why should investors from certain member states enjoy a greater degree of protection than that afforded by the European Treaties? Why should arbitral tribunals, in a purely intra-EU context, not be bound to the same restrictions on judicial review as courts of the Union and the member states? Moreover, in the light of the fact that the European Treaties have put into place the well-tested procedural mechanisms that ensure that the EU laws, establishing supra-national standards of protection of investments within the internal market, are they applied and interpreted autonomously, untainted by national parochial conceptions, and uniformly? And going beyond the substantive standards of protection: why should European investors in the Internal Market be allowed to crosscut the existing supranational judicial system of the ECJ by using an alternative system of international arbitration?*
>
> *[…]In summary, there seem to be good reasons for the Commission to push for ensuring that EU law is the only regime governing investment flows within the European market and that the ECJ is the only ultimate instance for interpreting and applying these rules. And, indeed, it does not seem too far-fetched to expect the ECJ to follow the Commission on this point.[…]*
>
> *Given the Commission's strong determination to eliminate the parallelism of standards and recourses for investments inside the Internal Market, it can be expected that also the intra-EU dimension of the ECT will be eventually targeted by the Commission and may disappear if member states cooperate or are forced to cooperate by the ECJ."*[77] *(footnotes to the omitted page)*

179. The author adds:

> *"The essence of this conflict is, indeed, about whether tribunals can be allowed to review, on the basis of the latter, the legality of government*

[76] *Développements récents du droit communautaire des investissements internationaux,* Bruno Poulain, Revue Générale de Droit International Public, C XIII/2009, 4; page 881. The omitted footnote states: "*Our opinion is based on the fact that Article 25 [ECT] proposes a disconnection clause for the benefit of the parties to a regional economic integration organisation and that Article 16 seems to link substantive law and a dispute settlement mechanism."* (free translation). RL-0024.

[77] *Investment protection and EU Law: the intra- and extra- EU dimension of the Energy Charter Treaty*, Jan Kleinheisterkamp, Journal of International Economic Law 15 (1), Oxford University Press, 2012, pages 101, 103 and 108, RL-0025.

> *measures that are, at least in theory, fully under the ECJ's control of the European market rules and fundamental rights, and the above sketched 'policy space' they reserve to the Union and the Member States."*[78] *(footnotes omitted)*

180. In actual fact, as is stated by Professor Jan Kleinheisterkamp, the problem raised is not a problem of the selection and application of the "most favourable regulation". The issue is that between EU Member States and their Citizens, EU Law puts aside the application of any other regulation by dint of the principle of supremacy.

181. It is thus a question of determining whether in the light of EU Law, it is valid to apply within the European Union in conflicts between an EU investor and an EU State the provisions of an International Treaty or whether, by contrast, in these intra-EU relations solely EU Law applies. Assuming that is not disputed that EU Directives on Renewable Energies are the framework for Spanish legislation which the Claimant supposedly believed when making its investment, the issue must be settled in the light of the interpretation of Community Law and with regard to these matters Spain cannot submit its decision to venues other than the EU judicial system by dint of Article 344 of the TFEU.

182. As has been stated above, any dispute settlement system introduced by a Treaty affecting the fundaments of the EU is incompatible with the EU Law. Article 26(6) of the ECT requires the settlement of those issues under litigation in accordance with "*the ECT and applicable rules and principles of international law*". EU regulations are International Law regulations and they must be applied with the same hierarchy as the ECT itself. Accepting arbitration to settle litigation which affects the freedom of establishment and the free circulation of capital of a Community investor in EU territory in the context of Renewable Energies is contrary to EU Law and incompatible with the actual content of Article 26(6) ECT.

183. For the sake of transparency and good faith, this Objection cannot be concluded without mentioning the impact on the result of this arbitration that may have the existence of a procedure before the European Commission as regards the evaluation of the measures supporting Renewable Energies and cogeneration in Spain (procedure SA.40348 2014/N).

184. This procedure must be understood in light of the Order issued on October 22nd 2014 by the European Court of Justice, set out in pre-judicial question C 275/13 (ELCOGAS Case) pertaining to Spain which concludes as follows in paragraph 33[79]:

> *"Article 107 of the TFEU, section 1, must be interpreted in the sense that the amounts attributed to a private electricity producing company which are financed by all the electricity end users established in national territory and which are distributed to Electric Sector companies by a public organization in accordance with predetermined legal criteria, constitute a State intervention or by means of State funds".*

[78] Ibid.

[79] Order of the European Court of Justice issued in the pre-judicial question C- 275/13, ELCOGAS dated 22 October 2014. (English version). R-0030.

185. Said legal classification made by the ECJ assume that the Member States are required to bear in mind the Guidelines on State aid for environmental protection and energy 2014-2020, approved by means of a Communication from the European Commission 2014/C 200/01 as well as those revoked and approved by the latter by means of a Communication from the European Commission 2008/C 82/01.

186. The existence of said procedure is particularly relevant in the light of the decision by the Commission on 26 May 2014 which ordered the suspension of payment by Romania of an Award rendered in an ICSID arbitration, Micula v. Romania. The Commission adopted an initial decision in accordance with Council Regulation (EC) No 659/1999 which allows the Commission to suspend payment of any aid it deems illegal. Subsequently, by way of a decision on 30 March 2015, the Commission decided that *"the payment of compensation by Romania to two Swedish investors by dint of the revoked aid regime breaches the EU State Aid rules"* and that *"by paying the compensation granted to the Claimants, Romania is actually granting an advantage equivalent to the revoked aid regime*". The Commission thus concluded that said compensation is equivalent to State Aid incompatible with EU Law and must be returned by the beneficiariary companies.[80]

(5) Conclusion

187. In view of the above, it is considered that the Arbitral Tribunal, with all due respect, lacks the jurisdiction to hear the present intra-EU dispute brought by alleged investors from the Netherlands against the Kingdom of Spain. Both the Netherlands and Spain were two EU Member States at the time of the coming into force of the ECT. Hence, the Claimant fails to comply with the requirement foreseen in Article 26(1) of the ECT which states that to access arbitration the dispute must be between a Contracting Party and investors from different Contracting Parties.

D. <u>Lack of jurisdiction rationae voluntatis of the Arbitral Tribunal through the denial of the Kingdom of Spain in this report of the Claimant, Masdar Solar & Wind Cooperatief UA, and the application of Part III of the ECT in concurrence with the circumstances of Article 17 of the ECT.</u>

(1) Introduction

188. For the case in which the Claimant is considered a private inversor with an investment, that comes from another Contracting Party territory, lack of jurisdiction rationae voluntatis of the Arbitral Tribunal is put forward, with the Kingdom of Spain exercising its right at this time to deny the Claimant the application of the benefits of Part III of the ECT in concurrence with the circumstances of Article 17. The non-application of Part III of the ECT determines that there is no "incompletion of obligations" that could be denounced in accordance with Article 26 of the ECT and, as such, that the Kingdom of Spain has not given its consent to the arbitration.

[80] Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013. R-0031

189. As confirmed by Loukas A. Mistelis and Crina Mihaela Baltag in their Article "*Denial of Benefits and Article 17 of the Energy Charter Treaty*":

> *"The "denial of benefits" clause was inserted in investment treaties for at least two purposes: to maintain reciprocity or asymmetry with regard to the benefits arising out of the protection offered by investment treaties, and to exclude from the protection of the treaties the so-called "shell companies."*[81]

190. The Article adds that:

> *"The scope of Article 17(1) is to give contracting states the right to exclude from the benefits conferred by Part III of the ECT alleged investors owned or controlled by citizens or nationals of third countries, which are not economically bound to the host state. This is the typical situation of the so-called "mailbox companies." (footnotes omited).*

191. And concludes that:

> *"The "denial of benefits" clause was seen as a safeguard against "free riders" or as a "method to counteract nationality planning" or to preserve the reciprocity in the relationship between two countries. Irrespective of how ones calls it, the end purpose of the clause is to exclude from the protection offered by investment/trade treaties those investors to whom, in normal circumstances, contracting states would not accord protection."*

192. As it has been proved in the first Preliminary Objection, the Claimant is a mere shell company possessed and controlled by a national company by Abu Dhabi Future Energy Company, Mubadala Development Company subsidiary. These companies belong to the Mubadala sovereign wealth fund, principal Agent of the Abu Dhabi Emirat, through which the latter performs economic diversification functions and governmental functions. Abu Dhabi Emirate (United Arab Emirates), is not an ECT Contracting Party.

193. The non-application of Part III of the ECT by the Kingdom of Spain to the Claimant accomplishes then the objectives of reciprocity protection and avoidance of protection of shell companies that the ECT postulates.

194. The ECT does not establish a concrete moment in which to exercise this right. In any case, the right is being exercised now for two fundamental reasons: the first, because a right can only be denied when it is known that it is being invoked and claims to be exercised. The second and more important, because the Kingdom of Spain has only been able to verify the concurrence of the circumstances established in Article 17 of the ECT after examining in detail the Claimant's Memorial, the documents attached to it and other documentation obtained by this party at the time of the dispute.

195. The exercise by the Kingdom of Spain of the right provided for in Article 17 of the TCE have, according to Article 26, the effect to deprive the Tribunal of their jurisdiction since, as we will see, there is no consent by the Kingdom of Spain to resort to arbitration.

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[81] *"Denial of Benefits and Article 17 of the Energy Charter Treaty*", accessible at http://pennstatelawreview.org/Articles/113%20Penn%20St.%20L.%20Rev.%201301.pdf RL-0026.

(2) Article 17 of the ECT as a limit of consent granted by the Contracting Parties to submit the controversies to the International Arbitral Tribunal.

196. The arbitral conflict resolution system derived from the ECT, in the image and likeness of any other arbitral conflict resolution system between investors and States, hinges on a fundamental principle that we can define as a condition ratione voluntatis: the State should give its consent to submitting itself to this arbitral process. This consent will enable the investor to submit a dispute to the arbitral mechanism set out in the ECT.

197. As was highlighted in the Decision on the Jurisdiction on the case ST-AD Gmbh v Republic of Bulgaria:

> *"337. At the outset, the Tribunal wants to restate that it is of the utmost importance to not forget that no participant in the international community, [...] has an inherent right of Access to a jurisdictional recourse. For such right to come into existence, specific consent has to be given. As far as investment arbitration is concerned, such consent can be given in a contract, a domestic law or an international bilateral or multilateral treaty. In all these different hypotheses, the State can shape its consent as it sees fit by providing the conditions under which it is given – in other words, the conditions subject to which an "offer to arbitrate" is made to the foreign investors."*[82]

198. Given the above, the mentioned Award on Jurisdiction went on to highlight that:

> *"The Tribunal has to clarify here that this is an incorrect view of the essence of international arbitration. The scope of the substantive protections granted in an international treaty does not have to be, and is not in this particular BIT, coextensive with the scope of the dispute settlement mechanisms, in particular the scope of investor state arbitration. It is indeed not because a State has given its consent to grant certain substantive rights to the investors of another State that it automatically flows from such consent that the State also gives its consent for these investors to sue the State directly in an international arbitration. For such right to come into existence, specific consent has to be given within the treaty. The State can shape this consent as it sees fit, by providing for the basic conditions under which it is given, or, in other words, the conditions under which the "offer to arbitrate" is made to the foreign investors. [...], within the framework of BITs, investors cannot intervene at the international level against States for the recognition of their rights unless the States have granted them such rights under conditions that they determined. An arbitral tribunal – just as the ICJ or any other international court – does not have a general jurisdiction; it only has a "compétence d'attribution", which has to respect the limits provided for by the States."*

199. In the same sense the Tribunal explains the case Iberdrola Energía, S.A. v. The Republic of Guatemala:

[82] *ST-AD GmbH v republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Decision on Jurisdiction of 18 July 2013. par. 337, RL-0016

> *"302. States signing an investment protection agreement have broad freedom to express their consent in the manner they consider appropriate. Thus, they can give it for all kinds of investment-related disputes or limit it to certain disputes. Thus, States may exclude certain types of disputes from arbitration, condition the submission to arbitration to compliance with certain prior steps or prerequisites and generally broaden or restrict the scope of the matters that can be submitted to arbitration."*[83]

200. The consent of the Kingdom of Spain to the arbitration derived from the ECT is found in Article 26 of the ECT, whose sections (1) and (2) state:

> *"1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably." (emphasis added)*

201. In order to interpret the extension of the consent to the arbitration contained in Article 26 of the ECT we should refer to the interpretive criteria that Article 31 of the Vienna Convention offers us.

202. According to the wording of the mentioned Article 26(1) of the ECT, the consent of the Kingdom of Spain regarding the arbitral clause of this Article 26(1) of the ECT is conditioned by the two following limitations:

- That the dispute must be "concerning an alleged breach by a Contracting Party of an obligation derived from Part III" of the ECT, and

- That this allegedly incomplete obligation should be "derived from Part III" of the ECT.

203. Regarding the first of these two limitations, it constitutes an evident restrictive criteria insofar as it delimits, specifies and restricts the disputes that should be resolved amicably or that, failing this, can be submitted to arbitration or other dispute resolution methods established by the ECT.

204. Following the argument included in the Iberdrola Award, from a doctrinal point of view, focusing on the extension of the consent of the States to the arbitration, the dispositions, of the investor protection treaties regarding the consent are classified into four groups:

> *"The Tribunal accepts the argument raised by one part of the specialized doctrine that has identified four types of provisions in investment protection treaties with regard to consent. [...]The second group restricts consent to arbitration - the Tribunal's ratione materiae jurisdiction - to disputes arising out of or related to (i) an investment authorization; (ii) an investment contract; or (iii) the allegation of a violation of any right conferred, created or recognized by the respective treaty in relation to an investment. The third*

[83] *Iberdrola Energía, S.A. v. The Republic of Guatemala*, ICSID Case, No. ARB/09/5, Award of 17 August 2012. RL-0027

group restricts the subject of arbitration between the investor and the State only to violations of the substantive provisions of the treaty itself. [...]'[84]

205. In line with what is highlighted in the Iberdrola Awards, the consent expressed in Article 26 of the ECT responds to a restricted model of the consent. The Kingdom of Spain, by virtue of the ECT, does not give its consent to submit to arbitration any type of dispute relating to an investor or with investments carried out with its territory. The use of the term "relating to" in the drafting of Article 26 (1) suggests that the Contracting Parties of the ECT restricted their consent to arbitration, consenting only to those disputes related ("relating to") " an alleged breach of an obligation of the former under Part III" itself. Any other subject remains excluded from the arbitral clause of Article 26 (1) of ECT.

206. For its part, regarding the second of the limitations mentioned, Article 26 (1) of the ECT again introduces a new restriction regarding the obligations whose alleged incompletion gave the right to resorting to arbitration of the ECT. This second limitation is introduced through the use of the qualifying adjective "derived from" in the following sentence: "obligation (…) derived from Part III".

207. In accordance with the *Diccionario de la Real Academia Española* (Dictionary of the Royal Spanish Academy) the qualifying adjective "*derived"* means *"a product: that is obtained from another".* In the same line, the verb to derive is defined as: *"Referring to a person when: Their origin is brought from another*"[85].

208. In this way, Article 26 of the ECT does not only condition the consent of the Contracting Parties for the possible disputes to arise "relating to" the alleged incompletion of the obligations of Part III. The ECT demands, in addition, that these obligations "derive" from Part III.

209. We must underline that the wording of the Treaty is clear. It does not highlight, as it could have done, that the obligations must derive from Articles 10 to 15. Far from it, it highlights that the obligations must necessarily arise from the application of Part III, included in Articles 10 to 17. They must have their origin in the application of the third part in its entirety.

210. Part III of the ECT is configured under the rubric "Investment Promotion and Protection". Part III that is broken up over 8 Articles: Articles 10 to 17. These Articles, can be classified in two categories according to their content: (i) Articles 10 to 15, regulate the fixed obligations which, through the subscription of the ECT, the Contracting Parties assume with the investors or the investments; (ii) Articles 16 and 17, which regulate different situations whose concurrence can give rise to the implication of Articles 10 to 15, either for concurrence with other Treaties (Article 16) or even for the interpretation of the refusal of benefits clause (Article 17).

[84] *Iberdrola Energía S.A. v Republic of Guatemala*, ICSID Case No. ARB/09/5, Award 17 August 2012. RL-0027.

[85] Dictionary of the Spanish Royal Academy (22nd edition with amendment until 2012): 2nd entry of the term "derived" and Dictionary of the Spanish Royal Academy, electronic version (22nd edition with amendment until 2012): 1st entry of the term "to derive". R-0032

211. In particular and from what Article 17 refers to, its heading describes its aim when it highlights: *"Non application of Part III in certain circumstances"*. As a consequence, when the "circumstances" included in said Article concur, Part III of the ECT will not be applied, as no obligation of this Part of the Treaty will be derived.

212. The previous conclusion makes it clear that an arbitration for the protection of the ECT will only be covered by the consent of the Contracting Parties when:

- the specific requirements established by Articles 10 to 15 of the ECT to create different obligations concur that they are to be imposed on the Contracting Parties and;

- in addition to the above, the circumstances expressly set out in Part III do not concur, specifically in Article 17 of the ECT.

213. The non-application of Part III through concurrence with the assumptions expressly set out in Article 17 of the ECT will determine the breaking of the link that must exist between the obligations of Articles 10 to 15 of the ECT and its possible enforceability before the Arbitral Tribunal under Article 26 of the ECT.

214. If Part III is not applied as a consequence of the concurrence of the circumstances set out in Article 17 of the ECT, it becomes evident that an "obligation derived from Part III" will not be able to exist as Article 26(1) of the ECT predicts. As a consequence, if there is no "obligation derived from Part III", the Contracting Parties have not given their consent to the arbitration under Article 26(1) of the ECT.

215. As explained previously, the concurrence of the circumstances set out in Article 17 of the ECT has a fundamental impact based on jurisdiction. The application of this Article 17 affects the essential element upon which the arbitral clause of Article 26 is constructed: the consent of the Contracting Parties. In this way, if the circumstances of Article 17 of the ECT concur and an investor claims to require a Contracting Party to complete one of the obligations set out in Articles 10 to 15 of the ECT under the ECT, the Arbitral Tribunal constituted for this purpose will lack the Jurisdiction *ratione voluntatis* to hear this claim.

(3) C

ircumstances that justify the application of Article 17(1) of the ECT of the Claimant

216. Article 17 of the ECT, under the title "Non application of Part III in certain circumstances" states:

> *"Each Contracting Party reserves the right to deny the advantages of this Part to:*
>
> *1. a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized, [...]."*

217. The application of Article 17(1) of the ECT requires the concurrence of the following factual elements:

- It is only applicable to Legal Persons ("Legal entities") incorporated into the territory of a Contracting Party other than that against which the dispute is brought.

- It is necessary that this "legal entity" is controlled or possessed by citizens or nationals of a third party country.
- In addition it is necessary that this legal entity "has no substantial business activities in the Area of the Contracting Party in which it is organized".

218. The three factual conditions to which the application of Article 17 of the ECT is subject concur in this case. For reasons of clarity we are going to analyse its concurrence separately in the current case.

(3.1) Masdar Solar is a Legal Entity incorporated into the territory of a Contracting Party other than that against which the dispute is brought

219. For the case in which the Tribunal dismisses the previous legal objection through understanding that, for the purposes of this dispute, the Kingdom of Spain and the Netherlands are different Contracting Parties, we will be able to sustain that the Claimant is a Legal Entity incorporated into the territory of a Contracting Party other than that against which the dispute is brought.

220. In accordance with paragraph 2 of the Claimant's Memorial:

"Masdar Solar is a company established in the Netherlands"

221. In this respect, paragraph 143 of the Claimant's Memorial states:

"ADFEC incorporated the claimant in the Netherlands 19 March 2008."

222. As a consecuence, it is not at issue that Masdar Solar & Wind Cooperatief UA is a Legal Entity established into the territory of a Contracting Party of the ECT: the Kingdom of the Netherlands [86].

(3.2) Masdar Solar is a Legal Entity owned and controlled by Abu Dhabi (United Arab Emirates), a State that is not a Contracting Party of the ECT

223. The Claimant, Masdar Solar & Wind Cooperatief UA, was established on 19 March 2008, setting its registered office at the World Trade Center in the Schiphol Airport (Schiphol Boulevar 231, 1118 BH, Amsterdam, Netherlands).

224. The Claimant was established in 2008 by ADFEC in order to channeling the action of the former one. ADFEC is the Claimant's partner with a 99,99% of the share capital (the residual percentage corresponds as well to Masdar Energy Limited, settled in Dubai-EAU).

225. This in turn, ADFEC was created by the Mubadala sovereign wealth fund in order to achieve their objectives, seeking the country's economic diversification, specifically making investments in renewable energy. It is highly illustrative the Section A from the preamble of

[86] Extract from the web page on the Constituency of the Energy Charter Conference where the Kingdom of the Netherlands (the Netherlands) is a member of the Charter Conference. Information available at http://www.encharter.org/index.php?id=61. R-0033

the "joint venture" agreement signed between ADFEC and Sener (Masdar Solar would join it later on by contract for novation dated 9 June 2008), where the following is noted:

> *"ADFEC is a company wholly – owned by Mubadala Development Company PJSC, and has launched the Masdar Initiative, which has as its main objectives: (i) helping drive the economic diversification of Abu Dhabi, (ii) maintaining and expanding Abu Dhabi's position in the evolving global energy markets in the long term, (iii) positioning Abu Dhabi as a developer of technology, as well as (iv) making meaningful contribution towards human development."*[87] *(emphasis added)*

226. Actually, the mentioned objectives are the guiding principle of the Mubadala fund action–and, by extension, of Abu Dhabi Government– in the renewable energy sector. The Claimant itself recognises this, as derived from the Project Introduction made by Masdar to Mubadala:

> *"[Torresol is] government owned through Mubadala Development Company which aims:*
>
> *- To help drive the economic diversification of Abu Dhabi.*
>
> *- To maintain and expand Abu Dhabi's position in evolving global energy markets.*
>
> *- To position Abu Dhabi as a developer of technology, and not simply an importer.*
>
> *- To make a meaningful contribution towards sustainable human development"*[88]

227. The Mubadala sovereign wealth fund was directly created by Abu Dhabi Government by decree dated 6 October 2002 with the purpose to strengthen the Emirates growth, helping to the achievement of their socio-economic targets in different sectors; among them, the renewable energies sector [89]. Its mission is to invest on strategic areas with the purpose to diversify the Abu Dhabi economy and to improve the United Arab Emirates growth prospects[90].

228. As explained at the first Preliminary Objection of this Counter-Memorial, There is not only an identity in the aims pursued by Abu Dhabi Government and the Claimant, but besides it does exist a relationship of full command, as well as a relationship of full reliance in decision making.

229. According to the Accuracy's expert report[91], supported by the Notary Act from a Dutch Public Notary, the Claimant's Board of Directors is constituted by the following persons: Mohamed Jameel Ismail Al Ramahi, Niall Patrick Hannigan, Johanes Jacobus Van Ginkel and Izak Marinus Ten Hove.

[87] C-0044 produced with the Claimant's Memorial.
[88] Page 7 of C-0042 produced with the Claimant's Memorial.
[89] Paragraphs 205 and 206 from the Financial Report on the Claimant and its claim submitted by Accuracy, dated 15 September 2015.
[90] Who we are? Mubadala web page; last access 14 September 2015. (English). R-0034
[91] Financial Report on the Claimant and its claim submitted by Accuracy, dated 15 September 2015, page 23.

230. The first two "Managers A" and they are two individuals not native people from the Netherlands: on the one hand, Mohamed Jameel Ismail Al Ramahi, who is also Abu Dhabi Future Energy Company's (ADFEC) Managing Director (CEO), a company established in Abu Dhabi, who participates at 99,99% in the Claimant's capital. As we have stated, ADFEC is eventually a subidiary company of the Abu Dhabi Government's sovereign wealth fund. On the other hand, Niell Patric Hannigan, Irish, is manager of at least five subsidiary companies of Masdar.

231. The second two are Managers B and they are linked to Vistra, a Dutch company that share the registered office with the Claimant and it specialises in the provision of trust services. The firm itself advertises it on its web page and it is reflected in the mentioned Notary Act annexed to the Accuracy's report. Specifically, Mr. Ten Hove is member of the Board of Directors of Vistra Holdings (Netherlands) N.V. and Mr. Van Ginkel is representative of Vistra Corporate Services B.V.

232. In view of the above, it undoubtedly appears that Masdar Solar & Wind Cooperatief UA is controlled by the Abu Dhabi Government, Emirate member of the United Arab Emirates, through the Mubadala sovereign wealth fund and its subsidiaries companies, in compliance with the Article 17 of the ECT. It must be outlined that the United Arab Emirates is not an ECT contracting party. It is merelly an Observer to the Energy Charter Conference.[92]

(3.3) Masdar Solar has no business activity in the Netherlands or in any other place.

(a) Masdar Solar has no business activity

233. Applying Article 17 of the ECT demands a third requirement in an accumulative way: that the Legal Entity being studied *"has no substantial business activities in the Area of the Contracting Party in which it is organized".*

234. From the examination of the facts that we will now expose, we can firstly conclude that Masdar Solar & Wind Cooperatief UA has no business activity in the Netherlands or in any other country.

235. According to the Accuracy's expert report produced with this Memorial[93], the claimant's annual Accounts demonstrate that this is a company without business activity, which is used as an investment vehicle for the Mubadala sovereign wealth fund.

236. The Claimant presents a null financial operative, which is evidenced by the lack of breakdown of the identified information at the annexed Statement to its Annual Accounts. The Accounts consist only of eight pages. Dutch regulation only admits this limited level of information to those companies rated as "small". The level of information is so low that the document not even gives a profit and loss account. Moreover, a company's cash flows generation statement is

[92] Extract from the web page on the Constituency of the Energy Charter Conference where the Kingdom of the Netherlands (the Netherlands) is a member of the Charter Conference. Information available at http://www.encharter.org/index.php?id=61. R-0033

[93] Financial Report on the Claimant and its claim submitted by Accuracy, dated 15 September 2015, pages 21 to 28.

not provided. The company's Annual Accounts are neither audited nor even produce a management statement or a report by the Board of Directors on the annual activity. The 2014 Annual Accounts have not been possible to valuate, since the Claimant has failed to fulfil its obligation to produce them to the competent Netherlands Office.

237. The analysis of the Claimant's Balance Sheet corresponding to 2010 – 2013 shows the classical structure of a holding company, since its assets are only constituted by shares and financial assets in other companies: Masdar Energy B.V., Masdar Financing B.V., Torresol Energy Investments S.A.and Jordan Wind Project Company PSC. The only subsidiary companies established in the Netherlands are Masdar Energy B.V., Masdar Financing B.V. which, like the Claimant, are mere holding companies that have neither employees nor business activity.

238. According to what has been expressed at the Financial Statements, published by Amsterdam Chamber of Commerce, the purpose of the company is:

> *"to act as a holding company."*[94]

239. It is clear that the company's official account gives a description of its developed activity more accurate that the mere statement of intention that, besides, can be modified anytime

240. In contrast with the Claimant's Financial statements, the Mubadala sovereign wealth fund's Financial statements, the Claimant's ultimate owner, consist of 122 pages, they are audited by Deloitte and include the required report of the Board of Directors. As well as breaking down in detail every financial aggregate and analysing the accounting policies followed, the Financial statements include several pages describing the risks faced by the Company and explaining how the forecast are prepared and the cost estimated. Finally, the Mubadala's Statements provide further detail of the non-wage benefits granted to its employees.

241. According to Accuracy on its expert report:

> *"We can conclude that, far from being a sophisticated investor which participates in international projects, the Claimant is not an operational company with its own management carrying out an economic activity. This non-existent economic activity, typical of plain holding entities, is proved by the lack of any information breakdown identified in its Annual Reports included in the Financial Statements to which we have had access."*

242. In short, we are faced with a holding company that, as such, confines itself to the mere possession of shares and financial assets in other companies. That possession of shares and financial assets cannot be described as "business activity", and even less as "substantial" as required by Article 17 of the ECT. In this sense to the European Union law, which is not only mandatory international law according to Article 26 (6) TEC but also domestic law of both the

[94] Note 1.2 to the Annual Accounts R-0006, R-0007, R-0008, R-0009 and R-0010 as well as the Financial Report on the Claimant and its claim submitted by Accuracy, dated 15 September 2015, pages 24 to 26.

Netherlands and the Kingdom of Spain, the Claimant would not perform any business activity[95].

(b) Masdar Solar has no employees

243. Masdar Solar & Wind Cooperatief UA, with assets of over 200 million euros, has not a single employee.

(c) Location of Masdar Solar registered office in a seedbed of companies.

244. Masdar's registered office is located at World Trade Center in Schiphol airport (Schiphol Boulevar 231, 1118 BH, Amsterdam, Netherlands).

245. This address coincides with the trustee company Vistra Netherlands. As shown in the Accuracy's expert report (supported by the Notary Act from a Dutch Public Notary):

> *"Vistra is a company specialising in providing trust services in the Netherlands (establishment of registered office, maintenance of shelf companies; preparation of Shareholders Meetings, Board of Directors meetings, legal documents, account books preparation, submission of official documents before the authorities, services of banking management, and assignment of members of the Board of Directors, etc.)*
>
> *The notarial deed has certified that there are 673 companies registered under the same P.O. box (1118 BH). This list has enabled the Notary Public to quantify the number of companies, related to Vistra, which have the same registered office as the Defendant. The Claimant shares its registered office with precisely 323 other companies. In this regard, we can affirm that it is domiciled in a virtual office.*
>
> *The physical inspection of the address indicated in the Financial Statements by the Notary Public shows that:*
>
> *There are no external signs (posters, logos, etc.) at the office entrance where the Claimant is supposedly located. No reference to the Claimant was found at the main entrance of the business complex World Trade Center, at Schiphol Airport;*
>
> *Instead, the signs of such office refer exclusively to Vistra;*

[95] In that sense, the (2012/C8/02) Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, published at the Official Journal of the European Union on 11 January 2012 gathering the doctrine stated by the EU Court of Justice (English):
"*Two separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice looks at the existence of a controlling share or functional, economic and organic links. <u>On the other hand, an entity that in itself does not provide goods or services on a market is not an undertaking for the simple fact of holding shares, even a majority shareholding, when the shareholding gives rise only to the exercise of the rights attached to the status of shareholder or member as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset</u>"* (emphasis added) (footnotes omitted) R-0035

In addition, the Notary Public did not find any external signs of any nature related to the companies Mubadala Development Company PJSC and ADFEC, which, as we indicated previously, are the Claimant's shareholders."

246. Having regard to the above, it is clear that the residence of Masdar Solar & Wind Cooperatief UA at the address given is purely formal.

(d) Conclusion

247. As concluded from the Accuracy's expert report:

"Considering, among others, the following elements analysed in this chapter:

- *The declared corporate purpose: holding.*
- *The total and absolute lack of material or human resources: no workers and no tangible or intangible assets.*
- *The limited weight and relevance of its Financial Statements.*
- *The address registered is a virtual office where it is not physically present.*

We can conclude that the Claimant, the company Masdar Solar & Wind Coöperatief U.A.:

Does not carry out any economic activity.

It is a mere mailbox or shell corporation.

It has no material presence or trade in the Netherlands."[96]

(4) Applying Article 17(1) of the ECT to the Claimant

248. Taking all of this into account, the Claimant meets the three circumstances to which the application of the benefits denial clause is subject according to the ECT, which are:

- The Claimant is a Legal Entity formally incorporated in the Kingdom of the Netherlands, Contracting Party of the ECT.
- The Claimant is owned and controlled by Mubdala sovereign wealth fund, incorporated entity in the Abu Dhabi Government.
- The Claimant does not develop any business activity.

249. Given the said circumstances, it is appropriate to deny the advantatges of the ECT to the Claimant according to Article 17 of the ECT. Denial that, to all intents, is realised at this Counter-Memorial on Jurisdiction.

250. The Claimant will surely invoke the Plama Consortium Limited & Republic of Bulgaria Award[97] to try to justify the fact that the denial of advantatges must be prospective.

[96] Financial Report on the Claimant and its claim submitted by Accuracy, dated 15 September 2015, page 26.

Nevertheless, we believe this doctrine is wrong and clearly exceeded by later arbitral decisions which allow the exercise of the right of denial of benefits at this moment and with retroactive effects.

251. In this regard, the Tribunal on the matter Ulysseas, Inc pointed out that:

> *"A further question is whether the denial of advantages should apply only prospectively, as argued by Claimant, or may also have retrospective effects, as contended by Respondent. The Tribunal sees no valid reasons to exclude retrospective effects. In reply to Claimant's argument that this would cause uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made its the investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State"*[98]

252. Along the same lines that the Tribunal pointed out on the *Guaracachi* case[99] when stating that:

> *"The same must be said in relation to the supposedly retroactive application of the clause. The Tribunal cannot agree with the Claimants when they argue that the Respondent is precluded from applying the denial of benefits clause retroactively. The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is "activated" when the benefits are being claimed"*[100].

(5) Conclusion

253. Given that the circumstances set in Article 17 of the ECT concur in the Claimant, the Kingdom of Spain denies the benefits of this Treaty to it. This implies the non-application to the Claimant of Part III of the ECT.

254. Due to this non-application of Part III of the ECT, it is evident that will not be an "*obligation resulting from Part III*" that might have been allegedly breached as provided by Article 26(1) of the ECT in order to submit to arbitration, without the consent of the Kingdom of Spain according to Article 26(1) of the ECT.

255. Consequently, the Tribunal lacks the *ratione voluntatis* jurisdiction to recognise this dispute.

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[97] *Plama Consortium Limited & Republic of Bulgaria*. ICSID Case. ARB/03/24, Decision on Jurisdiction of 8 February 2005. RL-0009

[98] *Ulysseas, Inc. v. Ecuador, Interim Award,* UNCITRAL Case, Interin Award 28 September 2010. Par. 173. RL-0028.

[99] *Guaracachi America Inc. & Rurelec, Plc. v. Bolivia*, PCA Case Nº. 2011-17. Award of 31 January 2014. Par. 376. RL-0011.

E. <u>Lack of jurisdiction of the Arbitral Tribunal to hear about an alleged breach by the Kingdom of Spain of obligations derived from Article 10(1) of the ECT through the adoption of taxation measures, in particular, through the introduction of the TVPEE by Act 15/2012: absence of consent of the Kingdom of Spain to refer this issue to arbitration given that, pursuant to Article 21 of the ECT, section (1) of Article 10 of the ECT does not generate obligations regarding taxation measures of the Contracting Parties</u>

(1) Introduction

256. Without prejudice to the rest of Preliminary Objections, the Arbitral Tribunal, with all due respect, lacks jurisdiction to hear about the dispute on the alleged breach by the Kingdom of Spain of obligations derived from Article 10(1) of the ECT through the adoption of taxation measures, in particular, through the introduction of the Tax on the Value of the Production of Electrical Energy (TVPEE) by Act 15/2012, of December 27, on taxation measures for energy sustainability (hereinafter "**Act 15/2012**").

257. This lack of jurisdiction of the Arbitral Tribunal is due to the fact that the Kingdom of Spain has not given its consent to submit such dispute to arbitration.

258. In this sense, the Contracting Parties of the ECT, among which is the Kingdom of Spain, have only consented to submitting to investment arbitration alleged breaches of obligations derived from Part III of the ECT, as is indicated in Article 26 of the ECT.

259. As analysed below, according to Article 21 of the ECT, Article 10(1) of the ECT invoked by the Claimant, although located in Part III of the ECT, does not generate obligations regarding taxation measures of the Contracting Parties.

(2) Taxation measures disputed by the Claimant: the TVPEE created by Act 15/2012

260. Act 15/2012[101] passed by the Kingdom of Spain, which came into force on 1 January 2013[102], introduced a new Tax, disputed by the Claimant: the TVPEE.

261. The TVPEE taxes the performance of the activities of production and incorporation into the electrical system of electrical energy in the Spanish electrical system. The TVPEE is a tax of general application, that is, it applies to the production of all generation facilities, both renewable and conventional.[103]

[101] Act 15/2012, of 27 December, on taxation measures for energy sustainability. R-0018
[102] Act 15/2012, Fifth Final Provision:
"Fifth final provision. Entry into force.
This Act shall enter into force on 1 January 2013." R-0018.
[103] The TVPEE is regulated in Articles 1 to 11 of Act 15/2012. Article 1 of Act 15/2012 refers to the <u>nature</u> of the TVPEE: *"The tax on the value of the production of electric energy is a tax of direct character and real nature that taxes the performance of activities of production and incorporation into the electric system of electric energy, measured in power plant busbars, through each of the installations indicated in Article 4 of this Act."* R-0018.
Article 4 of Act 15/2012 regulates the <u>taxable event</u> of the TVPEE: *"Under this Act, the taxable event is the production of electrical energy and its incorporation into the electricity system, measured in power plant*

262. The tax base of the TVPEE shall be comprised by the total amount that the taxpayer is to receive due to the production and incorporation into the electrical system of electrical energy, measured in power plant busbars, for each installation, in the taxable period.[104] The applicable tax rate is 7%.[105] The taxable period will generally coincide with the natural year and the TVPEE is accrued on the last day of the taxable period.[106]

263. It should be noted that it is not clear whether the Claimant alleges that other taxation measures adopted by the Respondent, apart from the TVPEE created by Act 15/2012, allegedly constitute a breach of the ECT.

264. We refer in particular to the amendment of Act 38/1992, of December 28, on Excise Duties contained in Article 28 of Act 15/2012. Such amendment introduces variations to the Tax on Hydrocarbons that affect, among other products, natural gas.

265. This taxation measure was mentioned by the Claimant in its Request for Arbitration.[107] The Claimant makes no reference to this measure in its Claimant's Memorial but in Brattle´s Regulatory Expert Report it is mentioned as one of the disputed measures.[108] Thus, the Claimant should clarify whether it alleges that this measure supposedly amounts to a violation of the ECT.

266. In view of the above, the Kingdom of Spain will focus its allegations on the TVPEE introduced by Act 15/2012. Nevertheless we reserve the right to supplement, modify or complement our allegations in light of the clarifications that the Claimant may provide in this regard.[109]

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busbars, including the mainland electricity system and that of island and non-mainland territories, at any of the installations referred to in Title IV of Act 54/1997 of 27 November, on the Electricity Sector." R-0018.

[104] Article 6 of Act 15/2012 regulates the tax base of the TVPEE: *"1. The tax base consists of the total amount that the taxpayer is to receive for the production of electrical energy and its incorporation into the electricity system, measured in power plant busbars, at each installation, in the taxable period. […]".* R-0018.

[105] Article 8 of Act 15/2012 regulates the TVPEE tax rate: *"The tax is payable at a rate of 7 per cent."* R-0018.

[106] Article 7 of Act 15/2012 regulates the taxable period and the accrual of the TVPEE: *"1. The taxable period coincides with the natural year, unless the activity of the installation ceases, in which case the taxable period ends on the day when this cessation is understood to have taken place.*
2. The tax is accrued on the last day of the taxable period." R-0018.

[107] Request for Arbitration, dated 30 January 2014, paragraphs 71 and 72.

[108] Brattle's Regulatory Expert Report, dated 21 January 2015, paragraph 106.

[109] It should be noted that in the Trigger Letter of 19 February 2013, in the Request for Arbitration of 30 January 2014 (footnotes 36 and 42) and in the Claimant's Memorial of 22 January 2015 (paragraph 24 and footnote 13), the Claimant also makes reference to taxation measures contained in the following two pieces of legislation: i) Royal Decree-Law 12/2012, of 30 March 2012, which introduces various taxation and administrative measures aimed at the reduction of public deficit, and ii) Act 16/2012, of 27 December 2012, which adopts various taxation measures aimed at the consolidation of public finances and the promotion of economic activity. However, regarding Royal Decree-Law 12/2012, Brattle's Quantum Expert Report (paragraphs 32 and 132) expressly indicates that the Claimant does not allege that such piece of legislation violates the ECT. Moreover, in the Claimant´s Observations on the Respondent's Request for Bifurcation of 24 March 2015 (paragraph 120(b) and footnote 151), the Claimant does not include Royal Decree-Law 12/2012 nor Act 16/2012 among the measures disputed in this arbitration. Hence we consider that the Claimant does not allege that any of the two pieces of legislation amount to a breach of the ECT.

267. Therefore, focussing on the TVPEE, according to the Claimant, the introduction of this new tax by Act 15/2012 allegedly amounts to a breach by the Kingdom of Spain of its obligations derived from Article 10(1) of the ECT. In particular, according to the Claimant[110], the introduction of the TVPEE would have supposedly violated the following standards of protection included in section (1) of Article 10 of the ECT:

- Fair and Equitable treatment.

- Not to impair, in any way, by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of the investments.

- To observe any obligations entered into with an Investor or an Investment (umbrella clause).

268. As analysed below, the Claimant is mistaken in its approach since section (1) of Article 10 of the ECT does not generate any type of obligation for the Contracting Parties, nor correlative rights for the investors, with respect to taxation measures of the Contracting Parties. Therefore, there is no possible alleged breach of obligations derived from section (1) of Article 10 of the ECT through the introduction of the TVPEE that enables the Claimant to submit this issue to the Arbitral Tribunal.

(3) The Kingdom of Spain has only consented to submit to arbitration disputes related to alleged breaches of obligations derived from Part III of the ECT

269. It is usual for the signing States of international Treaties on reciprocal protection of investments, bilateral or multinational, to envisage the possibility of resorting to arbitration to resolve controversies that derive from these treaties. It is also usual for those signing States to delimit in these Treaties, as is the case with the ECT, the scope of their consent for resorting to arbitration.

270. The Arbitral Tribunal of the case *ST-AD GmbH v. Republic of Bulgaria,* clearly stated this idea:

> *"At the outset, the Tribunal wants to restate that it is of the utmost importance not to forget that no participant in the international community, be it a State, an international organisation or a physical or a legal person, has an inherent right of access to a jurisdictional recourse. For such right to come into existence, specific consent has to be given. As far as investment arbitration is concerned, such consent can be given in a contract, a domestic law or an international bilateral or multilateral treaty. In all these different hypotheses, the State can shape its consent as it sees fit by providing the conditions under which it is given – in other words, the conditions subject to which an "offer to arbitrate" is made to the foreign investors."*[111] *(emphasis added)*

[110] Claimant's Memorial, dated 22 January 2015, paragraphs 35, 36 and 343.
[111] *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06. Award on Jurisdiction, dated 18 July 2013, paragraph 337. RL-0016.

271. In the particular case of the ECT, Article 26 of the ECT grants the investor the possibility of resorting to arbitration in the case of alleged breach by a Contracting Party of an obligation derived from Part III of the ECT:

> *"1. Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.[...]" (emphasis added)*

272. That is, in the field of the ECT the Contracting Parties, among them the Kingdom of Spain, have only given their consent to submit to arbitration disputes with an investor relating to alleged breaches of obligations derived from Part III of the ECT.

273. In view of the cited Article 26 of the ECT, there is no doubt that if no obligation derived from Part III of the ECT exists, there cannot be an alleged breach of it and thus, there is no consent of the Contracting Party to resort to arbitration, the Arbitral Tribunals therefore lacking the jurisdiction to hear the issue.

274. This is precisely what occurs in this case regarding taxation measures, in particular, regarding the TVPEE. There cannot be an alleged breach of obligations that legitimises resorting to arbitration simply because there is no obligation regarding taxation measures.

275. As analysed below, section (1) of Article 10 of the ECT, on which the Claimant tries to base its claims, despite being located in Part III of the ECT, does not generate any obligation with respect to taxation measures of the Contracting Parties. For this reason, there can be no alleged breach of obligations derived from such section through the adoption by the Kingdom of Spain of a taxation measure as is the introduction of the TVPEE by Act 15/2012.

276. As a consequence, we are facing a dispute on which the Kingdom of Spain has not given its consent to resort to arbitration. Thus, the Arbitral Tribunal lacks jurisdiction to hear the dispute raised by the Claimant about an alleged breach of obligations derived from Article 10(1) of the ECT through the adoption of a taxation measure as is the introduction of the TVPEE by Act 15/2012.

(4) The ECT does not generate obligations or rights with regard to taxation measures of the Contracting Parties, with certain stipulated exceptions

277. The ECT does not impose obligations nor generate rights with regard to taxation measures of the Contracting Parties, with certain exceptions stipulated in Article 21 of the ECT. This is provided by Article 21 of the ECT itself, on taxation, which clearly establishes the following in its section 1:

> *"1. Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency."*

278. That is, Article 21 of the ECT is clear and express when it states that:

- The ECT does not include any provision that creates rights or imposes obligations with respect to taxation measures of the Contracting Parties, with certain exceptions stated in the same Article 21 of the ECT. That is, Article 21 of the ECT contains a general exclusion of taxation measures from the scope of application of the ECT (*taxation carve-out)* which only presents certain exceptions (*claw backs)* expressly stipulated in such Article 21.

- In the case of conflict between Article 21 of the ECT and any other Article of the ECT, the Contracting Parties give priority to the cited Article 21.

279. Regarding what those exceptions are, the same Article 21 establishes in its sections (2) and (5) the Articles or sections of Articles of the ECT that do apply to taxation measures of the Contracting Parties. Those Articles or sections of Articles mentioned in Article 21 are, therefore, the only ones that do generate obligations to the Contracting Parties with respect to taxation measures.

280. In this sense, sections (2) to (5) of Article 21 ECT provide the following:

> *"2. Article 7(3) shall apply to Taxation Measures other than those on income or on capital, except that such provision shall not apply to: [...]*
>
> *3. Article 10(2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to: [...]*
>
> *4. Article 29(2) to (6) shall apply to Taxation Measures other than those on income or on capital.*
>
> *5. a) Article 13 shall apply to taxes. […]"*

281. The terms of the cited Article 21 of the ECT are absolutely clear: the ECT excludes the taxation measures of Contracting Parties from its scope of application, with the exceptions expressly stipulated in sections (2) to (5) of the cited Article 21.

282. This is recognised by the Secretariat of the ECT in its document "*The Energy Charter Treaty. A Reader´s guide*":

> *"The issue of taxation has great significance both for the private economic agents in the energy sector and the involved states. While foreign companies have a keen interest that they are not fiscally discriminated, host countries may wish to retain some discretion concerning their tax treatment. In an international context, the issue is primarily and most commonly dealt with in bilateral agreements on the avoidance of double taxation.*
>
> *The ECT confirms the priority of the latter agreements and seeks to avoid a potential conflict with them. Accordingly, Article 21 excludes taxation matters, in principle, from the scope of application of the agreement. However, this carve-out of taxation issues does not affect the application of the principle of non-discrimination as included in agreements on the avoidance of double taxation existing among ECT CPs.*

Article 21 does not entirely exclude taxation matters:

According to Article 21 (2),(3), the principle of non-discrimination in transit aninvestment matters shall apply to taxation measures other than those on income and capital. […]

Pursuant to Article 21 (4), the ECT covers taxation matters in trade with the exception of income or capital taxes.

According to Article 21 (5), the provision on expropriation (Article 13) applies to taxes. A foreign investor may therefore claim that a tax measure has expropriatory effects."[112] *(emphasis added)*

283. This meaning of Article 21 of the ECT is totally peaceful, the Tribunal in *Plama Consortium Limited v. Republic of Bulgaria* also indicating in the same sense that:

> *"The Arbitral Tribunal cannot see how this claim gives rise to a violation of Bulgaria's obligations under the ECT. In the first place, Article 21 of the ECT specifically excludes from the scope of the ECT's protections taxation measures of a Contracting State, with certain exceptions, […]."* [113] *(emphasis added)*

284. Thus, there is no doubt that taxation measures of the Contracting Parties are excluded from the scope of protection of the ECT, with the only exceptions stipulated in Article 21 of the ECT.

(5) Article 10(1) of the TCE does not impose obligations on the Contracting Parties with respect to taxation measures

285. Given the wording of Article 21 of the ECT, it is clear that section (1) of Article 10 of the ECT, on which the Claimant tries to base its allegations, does not generate obligations for the Contracting Parties with respect to taxation measures. That is, none of the exceptions stipulated in Article 21 of the ECT by which taxation measures are included in the scope of protection of the ECT comprises section (1) of Article 10 of the ECT.

286. The only sections of Article 10 that do apply, if the case, to taxation measures of the Contracting Parties are sections (2) and (7), sections on which the Claimant has not based any of the claims in the Claimant's Memorial. This is clearly established in Article 21 of the ECT:

> *"1. Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. […]*

[112] *The Energy Charter Treaty: A Reader´s Guide*, Energy Charter Secretariat, pages 38 and 39. CL-0029
[113] *Plama Consortium Limited v. the Republic of Bulgaria*, ICSID case nº ARB/03/24. Award of 27 August 2008, paragraph 266. CL-0058

3. Article 10(2) and (7)[114] shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to: […].”[115] (added emphasis)

287. Apart from such mention to the application of sections (2) and (7) of Article 10 of the ECT to certain taxation measures, Article 21 of the ECT does not contain any additional mention that any other section of Article 10 of the ECT applies to taxation measures.[116]

288. As a consequence, section (1) of Article 10 of the ECT, on which the Claimant tries to base its allegations, is not applicable to taxation measures of the Contracting Parties. Therefore, with respect to taxation measures of the Contracting Parties, section (1) of Article 10 of the ECT does not impose any obligation on the Contracting Parties nor does it generate any correlative right for the investors.

(6) The provisions relating to the TVPEE of Act 15/2012 are a taxation measure for the purposes of the ECT

289. As is analysed below, the provisions on the TVPEE of Act 15/2012[117] are considered a taxation measure for the purposes of the ECT.

(6.1) According to Article 21(7) of the ECT, for the purposes of Article 21 of the ECT the term *taxation measure* includes any provision relating to taxes of the domestic law of the Contracting Party

290. Article 21 of the ECT itself, on taxation, makes reference to what should be understood as a "taxation measure" for the purposes of this Article. According to section (7)(a)(i) of Article 21 of the ECT the term taxation measure includes any provision relating to taxes of the domestic law of the Contracting Party:

"7. For the purposes of this Article:

a) The term "Taxation measure" includes:

i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and;

ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound."[118] (emphasis added)

[114] Section 2 of Article 10 of the ECT states that the Contracting Parties shall endeavour to accord to investors of other Contracting Parties a treatment that is no less favourable than that which it accords to its own investors or to investors of any other Contracting Party or any third State in the phase of making the investment in its territory (pre-establishment phase). Section 7 of Article 10 of the ECT makes reference to the obligation of the Contracting Parties, in the post-establishment phase, to accord to investments of investors of other Contracting Parties, and their related activities, a treatment that is no less favourable than that which it accords to investments of its own investors or of investors of any other Contracting Party or any third State. RL-0002.

[115] Section 1 and 3 of Article 21 of the TCE. RL-0002.

[116] See full text of Article 21 of the TCE. RL-0002

[117] Articles 1 to 11 of Act 15/2012 regulate the TVPEE. R-0018

291. In light of Article 21(7)(a)(i) of the ECT, the following question ought to be raised: which Law is applicable in order to determine whether we are looking at provisions relating to taxes? To answer this question, two interpretations are possible: understanding that the Law applicable to determine whether we are looking at provisions relating to taxes should be the domestic Law of the Contracting Party or understanding that it should be international Law.

292. With respect to the first of these interpretations, there are various reasons to consider that the Law that governs the determination of whether certain provisions are provisions relating to taxes should be the domestic Law of the Contracting Party.

293. The first reason is the wording of Article 21(7)(a)(i) of the ECT. From the ordinary meaning of its terms it is understood that such Article contains a referral to the domestic legislation of the Contracting Party for the purpose of determining when are we looking at provisions relating to taxes:

> *"i) any provision relating to taxes of the domestic law of the Contracting Party,[…]"*[119] *(emphasis added)*

294. The arbitral jurisprudence has acknowledged the possibility that in international investment treaties a certain term is defined by reference to the domestic Law of a Contracting Party. In this regard, the Arbitral Tribunal in the case *Saipem v. Bangladesh* can be cited, which recognises that possibility, although it did not occur in such case:

> *"in the absence of any indication that the contracting states intended to refer to 'property' as a notion of Bangladeshi law, the Tribunal cannot depart from the general rule that treaties are to be interpreted by reference to international law."* [120] *(emphasis added)*

295. *The Oxford Handbook of International Investment Law* also recognises the possibility that international Treaties contain explicit reference to domestic Law:

> *"While treaty claims are obviously to be decided on the basis of international law, national law still has a role to play. […] Some of the facts on the basis of which to resolve international claims have been produced by, and may only be assessed by applying, national law […]. Examples of such 'preliminary' or 'incidental' questions governed by national law are whether an investment is valid, or a contract has been concluded […]. Further examples may, depending on the exact claim, comprise such issues as […] taxation, […]. Also, a treaty may make express reference to national law." (emphasis added) (footnotes omited)*

296. Another reason to interpret that Article 21(7)(a)(i) of the ECT refers to domestic Law to determine if we are looking at provisions relating to taxes is the referral to domestic Law contained in the Agreement to avoid double taxation signed by Spain and the Netherlands, the

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[118] Section (7)(a) of Article 21 of the ECT. RL-0002.
[119] Article 21(7)(a)(i) of the ECT. RL-0002.
[120] *Saipem S.p.A. v. the Popular Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, of 21 March 2007, paragraph 82. RL-0029

country where the Claimant is established. The Agreement to avoid double taxation between Spain and the Netherlands states in its Article 3 that:

> *"For the application of the present Convention by one State, any term not otherwise defined shall, unless the context requires a different interpretation, have the meaning which it has under the laws of that State relating to the taxes which are subject of this Convention."* [121] *(emphasis added)*

297. It should be noted that the said Agreement to avoid double taxation is an international treaty that binds the Respondent and the State of the Claimant in the present arbitration. Hence, such Convention has to be taken into consideration in accordance with Article 31(3)(c) of the Vienna Convention, which indicates regarding the interpretation of international Treaties that:

> *"3. There shall be taken into account, together with the context:[...] c) any relevant rules of international law applicable in the relations between the parties."*[122]

298. Lastly, it should be noted that in the field of other international investment Treaties different from the ECT it may be necessary to resort to international Law to define the concept of taxation measure since the Treaties themselves do not contain a provision like Article 21(7)(a)(i) of the ECT. For example, Article 2103 of the NAFTA[123] also includes a general *taxation carve-out* (with certain exceptions) regarding taxation measures, but such Treaty does not make reference to what is understood by taxation measure, as the ECT does.

299. On the other hand, a second interpretation of Article 21(7)(a)(i) of the ECT leads to understand that in order to determine if we are looking at provisions relating to taxes it is necessary to refer to international Law. This can be argued based on what is set out in Article 26(6) of the ECT, which provides that:

> *"A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."*[124]

300. The Kingdom of Spain particularly shares the first of the mentioned interpretations of Article 21(7)(a)(i) of the ECT. However, as far as the present arbitration is concerned, either of the two indicated interpretations of Article 21(7)(a)(i) of the ECT leads us to the conclusion that the TVPEE is a tax.

301. As analysed below, the provisions on the TVPEE of Act 15/2012 are provisions relating to a tax of the domestic law of the Kingdom of Spain since: i) Act 15/2012 is part of the domestic law of the Kingdom of Spain and ii) there is no doubt that the provisions on the TVPEE contained in Act 15/2012 are provisions relating to taxes, both if a concept of tax from the

[121] Agreement between the Government of the Spanish State and the Government of the Netherlands to avoid double taxation regarding Taxes on Income and on Capital, done in Madrid on 16 June 1971, Article 3(2). R-0036.
[122] Vienna Convention. CL-003.
[123] Article 2103 of the NAFTA. https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement. R-0030
[124] Article 26(6) of the ECT. RL-0002.

domestic Law of the Kingdom of Spain is used and if a concept of tax from international Law is used.

302. Thus, in accordance with Article 21(7)(a)(i) of the ECT, we are looking at a taxation measure for the purposes of the ECT.

(6.2) Act 15/2012 is part of the domestic Law of the Kingdom of Spain

303. Act 15/2012 is part of the domestic law of the Kingdom of Spain. In particular, Act 15/2012 is a national law passed by the Parliament of the Kingdom of Spain (comprised of the Congress of Deputies and the Senate) in accordance with the corresponding legislative procedure provided in the Spanish Constitution and the rest of the Spanish legal system.[125]

304. In this respect, the Spanish Constitution provides in its Article 66 that:

> *"1. The Parliament represents the Spanish people and shall consist of the Congress of Deputies and the Senate.*
>
> *2. The Parliament exercises the legislative power of the State, […]."*[126]

305. Moreover, Act 15/2012 that creates the TVPEE was passed in accordance with Article 133 of the Spanish Constitution, which grants the State the original authority to establish taxations, by means of law:

> *"1. The original power to establish taxations corresponds exclusively to the State, by means of law. […]"*[127]

(6.3) The provisions on the TVPEE of Act 15/2012 are provisions relating to taxes

306. As will be shown below, the TVPEE is a tax both under the domestic Law of the Kingdom of Spain and under international Law.

307. Therefore, the provisions of Act 15/2012 on the TVPEE are provisions relating to a tax, both under the domestic Law of the Respondent and under international Law.

(a) The TVPEE is a tax under the domestic Law of the Kingdom of Spain

308. From perspective of the domestic Law of the Kingdom of Spain, there is no doubt that the TVPEE is a tax. The Spanish Constitutional Court itself has ratified the taxation nature of the TVPEE and its conformity with the Spanish Constitution.

309. Act 15/2012 is clear about the taxation nature of the TVPEE. According to Act 15/2012, the TVPEE is a direct tax levied on the performance of the activities of production and

[125] The procedure of processing and approval of Act 15/2012 by the Spanish Congress of Deputies and the Senate is public and can be consulted in detail on the website of the Congress of Deputies. R-0037

[126] Spanish Constitution of 1978. Consolidated version. R-0038

[127] Act 58/2003, of 17 December, on General Taxation, provides the same when stating in its Article 4 that *"1. The original power to establish taxations corresponds exclusively to the State, by means of law […]".* R-0039.

incorporation into the electrical system of electrical energy in the Spanish electrical system. In this regard, Article 1 of Act 15/2012 provides the following:

> *"Article 1 Nature*
>
> *The tax on the value of the production of electrical energy is a taxation of a direct and real nature levied on the performance of activities of production and incorporation into the electrical system of electrical energy, measured in power station busbars, through each of the installations indicated in Article 4 of this Act."*[128] *(emphasis added)*

310. The concept of taxation and its different types (taxes, fees and special contributions) under Spanish Law is set out in Article 2 of Act 58/2003, of 17 December, on General Taxation:

> *"1. Taxations are public incomes that consist of monetary contributions required by a public Administration as a consequence of the performance of an act to which the law connects the duty to contribute, with the primary purpose of obtaining the necessary income to support public spending.*
>
> *As well as being a means to obtain the resources needed to support public spending, taxations may also serve as instruments of general economic policy and attend to the compliance with the principles and purposes contained in the Constitution*
>
> *2. Taxations, whatever their denomination, are classified in fees, special contributions and taxes:*
>
> *[…]*
>
> *c) Taxes are taxations required without compensation, whose taxable event is made up of deals, acts or events that show the economic capacity of the taxpayer."*[129]

311. As we have indicated previously, the TVPEE applies to all installations for electricity production, both from renewable and conventional sources. The tax base of the TVPEE shall be comprised by the total amount that the taxpayer is to receive due to the production and incorporation into the electrical system of electrical energy, measured in power plant busbars, for each installation, in the taxable period. The applicable tax rate is 7%. The taxable period will generally coincide with the natural year and the TVPEE will be accrued on the last day of the taxable period.

312. The self-assesment and payment to the Public Treasury of the TVPEE is made through Form 583 "Tax on the value of production of electrical energy. Self-assessment and installment payments".[130] Form 583 was approved by Order HAP/703/2013, of 29 April 2013, which also

[128] Act 15/2012. R-0018

[129] Act 58/2003, of 17 December, on General Taxation, Article 2. R-0039

[130] Web page of the State Tax Administration Agency containing information on Form 583 and where it can be filed online. R-0040

establishes the form and procedure for its presentation.[131] It should also be noted that the Spanish National Audience Court has declared that Ministerial Order HAP/703/2013 is in accordance with the Law.[132]

313. The taxation nature of the TVPEE has also been acknowledged by organisms such as the Institute of Accounting and Account Auditing (ICAC)[133], which when analysing the accounting treatment of the TVPEE established in consultation of June 2013 that:

> *"The tax on the value of the production of electrical energy is a direct and real taxation [...] having to be registered as an expense in the profit and loss account; for that purpose account 631 Other taxations may be used."*[134]

314. In addition it must be considered that, in accordance with Spanish Law, the TVPEE is a deductible expense in the Corporations Tax of taxpayers taxed by the TVPEE.

315. In this regard, as the ICAC indicates, taxpayers have to register the TVPEE as an expense in their accounting. This accounting expense corresponding to the TVPEE will be tax deductible in the Corporations Tax of the taxpayers. Article 15 of Act 27/2014, of 27 November, on the Corporations Tax includes the expenses that are not considered tax deductible. The expense that corresponds to the TVPEE does not fit in any of the cases of non-deductible expenses and, hence, is considered a tax deductible expense in the Corporations Tax.[135]

316. This tax deductibility of the accounting expense corresponding to the TVPEE in accordance with Spanish law has been confirmed by the General Directorate of Taxations[136] of the Kingdom of Spain. In the response of 23 December 2014 to a written tax consultation received, the General Directorate of Taxations indicated the following:

> *"The consultant raises the question of whether the amount self-assessed as the "Tax on the Value of the Production of Electrical Energy", through the filing*

[131] Order HAP/703/2013, of 29 April, which approves Form 583 "Tax on the Value of the Production of Electrical Energy. Self-assessment and instalment payments", and establishes the form and procedure for its filing. R-0041

[132] The Spanish National Audience Court has dismissed various contentious-administrative appeals filed against Ministerial Order HAP/703/2013, of 29 April 2013, and has declared that such Order is in conformity with the Law. In this sense the following Judgements of the Spanish National Audience Court can be cited: i) Judgement of the Spanish National Audience Court, of 2 June 2014 (appeal 297/2013 filed by the Spanish company Iberdrola Generación) (R-0042), ii) Judgement of the Spanish National Audience Court, of 2 June 2014 (appeal 298/2013) (R-0043), or iii) Judgement of the Spanish National Audience Court, of 30 June 2014 (appeal 296/2013) (R-0044)

[133] The Institute of Accounting and Account Auditing (ICAC) is an Autonomous Body of the Spanish State Administration, under the auspices of the Ministry of the Economy and Competitiveness. Among its functions, is responding to consultations that are made with respect to the application of the rules contained in the legal framework of applicable financial information and the regulatory law on the activity of accounts auditing. www.icac.meh.es. R-0045

[134] Consultation 1, No. of BOICAC 94/June 2013. R-0046

[135] Act 27/2014, of 27 November, on the Corporations Tax, Article 15. R-0047

[136] The General Directorate of Taxations is a body of the Ministry of Finance and Public Administrations of the Kingdom of Spain that has among its functions the interpretation of taxation regulations, among other ways, through the answering of written tax consultations that it receives. Web page of the Ministry of Finance and Public Administrations that refers to the structure and functions of the General Directorate of Taxations. R-0048

of Form 583, is considered a tax deductible expense, in the activity of the production of electrical energy (section 151.4), both for the taxpayer of the Corporations Tax, and in the calculation of return on direct estimation, for taxpayers of Corporations Tax, such as the calculation of return of the activity in direct estimation, for the taxpayers of the Personal Income Tax. […] given that the law of the Corporations Tax does not contemplate any specific provision in relation to the Tax on the Value of the Production of Electrical Energy, we will follow its accounting treatment, […] In conclusion, the taxpayer of the Tax on the value of the production of electrical energy, shall register it as an accounting expense, in the month of November of each year, an expense that will be tax deductible in the taxable period of accounting.[…]"[137] *(emphasis added)*

(i) The Spanish Constitutional Court has ratified the taxation nature of the TVPEE and its conformity with the Spanish Constitution

317. The Spanish Constitutional Court itself has ratified the taxation nature of the TVPEE.

318. The Regional Government of the Autonomous Community of Andalusia, a region of Southern Spain, filed an appeal of unconstitutionality (appeal of unconstitutionality number 1780-2013) before the Spanish Constitutional Court against the TVPEE. Such Government resorted to the Spanish Constitutional Court as such Government understood that certain Articles of Act 15/2012 that regulate the TVPEE were contrary to the Spanish Constitution. In particular, Articles 4, 5 and 8 of Act 15/2012, regarding respectively the taxable event, the taxpayers and the tax rate of the TVPEE.

319. The Claimant, in paragraph 266 of its Claimant's Memorial, makes reference to this appeal of unconstitutionality. However, it remains totally silent on the decision that the Spanish Constitutional Court made.

320. The Spanish Constitutional Tribunal, supreme interpreter of the Spanish Constitution[138], does not agree with the opinion of the said Regional Government. Thus, in its Ruling of 6 November 2014, the Spanish Constitutional Court has dismissed the appeal of the Government of the Autonomous Community of Andalusia in this regard and has stated that the cited regulation of the TVPEE contained in Act 15/2012 is perfectly valid and in accordance with the Spanish Constitution.[139]

321. Thus, there is no doubt that the TVPEE is a tax under Spanish Law.

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[137] Response of the General Directorate of Taxations, of 23 December 2014, to the Binding Tax Consultation V3371-14. R-0049

[138] Organic Act 2/1979, of October 3, of the Constitutional Court, first article:
"*First Article*
1. The *Constitutional Court, as supreme interpreter of the Constitution, is independent of the other constitutional bodies and is subject only to the Constitution and the present Organic Law*.
2. Its order is unique and its jurisdiction reaches all national territory." R-0050

[139] Judgement 183/2014, of 6 November 2014, of the Plenary session of the Constitutional Court in the appeal of unconstitutionality number 1780-2013 filed by the Council of the Government of the Junta de Andalucía in relation to Articles 4, 5 and 8 of Act 15/2012 (and other rules), published in the Official State Gazette of the 4 December 2014. R-0051

(b) The TVPEE is a tax under international Law

322. In addition, even from the perspective of international Law, it is undoubted that the TVPEE is a tax.

323. In this regard, as will be examined below, the TVPEE is a tax in accordance with the concept of tax in international Law used by arbitral jurisprudence. In addition, the European Commission has ratified the taxation nature of the TVPEE and its conformity with EU Law.

(i) The TVPEE is a tax in accordance with the concept of tax in international Law used by arbitral jurisprudence

324. If we resort to a concept of "tax" in international Law, especially to the concept that has been repeatedly used by the Arbitral Tribunals, it is concluded that the TVPEE is a tax.

325. *Black´s Law Dictionary* provides the following definition of a tax:

> *"**tax**, n. (14c) A charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue. […]"*[140]

326. It should be noted that this concept of tax is substantially equal to that provided by Spanish law in Article 2 of Act 58/2003, of 17 December, on General Taxation -in essence, a compulsory contribution to the Public Treasury-.[141]

327. Different Arbitral Tribunals have provided definitions similar to that of *Black´s Law Dictionary*.

328. The Arbitral Tribunal of the case *EnCana v. Ecuador* made reference to the meaning of the term "taxation measures", which is not defined in the Canada-Ecuador BIT applicable in that case, stating the following:

> *"It is in the nature of a tax that it is imposed by law.[…]The question whether something is a tax measure is primarily a question of its legal operation, not its economic effect. A taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes. The economic impacts or effects of tax measures may be unclear and debatable; nonetheless*

[140] *Black´s Law Dictionary*, Ninth Edition, Bryan A. Garner Editor in Chief, page 1594. RL-0031.
[141] Act 58/2003, of 17 December, on General Taxation. Article 2:
"*1. Taxations are public incomes that consist of monetary contributions required by a public Administration as a consequence of the performance of an act to which the law connects the duty to contribute, with the primary purpose of obtaining the necessary income to support public spending.*
As well as being a means to obtain the resources needed to support public spending, taxations may also serve as instruments of general economic policy and attend to the compliance with the principles and purposes contained in the Constitution
2. Taxations, whatever their denomination, are classified in fees, special contributions and taxes:
[…]
c) Taxes are taxations required without compensation, whose taxable event is made up of deals, acts or events that show the economic capacity of the taxpayer." R-0039.

a measure is a taxation measure if it is part of the regime for the imposition of a tax.[…]"[142] *(emphasis added)*

329. The opinion of that Arbitral Tribunal was welcomed by the Arbitral Tribunal of the case *Duke Energy v. Ecuador,* which, when referring to the concept of "matters of taxation" mentioned in Article X of the US-Ecuador BIT and not defined by it, indicated the following:

> *"The Treaty does not define the term "matters of taxation". In seeking to elucidate its meaning, the ruling in EnCana v. Ecuador appears to be of particular relevance."*[143]

330. Following this line, the Arbitral Tribunal of the case *Burlington Resources v. Ecuador*, when referring also to the concept "matters of taxation", stated the following:

> *"To answer the question whether Law 42 is a tax for purposes of Article X of the Treaty under international law, the Tribunal finds that the EnCana and Duke Energy decisions are indeed apposite. In EnCana, the tribunal held that a "tax" is "imposed by law" and that this "taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes." In Duke Energy, the tribunal, dealing with the Treaty applicable to this dispute, held that "the ruling in EnCana v. Ecuador appears to be of particular relevance" to elucidate the meaning of "matters of taxation" under Article X of the Treaty.*
>
> *Building on EnCana's ruling, Duke Energy stands for the proposition that there is "tax" under Article X of the Treaty if the following four requirements are met: (i) there is a law (ii) that imposes a liability on classes of persons (iii) to pay money to the State (iv) for public purposes. Under this definition, the Tribunal is of the view that Law 42 is a tax."*[144] *(emphasis added)*

331. Given all of the above decisions, the concept of tax in international Law used by Arbitral Tribunals presents a series of defining features that can be summed up as the following:

- That the tax is established by law.
- That such law imposes an obligation on a class of people, and
- That such obligation implies payment money to the State for public purposes.

332. As we will see below, in the present case the TVPEE complies with all of these defining features, and hence there is no doubt that we are looking at a tax according to a concept of tax under international Law.

The TVPEE is established by Law

[142] *EnCana Corporation v. The Republic of Ecuador,* UNCITRAL, PCA Case No. UN 3481, Decision of the 3rd February 2006, paragraph 142. RL-0032.
[143] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador Case* CIADI No. ARB/04/19, Decision of 18th of August 2008, paragraph 174. RL-0033.
[144] *Burlington Resources Inc. v. Republic of Ecuador Case* CIADI No. ARB/08/5, Decision on Jurisdiction of the 2nd of June 2010, paragraphs 164 and 165. RL-0034.

333. Firstly, as has already been analysed, the TVPEE was established by Law: Act 15/2012. Act 15/2012 is a law approved by the Parliament of the Kingdom of Spain (comprised of the Congress of Deputies and the Senate) in accordance with Article 133 of the Spanish Constitution, pursuant to which the original authority to establish taxations corresponds exclusively to the State by means of the Law.

The Law imposes an obligation on a class of people

334. Secondly, Act 15/2012 that regulates the TVPEE imposes the obligation of payment of this tax on a class of people. Specifically, as has already been analysed also, in accordance with Act 15/2012, the TVPEE applies to all those that perform the activities of production and incorporation into the electrical system of electrical energy in the Spanish electrical system, whether those installations produce electricity from renewable energy or conventional sources.

The obligation implies payment money to the State for public purposes

335. Thirdly, Act 15/2012 imposes on taxpayers of the TVPEE the obligation to pay money to the State for public purposes.

336. In this respect, the taxpayers of the TVPEE are obliged to make the payments to the State that correspond to this tax in accordance with Article 10 of Act 15/2012, on assessment and payment of the tax,[145] and with Order HAP/703/2013, of 29 April, which approves Form 583 "Tax on the Value of the Production of Electrical Energy. Self-assessment and instalment payments", and establishes the form and procedure for filing it.[146]

337. The TVPEE is an income of the Spanish State. Incomes corresponding to the TVPEE are public incomes that are included in the General Budget of the Spanish State. This can be clearly appreciated in the General Budget of the Spanish State for the years 2013, the first year the TVPEE was in force, 2014 and 2015.

338. In this regard, in the General Budget of the Spanish State for 2015, the last approved budget, it can be appreciated that the income corresponding to the TVPEE is included in these General Budget in Section *"State Income"* (Section 98), Chapter *"Direct taxes and social contributions"* (Chapter 1) and, within this, in section *"Taxes on the production and storage of electrical energy and fuel"* (section 13), (sub-section *"On the value of the production of electrical energy"* (sub-section 130)[147]:

[145] Act 15/2012. R-0018
[146] Order HAP/703/2013, of 29 April, which approves Form 583 "Tax on the Value of the production of Electrical Energy. Self-assessment and installment payments", and establishes the form and procedure for filing it. R-0041
[147] Extract of the General Budget of the Spanish State for 2015. R-0052

PRESUPUESTOS GENERALES DEL ESTADO

ESTADO

EJERCICIO PRESUPUESTARIO
2015

Sección: 98 INGRESOS DEL ESTADO
Servicio: 01 INGRESOS DEL ESTADO

(Miles de euros)

Económica	Explicación		Total
1	IMPUESTOS DIRECTOS Y COTIZACIONES SOCIALES		
10	**Sobre la renta**		**65.322.000,00**
100	De las personas físicas		40.215.000,00
10000	Impuesto sobre la Renta de las Personas Físicas	40.464.000,00	
10099	Asignacion tributaria a la Iglesia Catolica	-249.000,00	
101	De sociedades		23.577.000,00
10100	Impuesto sobre Sociedades	23.577.000,00	
102	De no residentes		1.530.000,00
10200	Impuesto sobre la Renta de no Residentes	1.530.000,00	
11	**Sobre el capital**		**164.000,00**
119	Otros impuestos sobre el capital		164.000,00
11900	Impuesto General sobre Sucesiones y Donaciones.	133.000,00	
11901	Impuesto sobre el Patrimonio	31.000,00	
12	**Cotizaciones sociales**		**954.032,75**
120	Cotizaciones de los regímenes especiales de funcionarios		954.032,75
12000	Cuotas de Derechos Pasivos	954.032,75	
13	**Impuestos sobre la producción y almacenamiento de energía eléctrica y combustible**		**1.958.000,00**
130	Sobre el valor de la producción de la energía eléctrica		1.721.000,00
131	Sobre la producción de combustible nuclear gastado y residuos radiactivos resultantes de la generación de energía nucleoeléctrica		227.000,00
132	Sobre el almacenamiento de combustible nuclear gastado y residuos radiactivos en instalaciones centralizadas		10.000,00
	TOTAL IMPUESTOS DIRECTOS Y COTIZACIONES SOCIALES		**68.398.032,75**
2	IMPUESTOS INDIRECTOS		
21	**Sobre el Valor Añadido**		**32.529.000,00**
210	Impuesto sobre el Valor Añadido		32.529.000,00
21000	IVA sobre importaciones	10.206.000,00	
21001	IVA sobre operaciones interiores	22.323.000,00	
22	**Sobre consumos específicos**		**8.092.000,00**
220	Impuestos especiales		8.092.000,00
22000	Sobre el alcohol y bebidas derivadas	331.000,00	
22001	Sobre cerveza	122.000,00	
22003	Sobre labores de tabaco	2.945.000,00	
22004	Sobre hidrocarburos	4.404.000,00	
22006	Sobre productos intermedios	7.000,00	
22007	Sobre la electricidad	43.000,00	
22008	Sobre carbón	240.000,00	
23	**Sobre tráfico exterior**		**1.400.000,00**
230	Derechos de aduana y exacciones de efecto equivalente establecidos para la importación o exportación de mercancías		1.358.000,00
231	Exacciones reguladoras y otros gravámenes agrícolas		42.000,00
28	**Otros impuestos indirectos**		**2.135.000,00**
280	Cotización, producción y almacenamiento de azúcar e isoglucosa		9.000,00
281	Impuesto sobre las Primas de Seguros		1.370.000,00

339. Equally, in the General Budgets of the Spanish State for the year 2013 and for the year 2014 the income from the TVPEE is also included as a State income in the same sections that we have just indicated for the Budget for 2015.[148]

[148] Extract of the General Budget of the Spanish State for 2013. R-0053
Extract of the General Budget of the Spanish State for 2014. R-0054

340. Therefore, the TVPEE is a public income that, together with the rest of the State income, contributes to conform the State funds with which public expenses are financed.

341. It should be noted that the Second Additional Provision of Act 15/2012 provides that an amount equivalent to the estimation of the annual revenue of the State derived from taxations and royalties included in Act 15/2012, among them the TVPEE, will be destined in the General Budget of the State Laws of each year to finance certain costs of the electric sector:

> *"Second Additional Provision Costs of the electrical system.*
>
> *The Laws of the General State Budget of each year, in order to finance the costs of the electrical system set out in Article 13 of the Law on the Electrical Sector, will allocate an amount equivalent to the addition of the following:*
>
> *a) The estimation of the annual collection derived from the taxations and royalties included in this Act.*
>
> *b) The estimated income resulting from the auctioning of emissions allowances, up to a maximum of 500 million euros."*[149] *(emphasis added)*

342. This Second Additional Provision was supplemented and specified by the Fifth Additional Provision of Act 17/2012, of 27 December, on the General Budget of the State for the year 2013, which states that an amount equivalent to the estimation of the annual collection derived from the taxations included in Act 15/2012, among them the TVPEE, shall be allocated to finance among the costs of the electrical power system refered in the Electric Power Act, specifically those referring to encouraging renewable energies:

> *"Fifth Contributions for the financing of the Electrical Sector*
>
> *1. The Laws of the General State Budget of each year will allocate, in order to finance the costs of the electric system provided in the Law of the Electrical Sector,* ***concerning the promotion of renewable energies,*** *an amount equivalent to the sum of the following:*
>
> *a) The estimation of the annual collection derived from the taxations included in the act on economic measures for energy sustainability [Act 15/2012].*
>
> *b) 90 per cent of the income estimated from the auctioning of greenhouse gas emission rights, with a maximum of 450 million euros.*
>
> *2. 10 per cent of the income derived from the auctioning of greenhouse gas emissions rights, up to a maximum of 50 million euros is allocated to the policy on the fight against climate change."*[150] *(emphasis added)*

343. It should be noted that the TVPEE is not the only taxation included in Act 15/2012. Act 15/2012 does not only create the TVPEE but it also creates two other new taxes: i) the Tax on the production of spent nuclear fuel and radioactive waste resulting from the generation of

[149] Second aditional provision of Act 15/2012. R-0018
[150] Act 15/2012. R-0018

nucleoelectric energy and ii) the Tax on the storage of spent nuclear fuel and radioactive waste in centralised installations.

344. The possibility of affecting the State funds to specific aims is permitted by Spanish Budgetary Law, in particular by Act 47/2003, of 26 November, on the General Budget, which expressly states in its Article 27(4) that:

> *"Article 27 Principles and rules of budgetary management:*
>
> *[...] 4. The resources of the State, of each of its autonomous agencies and of the bodies with limitative budgets that are part of the public state sector will be destined to pay the totality of their respective obligations, **unless their allocation for specific purposes is established by law**."*[151] *(emphasis added)*

345. As has been analyzed, the TVPEE was established by Act 15/2012 which imposes on a certain class of people the obligation to pay money to the State for public purposes. Therefore, the TVPEE constitutes a tax in accordance with the concept of tax in international Law that the Arbitral Tribunals have been applying.

(ii) The European Commission has ratified the taxation nature of the TVPEE and its conformity with EU Law

346. In addition, the European Commission has ratified the taxation nature of the TVPEE and its conformity with EU Law.

347. In the year 2013 the European Commission initiated a procedure of request for information to the Kingdom of Spain to verify the conformity of the TVPEE with EU Law (EU Pilot procedure 5526/13/TAXU). The Claimant makes reference to such procedure in paragraph 272 of the Claimant's Memorial. However, the European Commission has closed such procedure considering that the TVPEE is in accordance with EU Law.

348. The said EU pilot procedure of request for information to the Kingdom of Spain was started after a complaint was filed before the European Commission by private citizens who alleged a supposed conflict of the TVPEE with EU Law. After receiving the complaint, the European Commission requested information to the Kingdom of Spain regarding this matter.[152] Contrary to what the Claimant mistakenly affirms in the Claimant's Memorial, the Kingdom of Spain did provide the requested information to the European Commission.

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[151] Act 47/2003, of 26 November, on the General Budget, Article 27. R-0055

[152] The existence of this EU Pilot procedure 5526/13/TAXU relating to the TVPEE was mentioned in the Judgement of the Spanish National Audience Court, of 2 June 2014, which dismissed the contentious-administrative appeal filed by the Spanish company Iberdrola Generación, S.A., against Order HAP/703/2013 that approved Form 583 "Tax on the Value of the Production of Electrical Energy. Self-assessment and instalment payments". Such Judgement of 2 June 2014 reflected that during the processing of the appeal which it resolved it had been manifested that the European Commission was processing the cited EU pilot procedure: *"[...] a procedure relating to the Tax created by Act 15/2012 (EU Pilot 5526/13/TAXU) is underway by the European Commission in which observations to the national authorities have been requested*". R-0042

349. In view of such information, the European Commission concluded that there were no reasons to consider that the TVPEE breached EU Law and, thus, that there were no reasons to initiate an EU Law infringement procedure regulated in Article 258 of the TFEU. Consequently, on 8 September 2014 the European Commission proceeded to close the mentioned EU Pilot procedure.[153]

350. It must be taken into consideration that the EU Pilot procedure is a process of exchange of information between the European Commission and a Member State of the EU to analyse whether a certain measure of that Member State is in conformity with EU Law. The EU Pilot procedure constitutes a previous phase, if the case, to the EU Law infringement procedure regulated in Article 258 of the TFEU.

351. Thus, specifically, when a complaint is filed by citizens or companies alleging that a measure of a Member State supposedly violates EU law (or when the European Commission detects at its own initiative a possible violation of EU Law), the European Commission begins an EU Pilot Procedure. Through that EU Pilot procedure, the European Commission requests information to the relevant Member State regarding the measure in question of such State.

352. In view of the information and observations provided by the Member State in the corresponding EU Pilot procedure, if the European Commission considers that there are reasons for understanding that a possible breach of EU Law has taken place, an EU Law infringement procedure regulated in Article 258 of the TFEU is initiated. On the contrary, as it has occurred regarding the TVPEE, if the European Commission concludes there are no reasons for understanding that a violation of EU Law may have taken place, the EU Pilot procedure is ended, and therefore no EU Law infringement procedure regulated in Article 258 of the TFEU is initiated.

353. This is explained on the web page of the European Commission itself:

> *"Further to an enquiry or a complaint (by citizens, businesses and organisations), or on their own initiative, the Commission's services might need to gather additional factual or legal information for a full understanding of an issue concerning the correct application of EU law or the conformity of the national law with EU law. In such cases, the Commission's services submit a query to the Member State concerned via EU Pilot. Member States normally have 10 weeks to respond and the Commission's services, in turn, also have 10 weeks to assess the response (if the response is not satisfactory, the Commission will normally launch infringement proceedings by sending a letter of formal notice to the Member State concerned)."*[154]

354. As we have seen, the European Commission itself has never doubted that the TVPEE is a tax and, moreover, it has ratified the conformity of this tax with EU Law.

[153] E-mail from the European Commission to the Ministry of Foreign Affairs and Cooperation of the Kingdom of Spain informing of the closing of EU Pilot procedure 5526/13/TAXU. R-0056

[154] European Comission webpage referring to the EU Pilot procedures (English version). R-0057 http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm.

355. In summary, in view of all of the above, there is no doubt that the TVPEE is a tax both from the perspective of the domestic Law of the Kingdom of Spain and from the perspective of international Law, and that it has been established through a domestic Law of the Kingdom of Spain: Act 15/2012. In other words, both from the point of view of domestic Law and from that of international Law, the provisions on the TVPEE of Act 15/2012 are provisions relating to taxes of the domestic law of the Kingdom of Spain.

356. Consequently, in accordance with Article 21(7)(a)(i) of the ECT, we are looking at a taxation measure for the purposes of Article 21 of the ECT.

(7) Conclusion

357. Considering all of the above, we can conclude, in short, that the Kingdom of Spain introduced, with effect from 1 January 2013, the TVPEE through Act 15/2012, passed by its Parliament (Congress of Deputies and Senate). The provisions relating to the TVPEE of Act 15/2012 are considered a taxation measure for the purposes of the ECT given that the ECT states that the term "taxation measure" includes any provision relating to taxes of the domestic law of the Contracting Party (Article 21(7)(a)(i) of the ECT).

358. The Kingdom of Spain has only given its consent to submit to investment arbitration disputes related to alleged breaches of obligations derived from Part III of the ECT (Article 26 of the ECT).

359. The Claimant argues an alleged breach by the Kingdom of Spain of obligations derived from section (1) of Article 10 of the ECT -an Article contained in Part III of the ECT- through the establishment of the TVPEE by Act 15/2012.

360. However, section (1) of Article 10 of the ECT does not generate obligations regarding taxation measures of the Contracting Parties. The only sections of Article 10 that do apply to taxation measures, if the case, are sections (2) and (7), not invoked by the Claimant (Article 21 of the ECT).

361. Thus, there is no obligation arising from section (1) of Article 10 of the ECT that could have been allegedly breach by the Kingdom of Spain through the adoption of taxation measures, particularly, through the introduction of the TVPEE by Act 15/2012.

362. Therefore, the Kingdom of Spain has not given its consent to refer to arbitration the dispute on an alleged breach of section 1 of Article 10 of the ECT through the introduction of the TVPEE by Act 15/2012. Hence, with all due respect, the Arbitral Tribunal lacks jurisdiction to hear about such dispute.

363. Consequently, the Kingdom of Spain requests that the Arbitral Tribunal declares its lack of jurisdiction to hear the dispute on the alleged breach by the Kingdom of Spain of obligations arising from section (1) of Article 10 of the ECT through the introduction of the TVPEE by Act 15/2012.

F. <u>Breach of the obligation to submit the dispute on Royal Decree-Law 9/2013, Act 24/2013, Royal Decree 413/2014 and Ministerial Order IET/1045/2014 to the Kingdom of Spain and to observe a three month perdio (*cooling off period)* prior to the submission of the dispute to arbitration, in accordance with Article 26 of the ECT</u>

(1) Introduction

364. The Claimant has not respected the requirements contained in Article 26 of the ECT regarding the request for an amicable solution to the Kingdom of Spain, and the three month period to try to reach an amicable solution, or *cooling off period*, before submitting the dispute to arbitration in relation with:

- Royal Decree-Law 9/2013, which sets forth urgent measures to ensure the financial stability of the electricity system,
- Act 24/2013, of 26 December 2013, on the Electricity Sector (hereinafter "**Act 24/2013**"),
- Royal Decree 413/2014, of 6 June 2014, regulating the activity of electricity production via co-generation from renewable energy sources and from waste products (hereinafter "**Royal Decree 413/2014**"), and
- Ministerial Order IET/1045/2014, of 16 June 2014, which approves the remuneration parameters of type installations applicable to certain installations that produce electrical energy through renewable energy sources, cogeneration and waste (hereinafter "**Ministerial OrderIET/1045/2014**").

365. For this reason, the Arbitral Tribunal lacks jurisdiction to hear about these pieces of legislation that the Claimant attempts to unduly include in the scope of the present arbitration: Royal Decree-Law 9/2013, Act 24/2013, Royal Decree 413/2014 and Ministerial Order IET/1045/2014.

(2) The obligation to communicate the dispute to the Kingdom of Spain and to observe a three month period to try to reach an amicable solution, or *cooling off period*, before submitting the dispute of arbitration

366. Article 26 of the ECT contains the consent of the Contracting States to arbitration. This consent is granted in accordance with Article 26 itself, as indicated in section (3)(a) of the said Article 26:

> *"3. a) [...] each Contracting Partys hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation <u>in accordance with the provisions of this Article</u>."*[155] *(added emphasis)*

367. According to Article 26(2) of the ECT, prior to being able to resort to arbitration, an amicable solution to the dispute shall be requested and a three month period to try to reach an amicable solution shall be observed.[156] Thus, under the ECT, the Contracting States only consent to

[155] Article 26(3)(a) of the ECT. RL-0002
[156] Article 26 of the ECT. RL-0002

resorting to arbitration once an amicable solution has been requested and a three month period has passed by without having reached a solution to the particular dispute. As indicated in *The Oxford Handbook of International Investment Law*:

> *"The Energy Charter Treaty (ECT) also provides consent to investment arbitration. Article 26(3)(a) provides in relevant part: `...each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with this Article'. [...] Consent applies if the dispute cannot be settled within three months from the date on which either party requested amicable settlement."*[157] *(emphasis added)(footnotes omitted)*

368. Therefore, the lack of request for an amicable solution and the non-observance of the three month period of a particular dispute amounts to a breach of the circumstances under which the Contracting Parties have consented to submit to arbitration a dispute based on the ECT. Thus, the lack of compliance with those circumstances excludes the jurisdiction of the Arbitral Tribunal on the said dispute.

369. In this sense, the Arbitral Tribunal in *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* stated that the observance of a period to try to reach an amicable solution constitutes a jurisdictional requirement whose omission results in the inability of the Arbitral tribunal to hear about the dispute:

> *"The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction."*[158]

370. In addition, recently, in *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, the arbitral award indicated the following:

> *"[...] the "cooling off period" narrows the consent given by the Contracting Parties to international arbitration. [...]*
>
> *The Tribunal thus concludes that, at least in this case, the "cooling off period" is a jurisdictional barrier conditioning the jurisdiction of the Tribunal rationae voluntatis, since it is not up to a claimant to decide whether and when to notify the host State of the dispute, just as it is not up to such claimant to decide how long they must wait before submitting the request for arbitration. The Tribunal agrees with the Respondent that no explicit*

[157] *The Oxford Handbook of International Investment Law*, Muchlinski, Ortino and Schreuer, Oxford University Press, página 851. RL-0035

[158] *Enron Corporation and Ponderosa Assets, L.P. v. Republica Argentina*, ICSID Case No. ARB/01/3. Decisión on Jurisdiction of 14 January 2004, paragraph 88. RL-0036

notification has been made in relation to the so-called "New Claims" and thus the cooling off period has been breached."[159]

371. In the same sense, *The Oxford Handbook of International Investment Law* makes reference to the award documented in the case *Antoine Goetz et consorts v. The Republic of Burundi,* indicating the following with respect to such award:

> *"The tribunal found that the waiting period had been satisfied with respect to the investor´s primary claim, but not with respect to certain supplementary claims put forward by the claimant. For the tribunal, it followed that the supplementary claims were 'not in consequence capable of being decided on, and the dispute on which the Tribunal is called to give an award relates exclusively to the [primary claim]'."*[160]

(3) In the present case, an amicable solution has not been requested nor has the subsequent three month period been respected regarding Royal Decree-Law 9/2013, la Act 24/2013, Royal Decree 413/2014 and Ministerial Order IET/1045/2014

372. In the present case, an amicable solution has not been requested nor has the subsequent three month period been respected regarding Royal Decree-Law 9/2013, Act 24/2013, Royal Decree 413/2014 and Ministerial Order IET/1045/2014, which the Claimant unduly tries to bring within the scope of the present arbitration.

373. Definitively, in this case the circumstances under which the Kingdom of Spain has consented and offered to resort to arbitration under the ECT have not been respected. As a consequence, the omission of these requirements prevents the Arbitral Tribunal to have jurisdiction regarding Royal Decree-Law 9/2013, Act 24/2013, Royal Decree 413/2014 and Ministerial Order IET/1045/2014.

374. Despite the fact that the Claimant's Memorial affirms that this requirementhas been fulfilled, the Claimant has not made the mandatory communication to the Kingdom of Spain of the existence of a dispute, nor has it observed the mandatory requirement of waiting for three months regarding these pieces of legislation included in the Claimant's Memorial:

- Royal Decree-Law 9/2013
- Act 24/2013,
- Royal Decree 413/2014, and
- Ministerial Order IET/1045/2014.

375. On 27 December 2012, the Spanish Parliament approves Act 15/2012, on taxation measures for energetic sustainability, published in the Official State Gazette (hereinafter "**BOE**") of 28 December 2012.

[159] *Guaracachi America, Inv. and Rurelec PLC v. v. The Plurinational State of Bolivia,* UNCITRAL, PCA Case No. 2011-17, Award 31 January 2014, paragraphs 388 to 391. RL-0011

[160] *The Oxford Handbook of International Investment Law,* Muchlinski, Ortino and Schreuer, Oxford University Press, pages 845- 846. RL-0017

376. On 1 February 2013, the Spanish Government approves Royal Decree-Law 2/2013, on urgent measures in the electrical system and in the financial sector (hereinafter "**Royal Decree-law 2/2013**"), published in the BOE on 2 February 2013.

377. On 21 February 2013 the Claimant sends a Letter to the President of the Spanish Government [161] which contains the Communication to the Kingdom of Spain of the Dispute and of the Attempt for an Amicable Solution regarding the measures incorporated in Royal Decree-Law 12/2012, Act 15/2012 and Royal Decree-law 2/2013.

378. On 12 July 2013, the Spanish Government approved Royal Decree-Law 9/2013, on urgent measures to be adopted to ensure the financial stability of the electric sector (hereinafter "**Royal Decree-Law 9/2013**"), published in the BOE of 13 July 2013.

379. No Letter of Communication to the Kingdom of Spain of the Dispute and Attempt for an Amicable Solution has been presented by the Claimant in relation to the measures incorporated in Royal Decree-Law 9/2013.

380. On 26 December 2013, the Spanish Parliament approves Act 24/2013, on the Electrical Sector, published in the BOE of 27 December 2013.

381. No Letter of Communication to the Kingdom of Spain of the Dispute and Attempt for an Amicable Solution has been presented by the Claimant in relation to the measures incorporated in Act 24/2013.

382. On 6 June 2014, the Spanish Government approves Royal Decree 413/2014, where the electric energy activity production is regulated based on renewable, cogeneration and waste energy. Its publication in the BOE took place on 10 June 2014.

383. No Letter of Communication to the Kingdom of Spain of the Dispute and Attempt for an Amicable Solution has been presented by the Claimant in relation to the measures incorporated in Royal Decree 413/2014.

384. On 16 June 2014, Order IET/1045/2014 was approved by the Ministry of Industry, Energy and Tourism, approving remuneration parameters of type installations applicable to certain electric energy production installations from renewable energy resources, cogeneration and waste. Its publication in the BOE took place on 20 June 2014.

385. No Letter of Communication to the Kingdom of Spain of the Dispute and Attempt for an Amicable Solution has been presented by the Claimant in relation to the measures incorporated in Order IET/1045/2014.

(4) Conclusion

[161] Copy of the letter submitted by the Claimant to the President of Government of 30 July 2013. C-0013

386. In conclusion, in view of the above, the Arbitral Tribunal, with all due respect, lacks jurisdiction to hear a dispute referring to Royal Decree-Law 9/2013, Act 24/2013, Royal Decree 413/2014 and Ministerial Order IET/1045/2014.

387. This is due to the fact that the Claimant has not complied with the obligation to submit the dispute to the Kingdom of Spain nor to observe a three month period to try to reach an amicable solution in relation to Royal Decree-Law 9/2013, Act 24/2013, Royal Decree 413/2014 and Ministerial Order IET/1045/2014. This constitutes a breach of the circumstances under which the Kingdom of Spain consented through the ECT to submit to arbitration an alleged dispute referring to Royal Decree-Law 9/2013, Act 24/2013, Royal Decree 413/2014 and Ministerial Order IET/1045/2014, in accordance with Article 26 of the ECT.

388. In view of the above, we request the Arbitral Tribunal to declare its lack of jurisdiction to hear about a dispute about the measures contained in Royal Decree-Law 9/2013, Act 24/2013, Royal Decree 413/2014 and Ministerial Order IET/1045/2014, or alternatively, the inadmissibility of the complaints of the Claimant regarding these measures.

IV. SUBSTANCE OF THE CASE: THE KINGDOM OF SPAIN HAS RESPECTED THE ENERGY CHARTER TREATY (ECT)

389. To understand and resolve the current case, it is necessary to be aware of the following subjects: (A) The Spanish Electrical System as a legal regulatory framework and its Function; (B) The principle of reasonable rate of return for investors and its economic balance with the costs of the; (C) The legal regime applicable at the time in which the Claimant made the alleged investment; (D) The measures challenged by the Claimant and (E) The Respect of the standards of the FET of the ECT by the Kingdom of Spain.

A. The Spanish Electrical System (SES)

390. The Spanish Electrical System (SES) is the group of legal relations derived from different activities whose purpose it is to guarantee the supply of electrical energy within Spanish territory, subject to the Spanish legal system.

(1) The Spanish legal system

391. The regulation of the SES in general, and of renewable energies in particular (as a part of this System) is carried out through rules of different nature. These rules are adjusted to the general scheme of the Spanish legal system.

392. To explain the regulation of the SES the Sources of the Spanish legal system should be described succinctly:

a) Spanish Constitution of 1978[162]: It is the supreme rule of the Spanish Legal System that configures the organisation of the Public Powers, their institutional and territorial structure, and which regulates the essential aspects of the rights and obligations of the citizens[163].

b) The law: is a written rule rising from Legal Power. There are two classes of Laws:

− *Organic Law:* those laws are reserved to the regulation of certain subjects set out in the Constitution (Fundamental Rights and Public Liberties, general electoral regime, among others). For its approval an absolute majority of the Congress of Deputies is required.

− *Ordinary Law:* regulates subjects not reserved by the Constitution to the Organic Law. For its approval a simple majority of the Congress of Deputies is sufficient.

c) The *Royal-Decree-Law*: is a rule with the force of Law that the Constitution authorises the Government to approve in situations of extraordinary necessity or urgency. The approval of a Royal Decree-Law is subject to strict conditions, controls and limits and to its subsequent parliamentary validation.

d) The *Royal Decree*: the Royal Decree is a regulatory rule that comes from the Government. It complements or develops the Laws and is hierarchically inferior to

[162] Spanish Constitution of 1978. R-0038

[163] Within the system of constitutional guarantees, the Constitutional Court is the Supreme interpreter of the Constitution and pursuant to Article 1 of Organic Law 2/1979, of 3 October 1979. R-0050

them. It can regulate among the authorisations that the Law issues and cannot infringe it[164].

e) *Ministerial Order:* is a legal rule that comes from one or various Ministerial Departments. In the field of energy the most frequent is the Ministerial Order that comes from the Minister for Industry, Energy and Tourism.

f) *Resolutions:* are acts of a lower level than the Ministerial Order that come from the relevant organisms of the Administration, with a technical content.

393. As is peaceful in the rule of law, legal provisions can be deliberately repealed by an equal or superior provision. Similarly, as a general rule, the subsequent legal provisions repeal all the previous provisions that are incompatible and of the same or inferior hierarquical level[165], enforcing the Roman law principle "*Lex posterior derogat anterior*". Such principle governs all the Spanish legal system.

394. In addition, within the Spanish legal system, the importance of European Union Law must be highlighted. Since Spain's incorporation into the European Union in 1986, European Law is a part of the Spanish Legal System.

395. Within European Union Law, together with the Treaties (Treaty on the European Union and the Treaty on the Functioning of the European Union), we must remember, through their incidence in the electrical sector, the different legal acts of the European Institutions (Article 288 of the Treaty on the Functioning of the European Union, hereinafter **"TFEU**"):

a) The *Regulation* that has a general reach and is obligatory in all of its elements and is directly applicable in each Member State.

b) The *Directive* that obliges the recipient Member State with regard to the result that should be reached, leaving, however, the national authorities the choice of the form and the means.

c) The *Decision* that is obkigatory for recipient Member State in all of its elements.

d) The *Recommendations* and the *Opinions* that are not binding.

[164]In the Electrical Sector, the establishment of subsidies in a regulatory rule (i.e. RD 661/2007) granted the Government the authorisation to modified them by another subsequent rule. The interested Business Associations, conscious of this clear risk, tried to modify this situation, requesting the concretion of the *"reasonable return"* of Article 30.4 LES 1997 in a rule laid down by Law. Thus in 2010 it was declared by the most authorised doctrine:
"*The Spanish FIT scheme has the legal Rank of a Royal Decree. Even though it is "stronger" than for instance a ministerial order, the Spanish renewable associations have long called for a FIT law. Before the last general elections, the current Socialist government had promised to initiate the respective legislative process, but up to now nothing has changed*"
"*Powering the Green Economy. The feed in tariff handbook*." Miguel Mendoca, David Jacobs and Benjamin Socacool. Editorial. Earthscan, 2010. R-0039

[165] As regulated in the preliminary tittle from the Spanish Civil Code, called "Sources of law". Its Article 2.2 establishes as a general rule:
"**2.2.** *Statutes may only be repealed by subsequent statutes. Such repeal shall have the scope expressly provided therein, and shall always extend to any provisions of the new statute on the same matter which are incompatible with the prior statute. Mere abrogation of a statute shall not entail recovery of the force and effect of any provisions repealed thereby*." R-0059

396. Lastly, in the Spanish Legal System, the relevance of the Case law of the Supreme Court must be considered. In accordance with Article 1.6 of the Civil Code:

> *"Case law shall complement the legal system by means of the doctrine repeatedly upheld by the Supreme Court in its interpretion and application of statutes, customs and general legal principles."*[166]

397. As such, the Case law of the Supreme Court on *applying* and *interpreting* the legal rules (including the Laws) is ***binding*** for the rest of the Courts. This binding nature is admitted by the Claimant, which invokes the Case lawof the Supreme Court as proof of fact and in the Merits[167] of the Memorial on the Merits. It omits, however, the consolidated Case law on the Law of the Electrical Sector, elaborated by the Supreme Court since the year 2005. This Case law, because its force, uniformity and clarity, is essential for understanding and resolving the current case.

(2) The energy supply in Spain

398. The supply of electrical energy has been configured since the year 1924 as a "Public Service" in Spain. This has motivated the State´s regulation of it in order to guarantee the supply of this service. Act 49/1984, of 26 December, declared it as a State Public Service[168].

399. The activities of the SES are Generation, Transport, Distribution and Commercialisation:

(1) The ***Generation*** of electricity corresponds to the Producers of electrical energy or entities with the ability to supply electricity to the network. Since the year 1994[169], Spanish legislation has distinguished between the generation adhered to an Ordinary Regime of remuneration and that adheredto a Special Regime. A distinction maintained by the LES 1997[170] that subordinates certain activities of generation to the Special Regime (technologies that use renewable sources, residual biomass and cogeneration in the cases set out in the rules). The main distinction between one Regime and the other is the regulation of the retribution to certain renewable energies.

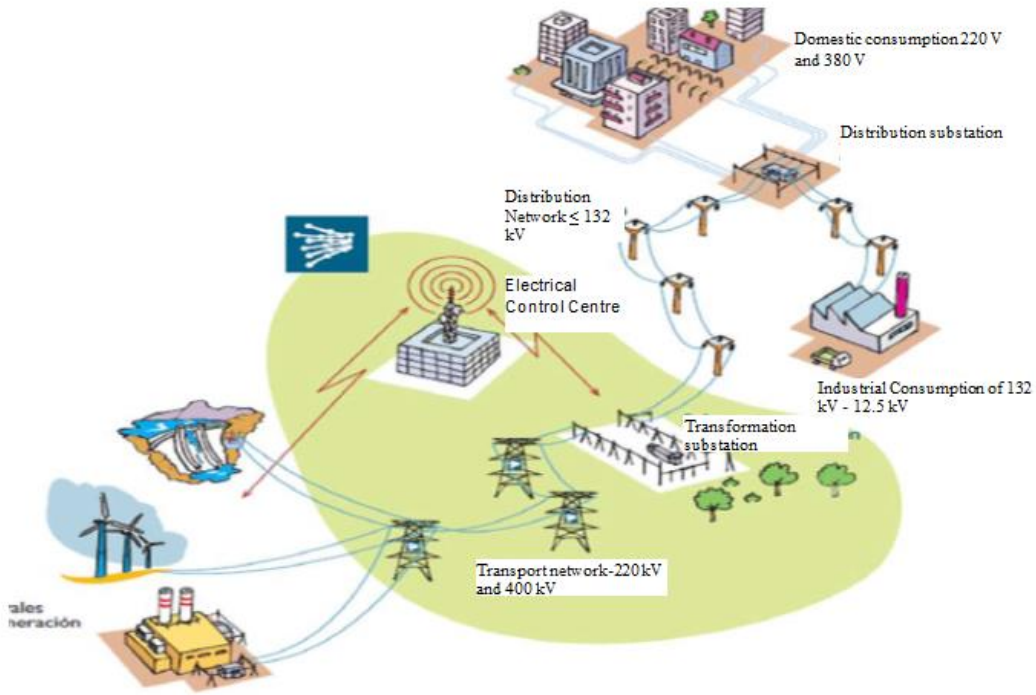
(2) The ***Transport***, corresponds to the Spanish Electrical Network, Red Eléctrica de España (hereinafter REE) in a monopoly and a regulated activity[171] .

[166] Article 1.6 of the Spanish Civil Code. R-0059.
[167] Claimant's Memorial, paragraphs 282, 447 and 448.
[168] Its evolution from a public service towards a service of general economic interest is a result of community regulation. Act 54/1997, of 27 November, on the Electricity Sector, qualified the activity of the supply of electricity as an "essential service" and, it would later be reflected in Act 24/2013, of 26 December, on the Electricity Sector, as a "service of general economic interest". Act 49/1984, of the 26 December, on the unified exploitation of the national electrical system. (BOE 29 December 1984). R-0060.
[169] Act 40/1994, of the 30 December, on the planning of the National Electrical System. R-0061
[170] They supply under a non-regulated price and can be both conventional technologies (fossil fuels) and renewable energies, (i.e. hydraulic production, with installations whose cost is considered amortized).
[171] In addition, REE acts as an *Agent of the System, responsible for* managing and coordinating the technical aspects of the System, which includes the management of the Network. Together with the REE, there is another *Agent*, OMEL, responsible for coordinating the economic trade operations of electrical energy

(3) The ***Distribution*** that consists of the supply of electrical energy from the transport network to the point of consumption. It is a regulated activity and it is carried out by distributing companies.

(4) The ***Commercialisation*** that corresponds to the companies that acquire the electricity produced and sell it to the consumers.

400. In the following diagram we can easily observe the different *activities* of the SES that we have just highlighted of Generation, Transport, Distribution and Commercialisation:



401. On the *activities* of the economic agents and the subjects of the system two regulators exercise their Public Authorities: a) the Ministry of Industry, Energy and Tourism ("Minetur"), and the NCMC, as the succeeding entity of the NEC.

402. Minetur is the State Department of General Administration responsible for the budget and execution of the Government's policy on energy. It approves the Ministerial orders on the improvement of energy law, and proposes to the Council of Ministers (the Government) the Royal Decrees on energy, for their approval. It is the main organism for energy regulation.

403. The National Commission for Markets and Competition takes on regulation functions subordinated to the laws, royal decrees and ministerial orders that are approved when it is expressly allowed to do so. These provisions are binding for the subjects affected by the field of application once published in the Official State Bulletin.

404. In addition, the NCMC has the authority of supervision and control in the electrical sector that includes, among others, the following functions:

- *To supervise* the accordance to the rules of the prices and the conditions of supply to the final consumer and *to publish* recommendations for the adaptationof the prices of the supply to the Public Service obligations and to the protection of the consumers.

- *To manage* the system of guarantee of the origin of the electricity coming from renewable energy sources and from high efficient cogeneration.

- *To publish* the final prices of the electricity market, from the information from the market operator and the system operator.

405. The NCMC manages the liquidation system of the electrical system. It makes 14 liquidations corresponding to each annual exercise to those who have a right to charge amounts to the SES and receive liquidations according to the appropriate flow of income.

(2.1) Principles of the Spanish Electrical System

406. The principles are going to be expressed in accordance with their drafting in Act 54/1997, of 27 November, on the Electricity Sector (hereinafter **"Act 54/1997**")[172], the Act in force when the Claimant made its investment. However it should be pointed out that the mentioned principles have existed and have remained consistent since 1994. What is more, the new Law on the Electricity Sector, Act 24/2013, of 26 December, on the Electricity Sector (hereinafter **"Act 24/2013**")[173], is constructed on these same principles.

407. These principles are:

- The SES is configured as a System.

- The supply of energy is a strategically important service.

- The guaranty of the supply demands the economic sustainability of the system.

- It is a system that must be financially self-sufficient.

- The liberalised and regulated activities coexist in the System.

(2.2) The configuration of the SES as a System

408. The participants in the SES do not act in the System disconnected from each other, in watertight compartments. Far from this, the SES is characterisedby a strong interdependency between its agents:

- The impossibility of storing electricity requires the offer to be equal to the demand in each moment. This implies a coordination in the production of electrical energy with the demand, as well as a coordination between the investment in generation and the infrastructure for the transport of electrical energy.

[172]Act 54/1997, of 27 November, on the Electrical Sector. R-149Bis
[173] Act 24/2013, of 26 November, on the Electrical Sector. R-147Bis

- Technically there is a real grid structure, a system in which generation, transport and distribution should have a dynamic harmony in their functioning and in which the agents are, in fact, physically interconnected.
- All of the operators are subject, both separately and jointly, to the intervention of a System regulator.
- The participants of the SES share a source of income: the Spanish consumers.

409. As a consequence, the SES is a System both from a technical perspective, and from a legal point of view.

(2.3) The supply of energy as a service of strategic importance.

410. The strategic importance of the supply of electricity is an unquestionable fact. Its guarantee is a necessity for the functioning of economic and social activity of any developed country. The price of electrical energy and the energy intensity are factors that have a direct impact on the growth of the economy and on fundamental macroeconomic variables, such as inflation and competition.

411. This factual circumstance is reflected on a legal level. Act 54/1997, of the 27 November, on the Electricity Sector, also as required by European Law[174], qualified the activity of the supply of electricity as an "essential service"[175] and, later Act 24/2013, of 26 December, on the Electricity Sector, as a "service of general economic interest"[176].

412. The configuration of the activity of the supply of electricity as a strategically important service allows the Laws of this sector to regulate it in detail, also establishing certain loads and obligations to the subjects that intervene in the different activities.

(2.4) The guarantee of the supply: economic sustainability of the system

413. The main objective of the SES established by Act 54/1997[177] is to guarantee that all consumers have access to electrical energy in equal and quality conditions, ensuring this is performed at the lowest cost possible, taking into account environmental protection as well.

414. The guarantee of the supply, essential in the SES, supposes that the action of the Public Authorities is principally directed towards assuring that the electricity supply is maintained, in affordable conditions for the consumers and that this supply is sustainable over the long term. "Sustainability" implies, therefore, the technical, environmental and economic-financial viability of the SES. This guarantee has been maintained in Act 24/2013, of the 26 December, of the Electricity Sector[178]

(2.5) Principle of financial self-sufficiency

[174]Constitutional Treaty of the European Community (92/C/224/01), published in the Official Journal of the European Communities of 31 August 1992, Article 86. R-0062
[175]. Act 54/1997, of 27 November, on the Electricity Sector. R-0149Bis
[176] Act 24/2013, of 26 November, on the Electricityl Sector R-147Bis
[177] Act 54/1997, of 27 November, on the Electricity Sector. Memorandum and Article 10. R-0149 Bis
[178] Act 24/2013, of 26December, of the Electricity Sector. Memorandum and Article 7. R-147Bis

415. As has been expressed the "sustainability" of the SES rests, among other factors, on its economic viability. This element is shown through the principle of financial self-sufficiency [179]. A principle embodied in Act 40/1994, of 30 December, on the planning of the National Electrical System [180].

416. This principle implies that the costs of the SES should be paid with the income of theSES. In this way if an imbalance in the System is generated and the costs are greater than the income, the measures that can be taken are: to increase the income or lower the costs.

417. This principle of self-sufficiency has been maintained in Act 24/2013, of 26 December, of the Electricity Sector. Only since the year 2013 have the relevant contributions been made by the General State Budget, but with the exclusive aim of payment of retributions to certain electrical energy installations with renewable energy sources.

(2.6) The coexistence of regulated and liberalised activities

418. Until the year 1997, the SES was structured as a regulated system in which the Government established the price of electricity, which remunerated the costs (principally the generation, transport and distribution of electricity) of the group of electrical companies.

419. From the entry into force of Act 54/1997, the sector started to be liberalised, through the demand of the EU. This liberalisation is supported in the vertical division of activities and its later specific regulation. Its aim is to introduce the competition and to increase the joint efficiency of the electrical sector. The resulting division gave way to the identification of different activities of the SES: generation, transport, distribution, and commercialisation.

420. Identifying these activities, Act 54/1997 associate each one of these activities to one of the following categories:

- *Liberalised activities:* The generation (with the exception of the activity of generation under Special Regime) and the commercialisation of energy.
- *Regulated activities:* The transport, distribution and commercialisation of the system[181].

(3) The generation of energy in the SES

421. The SES is in continuous evolution and development in all of its activities. Economic and technological development and environmental policy are determining factors in understanding this evolution. On the other hand, the increase in electrical demand has accompanied economic development, producing oscillating pairs between the cited indicator and the growth of the economy.

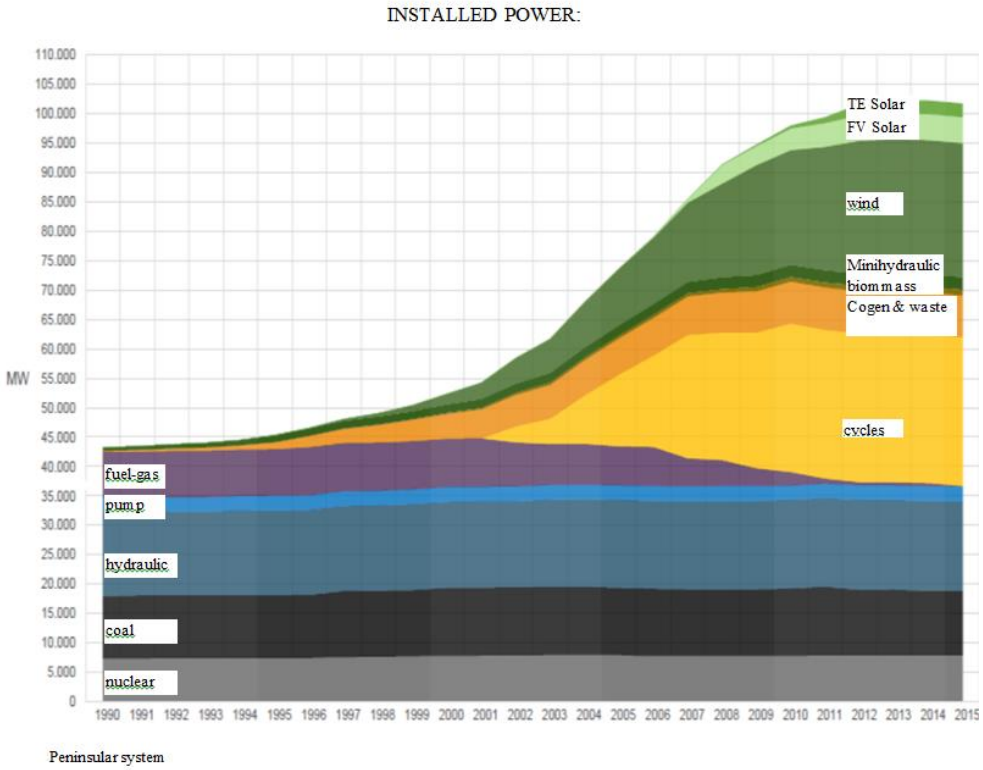
[179] Act 54/1997, of 27 November, on the Electricity Sector. Articles 15 and 16. R-0149Bis
[180] Act 40/1994, of the 30 December, on the planning of the National Electrical System. Articles 15 to 20. R-0061
[181] Act 54/1997, of 27 November, on the Electricity Sector. Article 11. R-0149Bis

422. In Spain there has been an important evolution in the construction and operation of installations, both in number and in the variety of technologies affecting them. The so called "*mix"* in generation is characterised by the strong implementation of Renewable Energies. It should be highlighted that the installations that use renewable energy as a source, in general, are not "*managed"* in the sense that they do not generate electricity in accordance with human will, but with nature.

423. This makes it necessary for the System to establish security mechanisms to guarantee the supply, considering the lack of stability of certain renewable energy sources (i.e. wind). This implies the necessity of having some installations that, remain practically inactive and that serve as a "backup" or support when facing a decrease in production through unexpected change in weather. For this reason, Ordinary Production installations such as combined cycle, charge the SES *payments by capacity*, to be able to satisfy these eventual energy production necessities.

424. As a consequence, the priority of sale of energy generated through renewable and high efficiency cogeneration installations gives rise to the necessity to remit *payments by capacity* to Ordinary Producers, which must be available to produce energy. This has also given rise to the existence in the system of an excess capacity that generates greater costs.

425. Through the following diagram one can appreciate the evolution of the starting up of electrical energy installations [182]:



[182] Source: Own development on REE data. http//www.ree.es/es/.

426. Generation installations have passed from 43,000 Mws in the year 1990 to more than 100,000 in the year 2014 until reaching an installed power of 108,000 Mws. It should be highlighted that the peak power in Spain has been situated, in recent years, at a maximum consumption of 44,000 Mws.

(3.1) Renewable energies as part of the SES.

427. As we can appreciate the evolution of the implementation of hydraulic and wind generation installations is extraordinary. In the case of wind generation its installation has been producing since the beginning of the 1990's until today. Of the 23,002 Mws installed, the years in which the greatest construction took place were 2002 and 2004 in which 3000 and 4000 Mws were installed respectively. With respect to hydraulic energy the start-up of its 18,000 Mws was centralised in the second half of the 20th century, with practically all of its power being installed in 1990.

428. With respect to thermosolar energy, we can appreciate that the construction of the plants and the start-up of their 2,300 Mws has fundamentally been carried out since 2010.

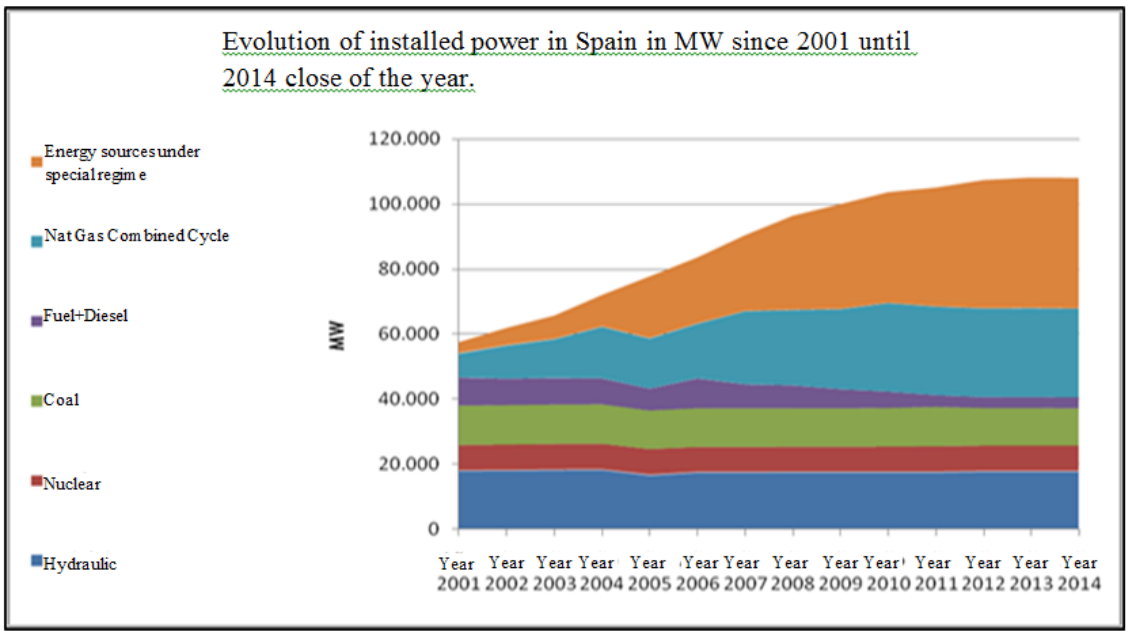
429. In turn, the construction of combined cycles have been made progressively since the year 2002, with 2004, 2007 and 2009 being the years of highest growth, until reaching the 27,200 Mws installed.

430. This data leads us to conclude that in Spain there are more than 50,000 Mws of renewable power and that the System suffers from an excess of power.

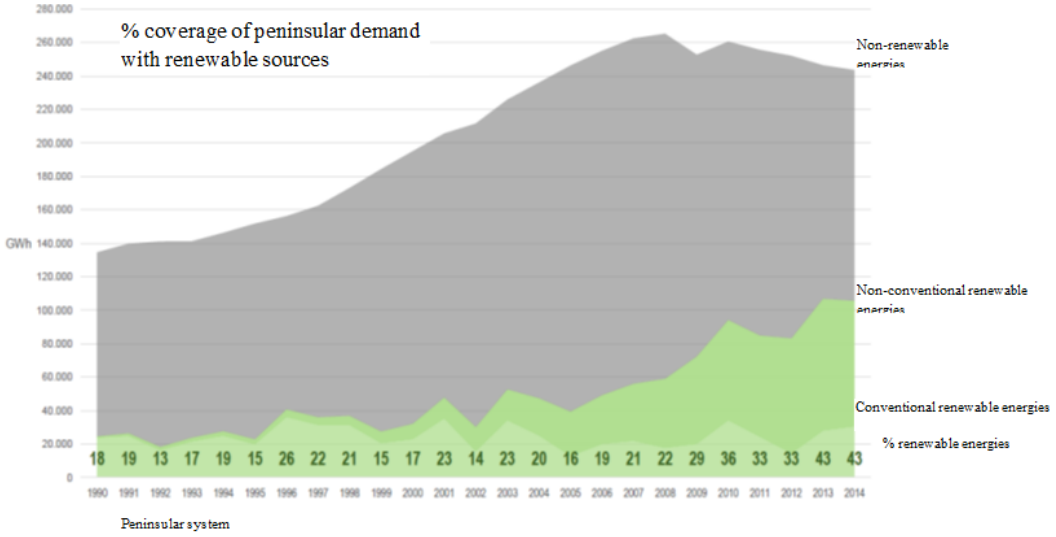
431. However, it is necessary to make another point of paramount importance. Not all renewable power has been subsidised in Spain. Support mechanisms have only been given with the purpose that certain installations and technologies recuperate their investment. In this way, for instance, the hydraulic generation installations have not been subjected to the so called "special regime". This special regime has determined the right to obtain the return of the investment and the obtaining of a reasonable rate of return. But not all of the installations included in the special regime use renewable energy as a source of energy, nor are they (or have been) under the so called "special regime".

432. In the following graphic we can appreciate the rhythm of construction of installations included in the special regime, from 2001 until end of 2014 [183]:

[183] Source: REE and Ministry of Industry and Tourism



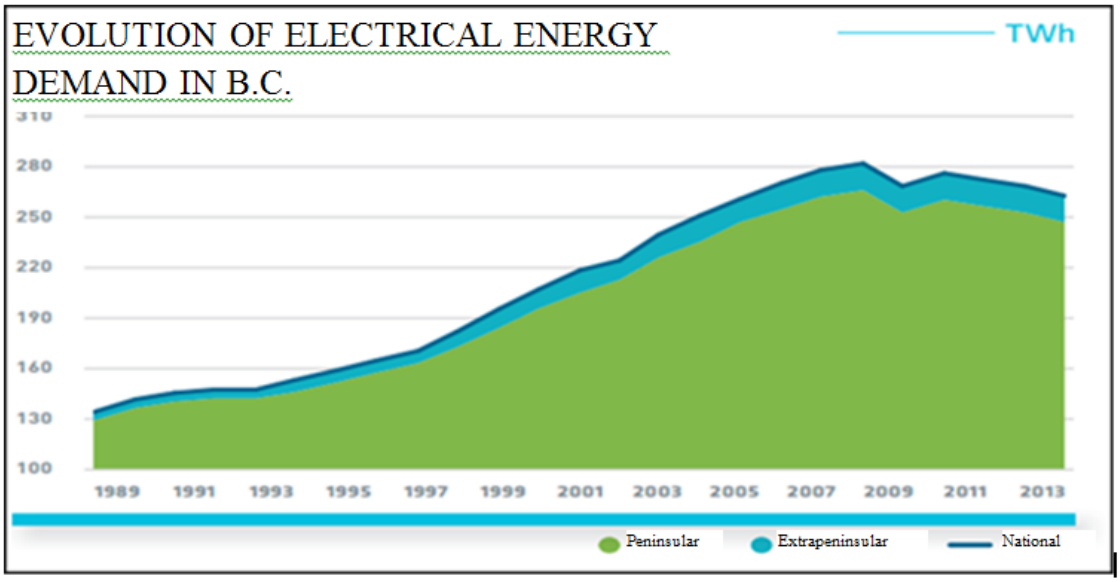
433. As we can appreciate in the chart there are some 18,000 Mws from hydraulic installations which are therefore "renewable" in the year 2001. In addition the system went on to include installations with a capacity of above 40,000 Mws in the special regime. We can see below when the generation of electrical energy is separated by years and when distinguishing conventional production from conventional renewable production (that which does not receive regular remuneration) and non-conventional production[184]:



(3.2) Evolution of electrical demand in Spain

[184] Source: Own development on REE data, http://www.ree.es/es/

434. Another important factor in understanding the SES and its evolution, is electrical demand. Electrical demand in Spain has suffered a sensitive decrease in recent years, which can be appreciated in the following chart[185]:



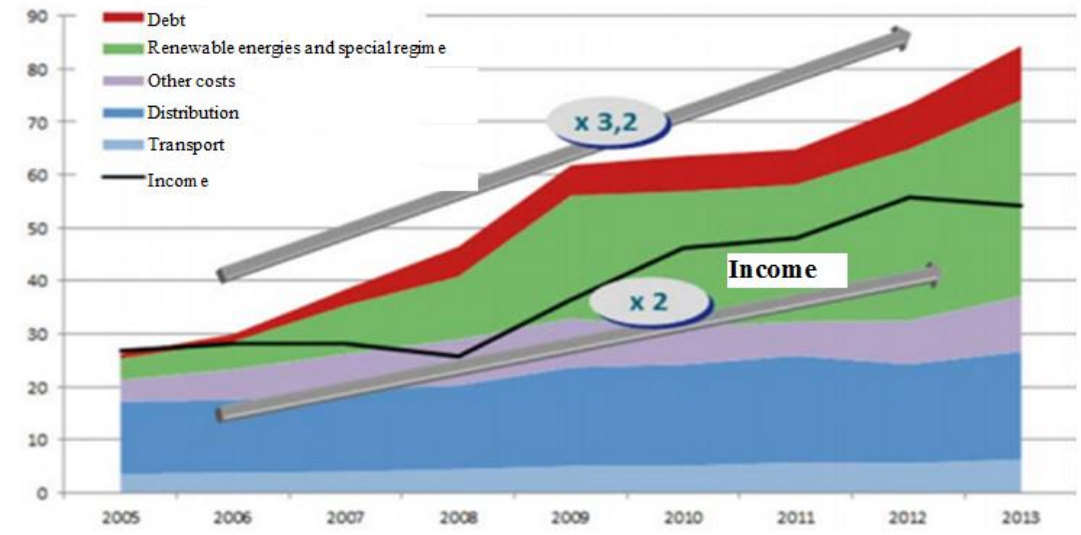
435. However, electrical energy production from installations with renewable energy sources has been increasing thanks to: a) the dispatch (sale) priority; b) variable reduced costs; and c) that certain support mechanisms of the system favoured the price offered by the renewable technologies in the market being zero or close to zero Euros.

(3.3) Evolution of the costs of the electrical system.

436. The SES has costs, whose payment is obligatory by Law, and income which is generated, largely, by the payment of tariffs and charges in the electricity bills of the consumers.

437. The costs of the electrical system have evolved exponentially in accordance with the evolution of the investments of the different activities, particularly in *Transport, Distribution and Generation.* In the activity of *Generation* the costs have evolved in accordance with the concession of remunerative regimes to certain facilities included in the Special Regime. In the following graphic the evolution of the costs of the system can be analysed[186]:

[185] Source: Own development on REE data, http://www.ree.es/es/
[186] Source: Own development on the data from the assessment reports of the NEC/NCMC for the years 2005-2013. http://www.cnmc.es/es
es/energía/energíaeléctrica/régimenespecialyliquidaciones.aspx?p=p3&ti=Liquidaciones sector eléctrico



438. The evolution shows that all the costs of the SES multiplied by 3.2 between 2006 and 2013; and that the income also multiplied by two, through the increase of the electricity bill borne by consumers. This difference between the income and the costs gave rise to the so called *tariff deficit*.

(3.4) Evolution of the electricity bill of the consumers.

439. A consumer in Spain when paying the bill for consuming electricity pays the price of the energy consumed and, in addition, the amount that corresponds to the *tolls and charges.* The access *tolls* are set aside for the sustaining of the transportation and distribution networks. The *charges* pay the costs of the System that do not respond directly to the supply of electricity that the consumer receives. Among these *charges* are the amounts that are paid to the electrical generation installations from renewable energy sources that have a right to additional remuneration.

440. We must observe the evolution of the annual bill of a domestic consumer in Spain that responds to the average consumption.[187]. Data by amount of the annual bill and by increase are as follows [188]:

[187] 3.3 kw contracted power and 3,000 kWh/year. Type applicable to a family of four members in a flat.
[188] Source: Own development on the data from the assessment reports of the NEC/NCMC for the years 2005-2013. http://www.cnmc.es/es-es/energía/energíaeléctrica/régimenespecialyliquidaciones.aspx?p=p3&ti=Liquidaciones sector eléctrico

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Bill with taxes	370.0	375.3	381.7	400.0	412.6	453.7	503.2	532.6	627.0	669.7	648.7	616.2
Increase Annual bill with taxes		1.4%	1.7%	4.8%	3.1%	10.0%	10.9%	5.9%	17.7%	6.8%	-3.1%	-5.0%
		2004-2003	2005-2003	2006-2003	2007-2003	2008-2003	2009-2003	2010-2003	2011-2003	2012-2003	2013-2003	2014-2003
Increase annual accumulation. Bill with taxes		1.4%	3.2%	8.1%	11.5%	22.6%	36.0%	44.0%	69.5%	81.0%	75.4%	66.6%

441. As such, a consumer paid 370 Euros a year on their electricity bill in the year 2003 and went on to pay a total of 669 Euros in the year 2012. The accumulated increase on those years is out of proportion for the same service. The greatest increase were in the year 2008 (10%), 2009 (10.1%) and 2011 (17.7%).

442. The evolution of the bill has grown, apart from in the last two years in which the price of energy has set a decrease in the final price. As such, the consumers have suffered an extraordinary increase in their bill, without the supplied service having seen a relevant increase or variation.

443. The Claimant states that "*in Spain, the Government repeatedly refrained*" from increasing the bill to the consumers "*in order to cover the raising of the costs*"[189]. The Kingdom of Spain has proved that it is not true. Until 2012 the Government increased the SES income, increasing the bill to the consumers in a continuous and unreasonable manner. It is not reasonable to try to impose to the consumers an exorbitant burden in order to pay the costs at any price. Even less to pay over-payments that exceeded a reasonable rate of return.

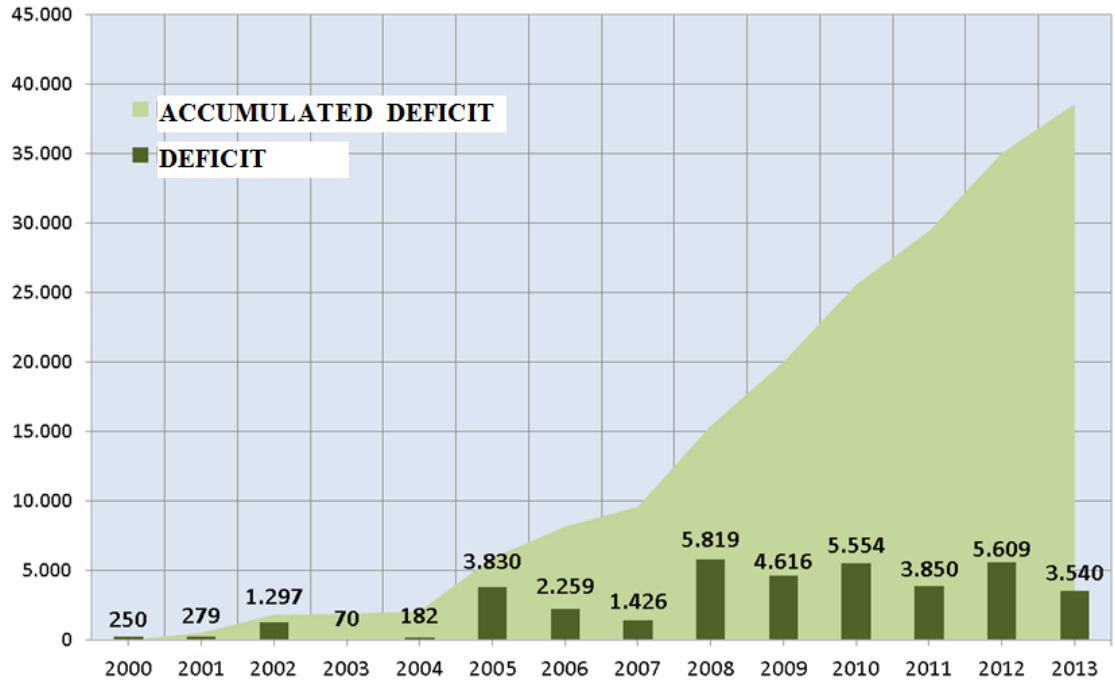
444. Spain has made a significant effort in facing up to the costs of the electrical system, taking into account that any increase has a significant impact on the economy and growth of the country. However, the electrical system has never stopped complying with its obligations to provide a reasonable rate of return to the Special regime facilities, and has always paid the costs that it has committed itself to, even though this has originated the so called *tariff deficit*.

(3.5) Evolution of the tariff deficit of the Spanish electrical system.

445. The so called tariff deficit constitutes the difference between the income and the costs of the electrical system. These differences have been very significant in recent years. The electrical system despite raising the tolls and charges permanently over the years, has not been able to cover the costs, due to the fact that these have increased at a greater rate than the bills that the consumers pay. The following graphic includes (in thousands of millions of Euros) the annual

[189]. Claimant's Memorial, Paragraphs 58 and 410

deficit and debt generated in these years without including the amounts repaid which we will analyse below[190]:



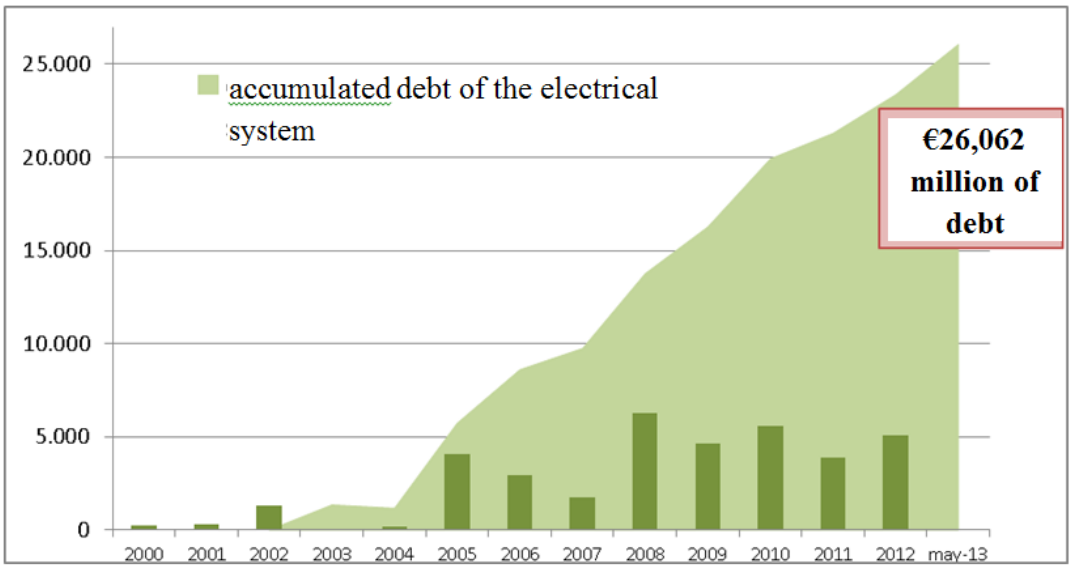
446. A consequence of this is that a debt has been accumulating over the years that reached 40,326 million Euros and which had been credited leaving a debt in 2015 of more than 26,000 million Euros. This debt is being paid in the bills of the Spanish consumers at the sum of 2,800 million Euros a year.

447. A number of companies were obliged to finance the system bringing the amounts that were necessary for the costs to be paid. These companies generated a credit right to the electrical system. This credit right could be directly securitised by the companies or through the "*Fondo de Amortización del Déficit Eléctrico*" or Fund of the Electricity System Debt (hereinafter, FADE).

448. In the following chart [191] we can appreciate the evolution of the electricity deficit and the non-amortised accumulated debt:

[190] Source: Own development on the data from the liquidation reports of the NEC/NCMC for the years 2005-2013.
http://www.cnmc.es/es-es/energía/energíaeléctrica/régimenespecialyliquidaciones.aspx?p=p3&ti=Liquidaciones sector eléctrico

[191] Source: Own development on the data from the liquidation reports of the NEC/NCMC for the years 2005-2013.
http://www.cnmc.es/es-es/energía/energíaeléctrica/régimenespecialyliquidaciones.aspx?p=p3&ti=Liquidaciones sector eléctrico



449. These amounts should be related to the annual average costs of the electrical system that are situated around 20,000 million Euros. What determines the annual load that has been produced in relation to the costs and which equates to a cost through repayment and interests of around 2,900 million Euros.

450. On the other hand, the result corresponding to the 2015 exercise, whose definitive figure will become known in December, is predicted to be in balance. The prediction for the exercise is positive.

(4) The regulation of the electrical system: legal system.

451. From the Spanish Constitution of 27 December 1978, the Kingdom of Spain has approved four laws of regulation of the SES, in 1984, 1994, 1997 and 2013. The latter, Act 24/2013, of 26 December is currently in force.

452. The four laws, which will be alluded to below, have maintained a unified, integrated electrical system, financed largely by the consumers and with similar remuneration schemes, focussed on the recuperation of the investment costs by all of the agents of the electrical system.

453. In addition, the administrative rules were enacted so that all of the electrical generation installations were subjected to a system of authorisations and permits from the different Public Administrations. All of this is in accordance with the consideration that the supply of electrical energy is a public service, an essential service or a service of general economic interest.

(4.1) Act 49/1984, of 26 December, on the unified exploitation of the national electrical system.

454. The configuration of the Electrical System, at this time declared as "*a public service owned by the state",* had among its objectives to regulate the remunerations charged from the system and in accordance with "*the global optimisation of this system, in agreement with the functions and activities*".

455. The determination of the remunerations was remitted to the Government regulations that established it through the tariff paid by the consumers and in accordance with the principle of return of the investment costs[192].

(4.2) Act 40/1994, of 30 December, on the planning of the National Electrical System.

456. Later, Act 40/1994, of 30 December, on the planning of the National Electrical System, introduces the distinction between the activities "*that constitute a natural monopoly and those which can be exercised in competitive conditions, as well as establishing the most appropriate remuneration for each one of those"* (Expressed in the Memorandum of Law).

457. Article 16 of Act 40/1994, when regulating the determination of the tariffs that should satisfy the users of the integrated system, alludes to the obligatory "*recognition of the costs applicable to each one of them with objective and non-discriminatory criteria that encourage the improvement of the efficiency of the management, the efficiency of these activities and the quality of the electrical supply*".

458. This same Article indicates the method for calculating the costs, that will correspond to the following principles:

> *"a) The costs for the different activities will be calculated in a standard way with formulas and transparent parameters and objectives set out by the Ministry of Industry and Energy.*
>
> *b) The costs for the activity of generation will include costs of investment, fuel and other operating costs.*
>
> *All of the installations that are within their active useful lifetime will receive a remuneration that allows them to recuperate the costs of the investment on their start-up in agreement with the remuneration rates that, according tothe evolution of the financial markets, will be determined by the Ministry of Industry and Energy."*

459. That is, it sets a system of recuperation of investment costs that takes into account the investment and the operating costs to be paid during the active useful lifetime of the installation and in accordance with the remuneration rate to be set by the Ministry of Industry and Energy. This system set in the year 1994 coincides with the current system which will be expressed later on.

(4.3) Act 54/1997, of the 27t November, on the Electrical Sector.

460. Thirteen years later, Act 54/1997, when regulating in Article 16 the remuneration of certain activities again alludes to the costs of investment, operation and maintenance. At the same time, it establishes an important feature for the installations under special regime.

[192] Article 3 third section of Act 49/1984, of 26 of December, on the unified exploitation of the national electrical system, predicts that a public company that managed the electrical system will obtain "*a price, subject to administrative approval, that will be offset from the provision of its services and use of its installations by producing companies and distributors of electrical energy, integrating itself as a differentiated component of the electrical tariffs, in such a way that it is legally established*". R-0060

461. For these installations under special regime, Article 30.4 final paragraph in its original draft maintains that in order to establish the premiums, the investment costs will be taken into account, following the normal terminology that states that they must focus on *"the aim of obtaining reasonable rates of return with regard to the cost of money in the capital market*".

462. As such the principle of reasonable return is enshrinedin our legal system, a concept that for the installations not included in the so called special regime is not established. In the rest of the activities the remunerative criteria of "appropriate remuneration" is maintained and not that of "reasonable return".

463. As we will highlight further on this principle of reasonable return has remained unaltered, despite legal changes, since 1997.

464. It is noteworthy that one year prior to enact the RD 661/2007, the Royal Decree-Law 7/2006, of 23 June was approved, produced by the Claimant as Exhibit C-0033. This RDL 7/2006 modified the section 30.4 Act 54/1997, specifically maintaining the payments of a "reasonable return" on its Article 1.Thirteen, final part:

> *"(...)In order to determine the premiums, the following will be taken into account: the voltage level in the delivery of the energy to the network, the effective contribution to improving the environment, the savings of primary energy and energy efficiency, the production of economically justifiable useful heat and the investment costs that have been incurred, for the purpose of achieving reasonable rates of profitability in reference to the monetary cost in the capital market."*

465. It must be also highlighted that the Claimant quotes and presents such RDL 7/2006 in paragraphs 110 and 111 of its Memorial. The Claimant omit to the Honourable Arbitral Tribunal that this Law Decree maintained the "reasonable return" as the reference and as limit for the Government to fix the remuneration to the Renewable Energy under the special regime. That is, in 2006 the Government maintained the determination of the remuneration regime in a regulatory level, with the reference and the legal limit to respect that "reasonable return". As we have seen, this has also been the common understanding of the Case law since 2005.

(4.4) Act 24/2013, of the 26 December, on the Electricity Sector.

466. This Act, as one of the challenged measures in this procedure, will be mentioned more extensively at another point. For now it is enough to highlight that it maintains the principle of *reasonable return* for the facilities that require an additional remuneration due to not being able to compete in the market. While in the rest of the activities mantains the remunerative criteria of *appropriate remuneration*

467. Reference should also be made, to the unification of the so called ordinary regime and special regime into a single one, in accordance with the evolution and importance that the facilities included in the special regime have had in the system.

468. The mentioned additional remuneration is maintained for the facilities that have not yet obtained remuneration of their investment costs and the reasonable return on the the project as

a whole which is calculated by meeting the costs of investment and operation during the legal active useful lifetime.

(5) The regulation of the energy production regime from renewable sources

(5.1) The Policy of the European Union

469. This regulatory evolution must be understood within the Spanish energy policy which framed within the policies of the European Union, both in the field of energy and the environment. The Claimant recognises this importance in its Memorial when dedicating an epigraph to European Law[193].

470. The policy of the European Union has been characterised by establishing objectives whose completion is mandatorily imposed on Member States and which are in line with the global objectives agreed in the Kyoto Protocol.

471. In order to achieve these objectives, Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (hereinafter "Directive 2001/77/EC") was approved.

472. The Directive recognised the need for public aid in favour of renewable energy sources, in consonance with the Community Guidelines on state aids in favour of the environment, but always within the obligations imposed in arts. 87 and 88 of the Treaty[194] In this sense, and resolving the doubts existed until now, the European Court of Justice has recently declared that the sums allocated to a private undertaking producing electricity which are financed by all end users of electricity in the national territory and which are distributed to undertakings in the electricity sector by a public body in accordance with predetermined legal criteria constitute aid granted by a Member State or through State resources. [195].

473. On the other hand, it is important to highlight that the Directive clearly establishes its field of application when defining the "electricity produced from renewable energy sources" such as ""*electricity produced by plants using only renewable energy sources, as well as the proportion of electricity produced from renewable energy sources in hybrid plants also using conventional energy sources and including renewable electricity used for filling storage systems, and excluding electricity produced as a result of storage system*"[196]. This definition is thus important to the CSP plants to which the present case concerns, because the field of

[193] Claimant's Memorial, 4.3, par. 92 to 101.
[194] Considering (12) of the Directive 2001/77/EC. C-0022
[195] Decision of 22 October 2014, issued on the preliminary ruling C 275/13 (Elcogás Case).
Paragraph 21: *"For some advantages to be qualified for aid according to Article 107 of the TFEU, section 1, it is necessary, on the one hand, for them to be directly or indirectly issued though state funds and, on the other hand, but attributable to the State".*
Paragraph 33: *"What constitutes an intervention by the State or through state funds, are the amounts attributed to a private elect producer that are financed by a group of final users of electricity established within the national territory and which are distributed to companies in the electrical sector by a public organism in accordance with predetermined legal criteria".* (emphasis added). R-0030.
[196] Article 2 (c) of the Directive 2001/77/EC. C-0022

application of this Directive 2001/77/EC expressly excludes the production that can be made burning gas.

474. In January 2007 the European Union set new objectives in the so called "20-20-20 Package". For these European objectives to be achieved it was approved the Directive 2009/28/EC, of 23 April (hereinafter "**Directive 2009/28/EC**")[197], on the promotion of the use of energy from renewable sources. This rule establishes a common framework for the promotion of these sources, setting obligatory national objectives.

475. Directive 2009/28/EC considers public aids as necessary for the promotion of electricity produced with renewable energy, while the prices of electricity in the internal market do not include the costs and the environmental and social benefits of these energy sources[198]. However, the Directive also puts on the record the difficulty of the Member states in reaching these objectives, and the need for the EU to adopt measures in order to reach them[199].

476. Thus, the Member States are obliged to consider the Guidelines on State aid for environmental protection and energy through the Communication from the Commission 2008/C82/01[200], and substituted for the period 2014-2020, through the Communication from the Commission 2014/C 200/01[201]. These guidelines establish that from 2020 the subsidies and exemptions from responsibility in terms of balance should be gradually eliminated."[202]

(5.2) Legal configuration of the remunerative regime to production through renewable energy sources in Spain.

477. Act 40/1994, of 30 December, on the planning of the National Electrical System firstly and after Act 54/1997, of the Electrical Sector, in line with the guidelines established by the law of the European Union, addresses the regulation of renewable energies in the SES, within the activity of the generation of electrical energy.

478. The regulation of the activity of generation is carried out by the cited Act 40/1994 and afterwards by Act 54/1997, of 27 of November distinguishing between an Ordinary Regime (hereinafter "**OR**") and a Special Regime (hereinafter "**SR**").

[197] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. C-0050, C-0022 y R-0026.
[198] Considering (27) of the Directive 2009/28/EC. C-0050
[199] Considering (96) of the Directive 2009/28/EC: *"Since t the general objectives of this t Directive, [...] cannot be sufficientlyachieved by the Member States [...] the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty*." C-0050.
[200] Community guidelines on State aid for environmental protection. 2008/C 82/01, of the European Commission, published in the Official Journal of the European Union of the 1st April 2008. R-0063.
[201] Guidelines on State aid for environmental protection and energy 2014-2020, 2014-2020, 2014/C 200/01, Communication from the Commission, published in the Official Journal of the European Union of the 28th June 2014. R-0064.
[202] Guidelines on State aid for environmental protection and energy 2014-2020, 2014-2020, 2014/C 200/01, Communication from the Commission, published in the Official Journal of the European Union of the 28th of June 2014. Paragraph 108. R-0064.

479. The reason for this double regime of the generation of electrical energy lies in the need to encourage a production from renewable energy sources in which:

> *"the price that they can get in the competitive generation market is insufficient to cover its installation costs with a reasonable return on investment, so that additional emoluments are required to be profitable."*[203] *(emphasis added)*

480. When the plant generating through renewable sources was included in the SR, the activity of production was governed by Act 40/1994[204] and then by Act 54/1997[205]. The legal regime of the SR on the production of electricity, as an integral part of the SES, remains subject to the economic and planning principles upon which the SES is structured[206]. In addition, in the same way that any other activity developed within the SES, it is subjected to the principles of supply security and economic sustainability.

481. In so far as the SR assumes for the owners the perception of certain economic incentives, this perception remains subject to the completion of certain specific obligations[207], especially in what interests us here, to the following:

- To provide the Administration with information on the production, consumption, sale of energy and other extremes that are established
- To contract and pay the toll that corresponds to the distributing or transporting company to which it is connected by discharging the energy onto its networks[208].
- To incorporate its energy production onto the SES, receiving the remuneration it is determined in accordance with what is expressed in the Law[209].
- Priority of access to the transportation and distribution networks of the generated energy, respecting the maintenance of the reliability and security of the networks. Law introduced as of 2006[210].
- To connect its facilities in parallel to the network of the corresponding distributing or transporting company.
- To use, jointly or alternatively in its facilities, the energy that it acquires through other subjects.
- To receive the supply of electrical energy needed from the distributing company.

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[203] Non-legal criterion read on *"The legal system of renewable energies in Spain"*, José Giménez Cervantes, in Treaty on Electric Sector Regulation, Volume I Legal aspects, Thomson Aranzadi, 2009, page 314. R-0065.
[204] Act 40/1994, of 30 December, on the planning of the National Electrical System. R-0061.
[205] Act 54/1997, of 27 November, on the Electrical Sector Article 27 (2) R-0149Bis.
[206] Act 54/1997, of 27 November, on the Electricity Sector Article 29. R-0149Bis.
[207] Act 54/1997, of 27 November, on the Electricity Sector. Article 30 (1). R-0149Bis.
[208] Royal Decree-law 14/2010, of 23 December, establishing urgent measures for the correction of the tariff deficit of the electrical sector. Article 1 (five). C-0064_ESP.
[209] Act 54/1997, of 27 November, on the Electricity Sector Article 30 (2). R-0149Bis.
[210] Royal Decree-law 7/2006, of the 23June, adopting certain measures in the energy sector. Article 1 (twelve). C-0033.

(5.3) Remuneration regime of Article 30.4 Act 54/1997: the principle of reasonable return.

482. The plants generating energy through renewable sources included in the SR of Act 54/1997 enjoy a particular remunerative regime. Its aim is "*to achieve reasonable rates of return with reference to the cost of the money in the capital market"*[211]. That is to say, with regard to renewable facilities subject to OR that receive their remuneration in market terms, the SR Plants are assured by Law to receive a "*reasonable return*".

483. This principle of *"reasonable return"* is translated into a remuneration that is the sum of two components: the *market price* of the sale of electricity[212] and an *economic stimulus* to allow the economic viability of this activity. This stimulus is constituted by the payment of a premium that complements the market price[213]: a subsidy. This subsidy is set by the Regulator through a legal pathway[214] and its amount is considered a cost of the SES: "*cost of diversification and supply security*"[215].

484. Act 54/1997 maintains the remunerative regime of electrical generation through renewable sources in SR in a regulated field, as was already done before this Law. This assumes that the remuneration regime of the generation under SR is assimilated to the activities of transportation and distribution[216].

485. When assuming the subsidies as a cost of the SES covered by the consumers, the Regulator is obliged to respect the principle of "reasonable return", adjusting the quantity of the subsidies to the real costs of investment and operation. For this reason, Act 54/1997 obliges the energy producers under SR to remit to the Regulator information on the investments, costs, income and other parameters of the different real facilities[217]. This obligation is not applicable to the producers in OR.

486. That is to say, it must be a reasonable return for the investor, within the framework of a balanced economy and a sustainability of the System.

487. On the other hand, as a stimulus mechanism for the take-off of renewable energies, the premiums of the production of this type of energy are linked to the implementation objectives established[218] in the different Community Directives.

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[211] Act 54/1997, of 27 November, on the Electricity Sector. Article 30 (4). R-0149Bis.
[212] Ibid, Article 30 (3). R-0149Bis.
[213] Ibid, Article 30 (4) (b). R-0149Bis.
[214] Ibid, Article 30 (4). R-0149Bis.
[215] Ibid, Article 16 (6). R-0149Bis.
[216] Ibid, Article 16 (2) (3). R-0149Bis.
[217] Ibid, Article 30 (1) (d). This obligation of information is set out in the Circular 3/2005, of 13 October, of the National Energy Commission, on the request for information on investments, costs, income and other parameters of the electricity production installations under special regime. R-0149Bis
[218] Act 54/1997, of 27 November, on the Electricity Sector, sixteenth Transitory Provision: "*With the aim that for the year 2010 the sources of renewable energy cover a minimum of 12 percent of the total energy demand in Spain, it shall be establiseh a Plan for the encouragement of Renewable Energies, whose objectives will be considered in the setting of premiums.".* R-0149Bis.

488. Directive 2001/77/EC established the need for the availability of indicative national objectives[219]. For its part the Directive 2009/28/EC allows the Member States to support the launch of energy coming from renewable sources. Notwithstanding, this faculty remains conditioned to the achievement of the implementation objectives established in Law, and are legally binding[220].

B. Reasonable Rate of Return

489. As we have just highlighted, the remunerative regime of the production of energy through renewable energy sources in SR is based on the principle of reasonable return that has remained, and continues to remain in place, established since the year 1997.

490. The methodology followed by the Regulator to set out the remuneration of the activity of generation under SR through renewable energy sources is that which has been historically maintained to set the remuneration of any not liberalised section of the SES. This procedure crosses two phases:

a) To recognise and reconstruct an economic exploitation structure, identifying the standard investment costs (CAPEX) and its operation and maintenance costs (OPEX), in agreement with the action of a "diligent investor";
b) To set and objective of a balanced and proportionate economic return, in terms of reasonable return.

491. This methodology has been followed by the Kingdom of Spain continuously. This is accredited, between them, in the following documents:

- Renewable Energy Promotion Plan 2000-2010[221].
- Renewable Energies Plan for Spain 2005-2010[222].
- Renewable Energy Plan 2011-2020[223].

[219] Directive 2001/77/ EC, Article 3: " Member States shall take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with the national indicative targets referred to in paragraph 2. These steps must be in proportion to the objective to be attained." C-0022.
[220] Directive 2009/28/EC of the European Parliament and of the Council of 23rd April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. Article 3 (3)C-0050.
[221] Renewable Energy Promotion Plan 2000 - 2010. Chapter 6, pages 204 to 231. R-0067.
[222] Renewable Energies Plan in Spain 2005-2010. Chapter 3.4, pages 142 to 145 and Chapter 4 pages 270 to 313. C-0028_ESP.
[223] Renewable Energy Plan 2011-2020 in several paragraphs refers to an objective of a balanced and proportionate economic return, in terms of reasonable return:
-Pag. 14: "*The premiums (...) claim to guarantee a reasonable return on investments.*
- Pag. 536: "*Revisions of the levels of remuneration: The levels of remuneration can be modified in terms of the technological evolution of the sectors, of the behaviour of the market, (...), always guaranteeing reasonable rates of return. In any case, these revisions serve the evolution of the specific costs associated to each technology, with the triple objective that (...) the remunerative scheme evolves towards the minimum socioeconomic and environmental cost".* (added emphasis). R-0068.

492. The significance of the principle of reasonable return has been subject to numerous judgements of the Spanish Courts and have been subject to wide and complete recognition by all agents of the system. It must be remembered that the concept of reasonable return is not applied to the remunerations received by facilities producing electrical energy coming from renewable energy sources, but only to those included in the special economic regime. It is also applied to other facilities producing electrical energy that use waste or gas (cogeneration) as a source of energy.

493. In terms of the interpretation and significance of this principle, the Jurisprudence has highlighted the this principle does not imply the immobility of the remunerations set at a certain time but, on the contrary, the aim has to be a continuous adaptation to be able to comply with the principle over the entirety of its legal lifetime[224].

494. In any case, it cannot be obviated that the reasonable return assumes a guarantee for the investor. On being imposed by Law that the premiums must provide a "reasonable return", the Law aims to give security to investors.

495. Every diligent investor knows and must know that the remuneration of the activity of generation of electricity under SR through renewable energy sources in Spain is supported on an essential principle: that of reasonable return. It is thus established in Act 54/1997; and has been declared as such by the Supreme Court of the Kingdom Spain continuously in its Jurisprudence, with more than 100 Judgements documented in the same sense. As we will prove hereinafter, this principle was known and was invoked by the Spanish Association for the Solar thermal industry (PROTERMOSOLAR) and by the Claimant's Partner (SENER).

496. As has been exposed, the activity of generation under SR in the SES is remunerated by complementing the market price of the elect generated with an economic system: a premium. Therefore when determining the premium Act 54/1997 expresses:

> *"In order to determine the premiums, account shall be taken of the level of delivery voltage of the energy to the grid, effective contribution to improvement of the environment, saving in primary energy and energy efficiency, production of economically justifiable useful heat and the investment costs which have been incurred, in order to achieve reasonable rates of return by reference to the cost of money in the capital market."*[225] *(emphasis added)*

497. From this law we must highlight the following points that are characteristic to the principle of reasonable return:

i) Balance of the costs of the premium with the return of the investor.

ii) It has a dynamic character.

iii) It assumes a guarantee for the investor.

iv) It has a referenced character.

[224] Judgement of the Third Chamber of the Supreme Court, of the 25th of September of 2012, RCA 71/2012, Third Legal Basis. (R-0069), reiterating pronouncement of the Judgement of the Third Chamber Supreme Court dated 19 June 2012, Rec. 62/2011 (R-0070).

[225] Act 54/1997, of the 27th of November, on the Electrical Sector. Article 30 (4). R-0149Bis.

v) It imposes an obligation of result on the regulator.

(1) Balance of the costs of the premium in the SES with the return that these generate to the investor.

498. As has been expressed, the activity of the generation of electricity through renewable energy sources was an economically immature activity to compete in the free market with traditional energies. For this reason in order to compete in equal conditions its development required economic support systems.

499. It has also been expressed that, in the SES, this economic support is a cost for the SES, which cannot be outside the principle of sustainability of the SES. Particularly if we take into account that the SES, from a financial point of view, it is a closed system based on the principle of self-sufficiency. The Claimant admits the necessary financial balance of the SES.[226].

500. The remuneration of renewable energies is not an island within the SES, but is one part more of the elements that affect the financing of the SES. It forms a part of the same and contributes to the achievement of the objectives of the SES subject to the principles upon which it is articulated.

501. In other words, the return must be "reasonable" for the investor and "reasonable" for the System. An excessive imbalance between income and costs brings with it, either the unsustainability of the System, or excessive charges for the consumers, which prevent the increase of income and to economically rebalance the System. It is neither reasonable nor admissible that, as the Claimant claims, consumers must bear any cost from the SES, without limit.

(1.1) It has a dynamic character.

502. The activity of electrical generation is in a continuous process of technological innovation that drives the reduction in costs. Those who finance the support systems so that this reduction is produced should benefit from this reduction in costs.

503. The necessary economic sustainability of the SES, jointly with the technological evolution, requires the configuration of a dynamic remunerative regime. A regime that allows itself to adapt to the form in which this activity is configured within the SES. For this reason, Act 54/1997, on defining the rate of return does not use the term *"non-modifiable", "fixed"* or other similar terms. Act 54/1997 uses the term *"reasonable",* which allows it to adapt to the concurrent circumstances.

504. As the Supreme Court of the Kingdom of Spain has recognised:

> *"The thesis according to which "reasonable return" that was estimated at a certain time must remain unaltered over time cannot be a theory that we share. Depending on the changing economic circumstances or circumstances*

[226] Claimant's Memorial, par. 74.

of another kind, a percentage of return may be reasonable at that first instance and subsequently require an adjustment to maintain the 'reasonableness' in light of the modification of other economic or technicalfactors."[227]. *(*emphasis added*)*

505. It must be highlighted that the flexibility of the economic support system of the Kingdom of Spain to renewable energies, and the possible modifications of the incentives of the same, was known by the Claimant before carrying out its investment, as we will see later on.

(1.2) It is a ''guarantee'' for the investor.

506. The reasonable return assumes a guarantee for the investor. When it was legally imposed that premiums must provide a reasonable return the Law aims to provide security to the investors, by assuming the SES the commitment to guarantee the recuperation of its investment and operation costs as well as obtaining, in any case, a return that can be understood as justified in the whole system.

507. With this legal guarantee the investors risk is reduced. It must be remembered that the investor risk is a basic financial hypothesis to be carried out before making an investment. Therefore, the risk reduction implicitly brings with it a buffering of the expected returns to be obtained by the investors. It is proven in the economic theory that in the binominal "return"-"risk", the lower the risk, the lower the return.

(1.3) It has a referenced character.

508. Act 54/1997 prohibits the reasonable return from being arbitrarily fixed by the Government. In any case its aim is to be necessarily referenced *"to the cost of the money in the capital market"*[228].

509. This reference is, precisely, what allows to evaluate of the most objective form the "reasonability" of the return of the economic supports granted by the Kingdom to the renewable energies

(1.4) It imposes on the regulator an obligation of result.

510. Article 30.4 of Act 54/1997 does not establish the concrete mechanism that should be followed to determine the reasonable return. This Article uniquely enables the Government to establish it in the corresponding Regulation.

511. It should equally be remembered that the Supreme Court of the Kingdom of Spain from its Judgement of the 25th of October 2006 has highlighted that:

"The remunerative regime we are analysing does not guarantee, on the contrary, to holders of facilities in special regime the intangibility of a certain

[227] Judgement of the Third Chamber of the Supreme Court, of the 25th of September 2012, RCA 71/2012, Third Legal Basis. (R-0069), reiterating pronouncement of the Third Chamber Judgement of the Supreme Court dated 19 June 2012, Rec. 62/2011 (R-0070).
[228] Act 54/1997, of the 27th of November, on the Electrical Sector. Article (4). R-0149Bis.

level of benefits or income related to those obtained in past fiscal years, nor the indefinite permanence of usable formulas to set premiums." [229] *(emphasis added)*

512. Facing a possible change in the subsidy to the renewable energies the only limit that prevents the Law is that, in any case, the new model that is implemented continues to guarantee a "*reasonable return"* to the investments. Reasonable for the investor and reasonable for the System.

513. The Claimant bases a great extent of Section Investment Framework [230] on the Renewables Energies Plan 2005-2010. In this way, the Claimant quotes such Plan in many paragraphs[231]. Nevertheless, the Claimant makes an imprecise statement of such Plan and it has omitted to the Honourable Arbitral Tribunal the relevant estimation to their Prospects: the reasonable return that such Plan expects to award to the Projects.

514. The Claimant states that "*the 2005-2010 Plan suggested that Spain must provide more investment incentives to the CSP sector*"[232]. Such statement refers to Section 3.4.2.7, page 143 of the Plan. It is sufficient with the mere reading of such Section to realise that the real proposal is to maintain the incentives of the RD 436/2004. It does not propose nor suggest increasing them. In fact, the next page does include the *Measures* that the Plan suggests. Among them, it does suggest to maintain the conditions of the RD 436/2004, not to increase them[233].

515. The Claimant as well has omitted to the Honourable Arbitral Tribunal that the Plan 2005-2010 does adopt returns that it considers reasonables. When exposing the investment Plan, the financial analysis establishes that the payments estimate has been made on the basis of keeping a return "*close to 7%*":

"Return on Project Type: calculated on the basis of maintaining an Internal Rate of Return (IRR), measured in legal tender and for each standard project, around 7%, on equity (before any financing) and after taxes."[234]

(2) Observance of the principle of reasonable return in its regulatory development.

516. The first regulation documented in the development of the mentioned legal precept, was RD 2818/1998, of the 23rd December (hereinafter "**Royal Decree 2818/1998"**) which introduces the SR of the production of electrical energy, as a different regime than the ordinary,

[229] Judgement of the Third Chamber of the Supreme Court, of the 25th of October of 2006, RCA 12/2005, reference El Derecho EDJ 2006/282164. Third Legal Basis. R-0071.
[230] Claimant's Memorial, Section 4.
[231] Claimant's Memorial, par 50, 51, 91, 93, 100 to 109, 123, 135 and 139.
[232] Claimant's Memorial, par 104.
[233] "*The measures to achieve this objective of 500 MW of nominal power in power plants are basically:* [...] *Maintenance of the conditions of R.D. 436/2004, increasing the legal framework limit until 500 MW, and of R.D. 2351/04*." Renewable Energies Plan for Spain 2005 -2010. Chapter 3.4, page 144. C-0028_ESP
[234] Renewable Energies Plan for Spain 2005 -2010. Chapter 4.2 page 274. The Claimant quotes and invokes Section 4.2 of the said Plan in paragraphs 107 and 139. The Claimant omits any reference in its claim to the Plan estimated return percentage. Nevertheless, it produces such section (even the transcripted paragraph) at the Claimant's Memorial as C-0028._ESP

establishing a premium as an incentive on the average reference tariff that it regulates. This regulation set out the periodic revision of the premiums calling for the evolution of the price of electrical energy on the market, the participation of these facilities in the demand coverage and their incidence on the technical management of the system[235].

517. Royal Decree 2818/1998 is revoked by Royal Decree 436/2004, of 12th March, establishing the methodology for the updating and systematisation of the legal and economic regime of the production of electrical energy under the SR (hereinafter "**Royal Decree 436/2004**") [236]. This regulation regulates the remuneration in SR on the basis of the average reference tariff contemplated in a previous rule [237]. The Explanatory Memorandum of Royal Decree 436/2004 establishes:

> *"the Royal Decree guarantees operators of facilities in the special regime a reasonable remuneration for their investments and guarantees electrical consumers also a reasonable assignation of the costs attributable to the electric system". (emphasis added)*

518. As has previously been expressed, Royal Decree 436/2004 expressly declares that the *economic framework* must be *reasonable*, as a benefit for the investors, but *also reasonable*, as a cost for the consumers.

519. Royal Decree 661/2007, of the 25th of May [238] (hereinafter "**Royal Decree 661/2007"**) substituted Royal Decree 436/2004. Its Explanatory Memorandum reiterates the principle of reasonable return in the following terms:

> *"The economic framework established in the present Royal Decree develops the principles stated in Act 54/1997 on the Electrical Sector, of 27 of November, guaranteeing operators of facilities in the special regime a **reasonable** return for their investments and electrical consumers also a **reasonable** assignation of the costs attributable to the electric system." (emphasis added)*

520. That is to say, Royal Decree 661/2007, in addition to guaranteeing a *"reasonable return"* to the producers, it again insists on also guaranteeing several "*reasonable*" costs for the consumers, who assume the payments in their electricity bills. It is thus established in the Explanatory Memorandum, transcripted, *when guaranteeing the "electrical consumer a reasonable assignation of the costs attributable to the electric system as well*".

521. The claiming party cites the previous Royal Decree 1614/2010, of the 7th December, (hereinafter "**Royal Decree 1614/2010**") as a Regulation that supposedly secures its legitimate

[235] Royal Decree 2818/1998, of 23rd December, on the production of electrical energy by installations supported by resources or sources of renewable energy, waste or co-generation. Article 32. C-0018_ESP

[236] Royal Decree 436/2004, of 12th March, establishing the methodology for the updating and systematisation of the legal and economic regime of the production of electrical energy under the special regime. C-0024_ESP

[237] Royal Decree 1432/2002, of 27th December, which establishes the methodology for the approval or modification of the average or reference electrical tariff. R-0072.

[238] Royal Decree 661/2007, of 25th May, regulating the production of electrical energy under the special regime. R-150Bis.

expectancies. The respect of the principle of reasonable return was included as a determination to this Royal Decree. As such, its Explanatory Memorandum establishes:

> *"The backup regime, just as it is included in its formulation, should be adapted, safeguarding legal security of the investments and the principle of reasonable return, to the dynamic reality of the learning curves of the different technologies and the technical restrictions that surface with the increase in the penetration of the same in the generation "mix [...]" (emphasis added)*

522. As we will see, neither this Explanatory Memorandum nor its Article 4 declare in any way the immutability of the economic regime applicable to determined CSP plants. Facing the contrary, it declares that it safeguards "*the principle of reasonable return''.* This principle is applicable, both for the investors, and for the electrical consumers. This could not be in any other way because safeguarding only the reasonable return of the investors would bring with it either the unsustainability of the System or excessive charges for the consumers, to economically rebalance the System.

(3) Supreme Court's case-law: guarantee of reasonable return.

523. In application of Act 54/1997 the Kingdom of Spain has approved different rules that have been subject to objection, giving rise to a strong dispute This dispute is the origin of a consolidated Jurisprudence of the Supreme Court of the Kingdom of Spain, wich is the Court competent to hear the cases against the Royal Decrees emitted by the Government of Spain[239.]

524. This Jurisprudence configures the nature, the reach and the limits of the right to reasonable return of the energy producers under SR. It is again necessary to highlight the importance of the Jurisprudence, as a complement to the Spanish Legal System[240].

525. In the light of these Judgements it is impossible to address the study of the remunerative regime of the producers under SR outside the principle of reasonable return. The claiming party has consciously omitted in its Claimant's Memorial this consolidated jurisprudential Doctrine.

526. However, the Arbitral Tribunal cannot repudiate it by resolving the present arbitration, so this Jurisprudence essentially figured the legitimate expectancies of the Claimant at the time of their alleged investment in Spain.

527. The Jurisprudence of the Supreme Court has only recognised the right to obtain a "reasonable return" in Spain for the producers under SR. That is to say, it has recognised the acquired right to obtain an *"end",* without guaranteeing a specific *"means"* to it, such as with the premiums, the regulated tariffs or other means available to the Executive.

528. In effect, the Supreme Court has come to constantly and clearly repeat that Act 54/1997 is limited to ensuring companies a *"reasonable rates of return with reference to the cost of the money in the capital market".* It has, in addition, consecrated the fact that the content of this

[239] Act 29/1998, of the 13th July, regulating the Contentious-Administrative Jurisdiction, Article 12. C-0013_ESP

[240] Article 1.6 of the Spanish Civil Code. R-0059.

right does not grant the producers the acquired and petrified in time right when to obtain the same remuneration through the exercise of its activity.

529. The Supreme Court, hearing the case against Royal Decree 436/2004 already expressly denied the petrification of the system or of the remuneration system in its Judgement of the 15th of December 2005[241].

530. Following this announcement, the Supreme Court had the opportunity to manifest itself on the regulatory modifications carried out in Royal Decree 436/2004. In all cases, it upheld to the legality of the same. In the important Judgement of the 25th of October 2006, the Supreme Court expressly denies the investors the right to receive a fixed tariff. It only recognises the right to obtain reasonable rates of return in accordance with Article 30.4 of Act 54/1997. In accordance to this Judgement:

> *"[…]The owners of electricity production facilities under the Special Regime have no "unchangeable right" to the economic scheme that regulates the payment of premiums staying the same. In effect, this regime tries to promote the use of renewable energies through an incentive mechanism which, as with all mechanisms of this type, cannot guarantee its permanence without modifications in the future."*[242] *(emphasis added)*

531. In addition, the Jurisprudence expressly establishes that the regime of economic support to renewable energies in the SES is associated to and helps towards the sustainability of the system. In this sense, the cited Judgement of the 25th of October 2006 establishes that the regime of incentives and premiums contemplated in Royal Decree 436/2004 must be understood as framed within the overall system which is affected by economic circumstances at any given time, and may therefore be amended to adapt it to changes[243].

532. In this same sentence of the 25th of October 2006, the Supreme Court affirms that the payments modifications do not contradict the principles of legal security and legitimate expectations. The legal changes are admissible as long as the principle established in Act 54/1997 is respected: a reasonable return[244].

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[241] Judgement of the Supreme Court of the 15th of December 2005: *"There is no legal obstacle that exists to prevent the Government, in the exercise of the regulatory powers and of the broad entitlements it has in a strongly regulated issue such as electricity, from modifying a specific system of remuneration […]"* (added emphasis). R-0073.

[242] Judgement of the Supreme Court of the 25th October 2006, later adds: "*The remuneration regime we are analysing does not guarantee, conversely, the intangibility of a certain level of benefits or income related to those obtained in past fiscal years to installation holders in renewable energies, nor the indefinite permanence of usable formulas to set premiums to the holders of installations."* (added emphasis). R-0071.

[243] The Judgement of the Supreme Court of the 25th October 2006: *"In the same way as according to factors of economic policy [...] the premiums and incentives for the production of electrical energy under special regime can increase from one year to another, they can also decrease when these same considerations so advise it.* As long as, we insist, the variations are maintained *within the legal limits that discipline this way of promotion, the mere fact that the economic updating or significance of the premium ascends or descends does not constitute its motive of nullity nor does it affect the legitimate confidence of its end users". (*added emphasis). R-0071

[244] Judgement of the Supreme Court of the 25th of October 2006: *"legal security is not compatible with the legal changes from the perspective of the validity of the latter, [...] The same consideration is applicable to*

533. This Jurisprudence was later confirmed. As such, the Judgements of the Supreme Court of the 20th March 2007[245] and the 9th October 2007 in which the High Court reiterated that there was no acquired right to the reception of the premium [246].

534. It is worth noting that these Judgements from the highest jurisdictional body in Spain on the incentive regime significantly precede the supposed investment of the Claimant. A diligent investor could not repudiate them nor could they found a claim on the right or any legitimate expectations to which the premium regime remained petrified indefinitely in front of any economic circumstance. It should be recalled that there is no evidence that the Claimant requested a legal due Diligence prior to its alleged investment in 2008.

535. As has been indicated Royal Decree 436/2004 is substituted by Royal Decree 661/2007[247]. The replacement of the regime established in Royal Decree 436/2004, gave rise to the lodging of various appeals before the Supreme Court. Several electrical energy producers under special regime understood that Article 40.3 of Royal Decree 436/2004[248] considered the "petrification" of the previous incentive scheme.

536. The Spanish Supreme Court, reiterated once more in these procedures its Jurisprudence on the reach of the regulation of the electrical sector and on the rights and guarantees on which the economic agents rely. Among these rights the right to immutability from the economic regime is not found in any case. According to the Supreme Court the only limitations to the regulatory power of the State are the following two: that the change does not reach the already received income and that the principle of reasonable return is not infringed. This is established in three important Judgements, one of the 3rd December 2009 and two of the 9 December 2009. In the first of them the Supreme Court highlighted the following:

> *"on the content prescribed in Act 54/1997, [...], it does not express the petrification of freezing of the remunerative regime of the owners of the electrical energy installations under special regime nor a recognition of the right of the producers under special regime to the unchangeability of this regime, when holding the Government, according to the design of the legislator, a margin of appreciation to determine the energy performances offers, [...] taking into consideration in the exercise of its regulatory power the evident and essential general interests involved in a correct operation of the system of production and distribution of electrical energy, and, in particular, the rights of the users."*[249] *(emphasis added)*

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the principle of legitimate confidence [...] The appellants submit that their investments in the activity of the production of electrical energy under special regime were made at a certain time "trusting that the Administration would not change the legal conditions that were determining for the (...) to decide to construct the installations", a premise that deduces that the minority of the previous premiums to Royal Decree 2351/2004 with regard to those set in Royal Decree 435/2004 would be contrary to this principle. Such reasoning, referred to as an incentive mechanism such as the premiums in question, cannot be shared." R-0071

[245] Judgement of the Supreme Court of the 20th of March 2007. R-0074.

[246] Judgement of the Supreme Court of the 9th of October 2007. R-0075.

[247] Royal Decree-Law 661/2007, of the 25th of May. R-150Bis

[248] Royal Decree 436/2004. Article 40. C-0024_ESP.

[249] Judgement of the Supreme Court of the 3rd of December 2009, Third Legal Basis. R-0076.

537. The clarity of the Jurisprudence applicable to this sector is evident. The regulatory development if the remuneration under SR is made to depend on the legal regulation (art. 30.4 Act 54/1997), to wich is subordinated according to the Jurisprudence. It is clear then, that the Kingdom of Spain did not offer any diligent investor a petrification of tits system of premiums, nor any petrification of the SES in favour of any investor not in prejudice of the consumers of the SES.

538. The appellants in the year 2009 alleged the violation of the principle of legal security. However, the Supreme Court already highlighted that:

> *"The argument [...] should be rejected, so it is not deduced that this rule [RD 661/2007] does not respond to the demands of the principle of legal security, which does not include any right to the freezing of the existing legal system."*[250] (emphasis added)

539. The appellants in the year 2009 also alleged the violation of the principle of legitimate expectations. However, the highest court in Spain reiterated that:

> *"the principle of legitimate expectations does not guarantee the perpetuation of the existing situation; which can be modified in the framework of the faculty of appreciation of the institutions and public authorities to impose new regulations appreciating the needs of the general interest." (emphasis added)*

540. The Jurisprudence expressed is sufficiently clear. However, we must highlight the other two Judgements of the 9th of December 2009, documented in the appeals against Royal Decree 661/2007. In these Judgements, the Supreme Court established with clear strenght the rights of the investors under the SR, managing to reprehend the appellant for not considering the applicable Jurisprudence:

> *"[...][the Claimant] does not pay sufficient attention to the jurisprudence of this specific Chamber specifically reverted in relation to the principles of legitimate confidence and non-retroactivity applied to the successive incentive regimes to the generation of electricity. It concerns the considerations exposed in our judgement of the 25th of October 2006, and repeated on 20th March 2007, among other things, on the legal situation of the holders of production facilities of electricity production under the special regime, for whom considering the future an "unchangeable law" to keep unaltered the remunerative framework approved by the holder of the regulatory authorisation is impossible, as long as the prescriptions to the Law on the Electrical Sector are respected with respect to the reasonable return of the investments."* [251] *(emphasis added)*

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[250] Judgement of the Supreme Court of the 3rd of December 2009, Fourth Legal Basis. R-0076.

[251] "*As stated by this Court in its judgement of the 25th of October 2006, and repeated on 20 March 2007: "the holders of production facilities of electricity production under the special regime are not covered by an "unchangeable right" to keep unaltered the economic regime governing the collection of premiums.* This regime concerns, in effect, promoting the use of renewable energies through an incentive mechanism that, with all those of this type, does not assure its permanence without modifications for the future […] *The companies who have freely decided to enter into a market such as that of the generation of electricity under the special regime, knowing beforehand that is largely dependent on the setting of economic incentives by the*

541. In these judgements, the Supreme Court reiterates what is already highlighted in those from the 25th October 2006 and the 20th of March in relation to the legality of the regulatory of Royal Decree 436/2004, now relating to Royal Decree 661/2007[252].

542. The authority of the Government to reform the remuneration regime within the legal limit of Article 30.4 Act 54/1997 could not be clearer. And no diligent investor can in 2011 repudiate the clarity, constancy and strength of this Jurisprudence.

543. Article 44.3 of Royal Decree 661/2007 was later modified by Royal Decree 1565/2010[253] and Royal Decree-law 14/2010[254]. Many producers contested before the National Courts alleging that these modifications were retroactive and impossible to predict by a diligent investor when making their investment in accordance with Royal Decree 661/2007. Regarding these challenges the Supreme Court stated, from the 12th April 2012 (the date on which the first of them fell) and until the month of November of the same year, a large series of Judgements that again reiterated its Jurisprudence on the limits and reach of the concept of reasonable return[255].

544. In these Judgements, the Supreme Court once more establishes that the holders of production facilities of electricity production under the special regime are not covered by an "unchangeable right" to keep unaltered the economic regime governing the collection of their remunerations. It is worth noting that this Judgement introduces in its evaluation the circumstances of economic crisis that the Kingdom of Spain is suffering at this time, as well as the existence and amount of the tariff deficit:

Public Authorities, are or should be aware that these incentives can be modified, within legal the legal frame, by the same authorities. One of the "legal risks" that they accept and that they necessarily must take into account, is precisely the variation of the parameters of premiums or incentives that the Law of the Electricity Industry aims to reduce but does not exclude."[251] (emphasis added). Judgement of the Supreme Court of the 9th of December 2009, Sixth Legal Basis. R-0077.

[252] Sentence of the Third Chamber of the Supreme Court of 9 December 2009, rec. 152/07, reference Law 2009/307357 Fifth Legal Basis. R-0077.

[253] Royal Decree 1565/2010, of 19th November, regulating and modifying certain aspects relating to the production of electrical energy under the special regime. R-0078.

[254] Royal Decree-law 14/2010, of the 23rd of December, establishing urgent measures for the correction of the tariff deficit of the electrical sector. C-0064_ESP.

[255] Judgements of the Supreme Court of the 20th of December 2011, rec. 16/2011; of the 12th April 2012, rec. 35, 50 and 112/11; of the 19th April 2012, rec. 39 and 97/11; of the 23rd April 2012, rec. 47/2011; of the 3rd May 2012, rec. 51 and 55/2011; of the 10th May 2012, rec. 61 and 114/2011; of the 14th May 2012, rec. 58/2011; of the 16th May 2012, rec. 46/11; of the 18th May, rec. 70 and 74/11; of the 22nd May 2012, rec. 45 and 49/11; of the 30th May 2012, rec. 59/2011; of the 18th June 2012, rec. 54, 56, 57 and 63/11; of the 25th June 2012, rec. 109 and 121/11; of the 26th June 2012, rec. 566/10; of the 9th July 2012, rec. 67, 94 and 101/11; of the 12th June 2012, rec. 52/11; of the 16th June 2012, rec. 53, 75 and 119/11; of the 17th June 2012, rec. 19 and 37/11; of the 19th June 2012, rec. 44/2011; of the 25th of July 2012, rec. 38/2011; of the 26th of July 2012, rec. 36/11; 13th September 2012, rec 48/11; 17th September 2012, rec 43, 87, 88, 106 and 120/11; 18th of September 2012, rec 41/11; 25th September 2012, rec 71/11; 27th September 2012, rec 72/2011; 28th September 2012, rec 68/2011; of the 8th October 2012, rec. 78, 79, 100, 106 and 104/11; 10th of October 2012, rec 76/2011; 11th October 2012, rec 95, 91, 105, 106 and 124/11; 10th October 2012, rec.64, 73, 91, 105 and 124/11; of the 17th October 2012, rec. 102/2011; 23rd of October 2012, rec 92/2011; 30th October 2012, rec 96/2011; 31st October 2012, rec 77 and 126/11; of the 5th November 2012, rec. 103/2011; of the 9th November 2012, rec. 89/2011; of the 12th November 2012, rec. 98 and 110/11; of the 16th November 2012, rec. 116/11; of the 21st November 2012, rec. 34/2011; of the 26th November 2012, rec. 125/2011. R-0079

> *"If these imply adjustments in many producing sectors [...], it is not unreasonable that these are also extended to the renewable energies sector that wish to continue to receive the regulated tariffs instead of resorting to market mechanisms [...]. And this much more in the face of situations of generalised economic crisis and, in the case of electrical energy, in the face of the growth of the tariff deficit that, in a certain part, derives from the impact, on calculating the access tolls, of the remuneration of these through the regulated tariff, with respect to the cost attributable to the electrical system."*[256] *(emphasis added)*

545. Moreover, the Supreme Court carried out in this same Judgement and on other later judgements three very specific considerations which reiterate the possibility of modifying the remuneration regime of renewable technologies.

546. Firstly, the Judgement of the 12th of April 2012 establishes that Article 30.4 of Act 54/1997 does not guarantee the receipt of a regulated tariff during a certain period of time:

> *"The reasonable return [...] has no reason to imply, we repeat, that the remuneration must be precisely through the regulated tariff (it could be so, in the future, at market prices) and, above all, that this is assured for more than thirty years."* [257]

547. Secondly, another Judgement of the same date of the 12th April 2012 (Appeal 59/2011) established that a "reasonable return" does not assume the right to the receipt of a remuneration throughout all the years of the active useful lifetime of the installation. It establishes that it is possible that these investments have been already amortised and have produced a reasonable return long before the end of the operational period. [258]

548. Finally, the Supreme Court denies that in can remain unaltered, including, a specific rate of return:

> *"According to the claim, [...] the "relevant loss of return" [...] should be compared contrasting the rates of return derived from it [RD] with the results of the previous RD. [...] The thesis according to which "reasonable return" that was expressed in a certain moment should remain unaltered, with nothing more, henceforth cannot be shared. For the change in economic circumstances and of another type of percentage of return can be "reasonable" in that first moment and require its other adjustment precisely*

[256] Judgement of the Supreme Court of the 12th of April 2012, Rec. 40/2011, Seventh Legal Basis. R-0080.
[257] Judgement of the Supreme Court of the 12th of April 2012, Rec. 40/2011, Fourth Legal Basis. R-0080.
[258] Judgement of the Supreme Court of the 12th April 2012: "*the principle of reasonable return must be applied [...] to the total active lifetime of the installation, but not [...] in the sense that during the whole lifetime this principle guarantees the production of benefits, but also in the sense that it is assured that the investments employed in the installation obtain, over the whole existence of the same, a reasonable return. For which [...] it does not imply the continued existence of a determined premium during the entire active lifetime of the installation, so it is perfectly possible that these investments have been already paid off and have produced a reasonable return long before the end of the operational period."* (added emphasis). R-0080. It is also cited in, among others, the Judgement of the Supreme Court of the 19th June 2012 (appeal 62/2011). R-0081.

to maintain the "reasonability" facing the modification of other economic or technical factors." [259]

549. The forcefulness, clarity and continuity of the Jurisprudence applicable does not leave room for doubts on the reach, content and legal limits of the reasonable return to which the investors have a right. It is surprising that the Claiming Party completely omitted this Jurisprudence completely clear, essential for appreciating the true legitimate expectations that the Kingdom of Spain offered to all national or foreign investors. As a result then, it is essential for setting the Legitimate Expectations Objectives that the claiming party could have made as a part of their investment.

(4) Knowledge of such Principle by the Thermosolar Sector in Spain

550. The reasonable return principle as basis and as limit to enable the Government to fix the payments to renewable energies was known by the Thermosolar Sector in Spain. In view of its relevance in this case, we will prove its knowledge by (a) the Association for the Solar thermal industry (PROTERMOSOLAR), of which the Claimant's company, Torresol, was Partner, and by b) the Claimant's Partner in the company Torresol (SENER), which did know and specifilically invoked.

(4.1) Knowledge and invocation to the State by PROTERMOSOLAR.

551. Protermosolar, is the Association that since 2004 promotes in Spain the Spanish thermosolar business development[260].

552. As we will explain later, since the beginning of 2012, the CNE opened an appeal phase to examine choices which would allow to solve the situation of the tariff deficit. It is noteworthy to the Honourable Tribunal that in such moment the RD 661/2007 was in force, since any of the measures subject of the present arbitration was adopted.

553. Protermosolar, on behalf of their partners, submitted written submissions on 10 February 2012, with proposals regarding the regulatory measures that ought to be adopted in the electrical sector. In the proposals, Protermosolar plainly exposes its knowledge of the *Principle of Reasonable Return* and specifically requests its implementation to other producers.

554. That is, in its proposals submission, the RD 661/2007 in force, states:

"it is suggested [to the CNE] to study the following actions: to apply a release for the excessive benefits that the activities of generation in nuclear power stations and large hydro-power have had since the implementation of the deficit tariff figure, ***according to the Supreme Court's "reasonable benefit" theory*** *that already justified certain measures on certain renewable energies in the past."*[261] *(emphasis added)*

[259] Judgement of the Supreme Court of the 19th of June 2012 (appeal 62/2011). R-0081.
[260] Information available at: http://www.protermosolar.com/quienes-somos/protermosolar/, R-0082
[261] PROTERMOSOLAR claims to the public Consultation of the CNE, R-0083.

555. Therefore, has been proved that such Principle of Reasonable Return was known by the Thermosolar Sector while the RD 661/2007 was in force. It was also known its implementation by the Supreme Court and that such principle justified the adoption of measures regarding certain renewables energies. In fact, PROTERMOSOLAR suggests to continue with the implementation of such principle.

(4.2) Knowledge and invocation by SENER.

556. SENER is the company with which the Abu Dhabi sovereign wealth fund was associated to invest in Spain. The Claimant itself states that "*Sener was a partner of great importance who knew deeply the Spanish market and its regulatory policy and who was well connected*".

557. Well then, SENER did know the Principle of Reasonable Return and it defended that this one was the limit for the Government to fix the renewables energies payments. In an Article published in a Spanish newspaper while the RD 661/2007 was in force, the President of SENER, Mr Jorge Sendagorta, publicly defended that:

> *"there is another key idea to appraise, the one about "reasonable return", established by the electrical system law as the basis for the Government to set the remunerations of the new energies. The reasonable return ought to be therefore the **limit** to any solution adopted, and it does not leave much room for manoeuvre"*[262]

558. SENER does publicly defend that the Principle of Reasonable Return is the reference and the limit for the Government to fix the payments. It does specifically confirm what the Kingdom of Spain has maintained herein.

559. Moreover, such theory was equally maintained by the large companies within the thermosolar sector in Spain[263]. They neither appeal to the Supreme Court the inmutability of the RD 661/2007 rights, nor the existence of any binding agreement in this sense. They claim that the Principle of Reasonable Return be respected.

560. In short, what is defended by the Thermosolar Sector in Spain confirms what the only Claimant's regulatory Due Diligence declared in 2009:

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[262] Press Article "Tariff deficit, retroactive effect and reasonable return" written by Mr Jorge Sendagorta, President of SENER, and published in:
- The Economic journal "Expansión", 19 July 2012: http://www.expansion.com/2012/07/19/opinion/tribunas/1342729151.html R-0084.
- The CSP sector journal "Helio Noticias", 22 July 2012: http://www.helionoticias.es/noticia.php?id_not=813 R-0085.

[263] Press release published by Helionoticias, Portal de noticias de Energía Termosolar: "*Abengoa, FCC, Sacyr, Elecnor, Samca and Sener led the Government to the Supreme Court because of the thermosolar cuts:*[...] *The large companies from the thermosolar sector have got together to led the Government to the Supreme Court because of the successive regulatory changes* [...] *Abengoa, FCC, Sacyr, Elecnor, Samca and Sener produced last 15 April a joint legal action before the High Court in order to try to restrain the impact of regulatory measures approved by the ministry of Industry* [...] *The thermosolar sector companies request the Supreme to recognise the legal basis of thermosolar reasonable return. The claim refutes the new tariffs fixed to facilities and promotes its review so the affected companies may "obtain the reasonable return guaranteed by law*". (emphasis added).R-0086.

> *"**The 2020 horizon and the development of the spanish renewable industry:** There are a number of uncertainties surrounding the development of the Spanish renewable industry. In our view the major obstacles arise from the existing tariff structure which is unable to account for the generation costs. [...] In adittion, recent history tell us that even though renewable technologies are expensive, the **Government is willing to provide a reasonable return** for investors by keeping subsdies, even in the event of tariff deficits being generated over time."*[264] *(Emphasis added)*

561. The statements made by Protermosolar and Sener while the RD 661/2007 was in force, do confirm that such Principle was widespread known, and that was even appealed to the Government by the Spanish Thermosolar Sector. It is not reasonable that the Claimant omits such case law doctrine on its exposure of the regulatory framework, since it is necessary to know such regulatory framework.

(5) Conclusions.

562. In view of the preceding chapter a diligent investor who wanted to invest in the activity of electrical generation from renewable energy sources of the SES within the relevant period for this arbitration recognised or should have necessarily recognised a series of basic elements.

563. It should be known that the activity of generation from renewable sources is integrated in the SES subject to the principles of supply security and sustainability of the system. That this activity is submitted to the action of the Regulator which essentially has the function of ensuring the sustainability of the System over the long term and the supply security.

564. A diligent investor should know that the remuneration regime of the activity of electrical generation under SR through renewable energy sources remains assimilated to the prevision for the regulated segments of the SES (transport and distribution) and is configured as a cost of the SES.

565. An informed investor knew or should have known that the support system to the generation of energy through renewable sources is conditioned to the achievement of the implementation objectives of renewable energy established by the EU.

566. An informed investor should have known that the remuneration system encourages Projects, and therefore, the participation of industrial investors.

567. An informed investor should have also known that the whole remuneration system of the generation of energy through renewable sources hinges on the principle of reasonable return. This principle of reasonable return is characterised by:

- Imposing a necessary balance between the cost that the remuneration assumes for the SES and the return that this remuneration will generate to the investor.
- Its dynamic, not "petrified" character.
- It assumes a guarantee for the investor.

[264] Pöyry Report, page 131, Document C-0049.

- It has a referenced character.
- It implies an obligation to achieve a result or "end", not of obtaining a result through a fixed "means".

568. Likewise, a diligent investor knew or should have known that the Supreme Court, highest Jurisdictional Body in the Kingdom of Spain, has established since the year 2005 a clear, reiterated and consolidated Jurisprudence relating to the remuneration regime of the energy producers included under the SR. This jurisprudential doctrine hinges on the legal principle expressed as "reasonable return". A diligent investor knew or should have known that the limits and outlines of the reasonable return established by the Supreme Court assume the right to receive, a remuneration under any of the admissible modes that would allow the recuperation of its investments in the plants by obtaining a reasonable return through reference to the cost of the money in the capital market, during the time in which it was necessary, not during the entire active useful lifetime of the plant as it was set out by the legislation and as it was authentically interpreted by the Supreme Court of Spain.

569. A diligent investor knew or should have known that the content of this right does not assume the immovable right to the receipt of a determined regime of benefits or income related to those obtained in past exercises, nor the indefinite permanence of the formulas used to fix the premiums, as the Supreme Court has repeatedly established.

570. The above are the facts that could have been received by any investor in the thermosolar sector. An investor could not ignore this reality and think that their investment in the thermosolar sector would be isolated from the application of the basic rules and principles of the remuneration regime of energy production under SR in particular and of the SES in general.

The Spanish Association for the Solar thermal industry (PROTERMOSOLAR) as well as SENER (Claimant's Partner) did know such Principle and they defended their implementation.

The Claimant, as well as Masdar and the Mubadala sovereign wealth fund, when investing according to the exposed regulatory Framework, do accept that, according to the reasonable return principle, it was potentially predictable the regulatory intervention, if the expected payment exceeded the reasonable return principle.

C. The legal regime applicable at the time when the Claimant made its investment.

571. As can be gleaned from the SES and the regulations set out, the Claimant neither obtained an administrative concession nor an administrative license nor has it been party to an agreement or contract with the Kingdom of Spain. Its investment was made, hence, within the regulatory framework described in the previous section.

572. Within said framework LES 1997 was thus applicable to it in line with the interpretation given thereunto by Case law.

573. The Claimant quotes RDL 7/2006 enacted on June 23rd[265]. This Royal Decree-Law, immediately prior to RD 661/2007, modifies the wording of Article 30.4 ESL, maintaining the need to "*achieve reasonable levels of profitability with regard to the cost of money on the capital market*". It is worthy of note that the Claimant has omitted this question from the Honourable Arbitral Tribunal in its explanation of this legal regulation, a question which is relevant to shape the expectations of the Claimant in 2008 and 2009. In actual fact, it has been stated previously[266] that Royal Decree-Law 7/2006 makes it clear that in 2006 the Government had specifically maintained the legal principle of reasonable rate of return as the basis and limit to the regulatory powers of the Government to setting remunerations for Renewable Energy producers. In other words, it was aware that the Government had maintained the essence of the System.

574. RD 661/2007, referred to in the previous section, did not establish nor guarantee anything eESL except this principle of a reasonable rate of return, but not an unchangeable remuneration. Neither did it ensure the tenure of the remuneration by means of regulated tariffs nor the option of payment by means of a pool plus a premium.

575. Having analysed the general legal framework of the energy production activity from renewable sources, a specific analysis needs to be carried out of the normative circumstances under which the Claimant made its investment and, in particular, those regulations laid down after RD 661/2007.

(1) As regards the regulations in force at the time of the investment by the Claimant. November 2008 and July 2009. Royal Decree-Law 1578 enacted on September 26th 2008

576. RD 1578 enacted on September 26th 2008 was known by the Claimant before signing the financing agreements that determined its investment in Spain in view of the fact that said RD 1578/2008 was published in the BOE» on September 27th 2008.

577. The Claimant quotes said RD in its Memorial[267] to refer to the Registration requirements set out in said RD for photovoltaic installations. However, it only provided part of said RD[268].

578. What's more, the Claimant omits from the Honourable Arbitral Tribunal that said RD 1578/2008 revised downwards the remuneration of RD 661/2007 for photovoltaic installations. In actual fact, the Explanatory Memorandum of said Regulation is clear, explaining the reasons behind the modification of remuneration regime of RD 661/2007:

> *"As well as insufficient remuneration it would make the investments unfeasible, excessive remuneration could significantly impact the costs of the electric system and remove any incentive to commit to research and development, reducing the excellent medium and long-term prospects for this technology. This is why it is deemed necessary to rationalise the remuneration and this is why the Royal Decree, which is approve, revises the economic*

[265] Claimant's Memorial, paragraphs 110 and 111. Document C-0033.
[266] Section IV.A.4.3 of the present Counter-memorial.
[267] Claimant's Memorial, paragraphs193 and 397.
[268] Document C-0046 accompanying the Claimant's Memorial which only includes Article 4 of said RD.

regime downwards, following expected evolution of technology from a long-term perspective."[269]

579. The Claimant states throughout its Claimant's Memorial that it was confident that the remunerations set out in RD 661/2007 would not change. However, the Claimant omits to say that before its investments it had already published a regulation which revised downwards remunerations pertaining to the PV installations, aimed at avoiding disproportionate remunerations which are not adjusted to the principle of a reasonable rate of return.

580. The PÖYRY Report dated March 2009[270] sets out the reduction in remunerations of PV Installations and the causes which could give rise to said reductions such as the over-remuneration of a technology and the excessive costs for the system[271]:

> *"In fact RD 661 has proved to be too generous with regards to the level of the FIT and this has led to un-sustainable levels of growth. As a result, the Government has recently issued a Royal decree that is specific to the Solat PV industry (RD 1578/2008) in attempt to slow the growth of the market"[...] "Solar PV projects that were not fully permitted and operational before 28th of September 2008 (RD 661) are forced on to the recently published RD 1578. In essence, the tariffs under RD 1578/2008 have been reduced by about 25% compared to the tariffs under RD 661." (emphasis added)*

581. This report also refers to the interventions of the Spanish Government during 2007 exposing the Spanish industry CSP[272] and it mentions the cuts in premiums in the wind sector as it obtained excessive benefits:

> *"During 2007, there have been significant changes to the Spanish wholesale electricity market and the rules that govern it. There are a number of events that seem indicative of what the medium term future may bring in Spain: [...] Changes in legislation to cap revenue to Special regime generators (RD 661/2007&RD1578/2008).*
>
> *[...] given recent high pool prices, Special regime Generators, in particular wind farms, [...] had been making supra-normal profits. As a result of these excessive profits the government has intervened in order to cap profits [...]*
>
> *Due to these major changes by the government, Pöyry believes the Spanish electricity industry will continue to be dominated by the government, with it actively managing the market to try and maintain a cap on generator profits [...] Thus the government is more likely to intervene to [...] cap revenues (RD 661/2007 & RD 1578/2008), that it is to directly intervene in the wholesale market and cap prices."*[273] *(emphasis added)*

582. The Pöyry report asserts the determination of the Government to avoid over-remuneration situations to reduce the tariff deficit:

[269] Royal Decree-Law 1578 enacted on September 26th 2008, Explanatory Memorandum, R- 0087.
[270] Memorial Document C-0049 partially set out in the paras. 171 and 172 of the Claimant's Memorial.
[271] Document C-0049, pages 6 to 11, 39 and 40, 45 and 51, 68, 74, 85 to 93
[272] Document C-0049, page 95 and subsequent pages.
[273] Document C-0049, page 113.

"The tariff deficit generated until September 2008 (€4bn) exceeds clearly 2007 deficit. The Spanish Government seems to be determinate to alleviate any potential deficit in advance this has been done partially was done [sic] by capping the wind remuneration. [...] Moreover, reductions on Solar PV tariffs."[274]

583. In the event that the above is not sufficient, the examination of the Pöyry report of "*Horizon 2020*" and the development of the Renewable Energies industry in Spain[275] ratifies that set out previously by the Kingdom of Spain: that the Government commitment was to "*provide a reasonable rate of return for investors"*, granting the subsidies, even with the tariff deficits generated over time[276].

584. This is the confidence based on which the Claimant invested, not in the immutability of the remuneration regime set out in RD 661/2007. And this is the commitment that the Kingdom of Spain has complied with by maintaining reasonable rate of return with the subsequent reforms as we will set out below.

585. On the other hand, in view of the reductions in profits in wind and photovoltaic technologies, the Claimant could have requested a Legal Due Diligence in this regard. It could also have asked the Government for a clarification or commitment about the future failure to modify the remunerations of the CSP Plants. In actual fact, it proved that it had access to the Spanish Minister of Industry in the context of the international political conversations they initially maintained face to face[277]. There is no record of any request for another Report nor any clarification prior to RD 1578/2008. Neither is there any record that it did so later.

586. Hence, the Claimant accepted the General regulatory regime and the Case law in place in Spain (Regulatory framework) at the time it made its alleged investments in 2008 and 2009. Said regulatory framework involved a regulatory risk to avoid over-remuneration situations which was made clear by RD 1578/2008 and assumed by the Claimant.

587. What's more, this regulatory risk was specifically mentioned in the regulatory Due Diligence of the Claimant on pages 113 and 122 thereof, setting out the cases of the wind and photovoltaic sector. This was accepted by the Claimant.

(2) As regards the regulations in force at the time of the Claimant's investment. November 2008 and July 2009. Royal Decree-Law 6/2009 enacted on April 30th.

[274] Document C-0049, page 122.
[275] Document C-0049, Section 9, page 131.
[276] Document C-0049, page 131: "*There are a number of uncertainties surrounding the development of the Spanish renewable industry. In our view the major obstacles arise from the existing tariff structure which is unable to account for the generation costs*. [...] *recent history tell us that even though renewable technologies are expensive, the Government is willing to provide a reasonable return for investors by keeping subsides, even in the event of tariff deficits being generated over time*."
[277] Statement by Mr. Tassabehji, para. 30: "*The **meetings** at **government level** were largely **political** cheerleading sessions e.g. could Abu Dhabi do more business in Spain, could Etihad fly to Madrid etc. The Spanish Ambassador to the UAE played a key role, he arranged a number of delegations."* (emphasis added)

588. Before signing the Project finance regarding the CSP Plants of Arcosol and Termesol, the Claimant learned of the approval of Royal Decree-Law 6/2009[278] which laid down limits on the tariff deficit for subsequent years. It should be remembered that the Pöyry report which served as the Due Diligence for the Claimant warned of the Government's wish to do away with the tariff deficit and the actions that had been taken up until then to mitigate it. When the Claimant makes its investment, it already had in mind the fact that the Government had approved RD 1578/2008 with said purpose and the wish to avoid any over-remuneration situations.

589. Following the same line, a few months later Royal Decree-Law 6/2009 was approved, enacted on April 30th 2009 whereby certain measures were adopted in the energy sector and the social bonus was approved (henceforth "Royal Decree-Law 6/2009"). To be precise, the Explanatory Memorandum of said regulation stated:

> *"The growing tariff deficit, [...] and the real costs associated with said tariffs, is bringing about serious problems which, in the current context of an international financial crisis, is deeply affecting the system and* ***putting at risk*** *not only the financial situation of companies in the Electric Sector, but also the actual* ***sustainability*** *of the system. This maladjustment proves to be unsustainable and has serious consequences as it deteriorates the security and financing of the investments required for the supply of electricity at the quality and safety levels required by Spanish society"*

590. Hence, the Claimant could not have been unaware of the international financial crisis situation which was already affecting Spain, nor of the need to ensure the financial sustainability of the SEE and the determination of the Government to adopt measures which would guarantee the maintenance a reasonable return on investments in the sector which would not result in over-remuneration.

591. To put it another way, based on the regulations set out above, the Claimant could not reasonably expect – as it argues – the unchangeable nature of the remuneration set in RD 661/2007 throughout the working life of the Plants. What it could trust in was in a remuneration regime which ensured a reasonable rate of return. Profitability with regard to which the Government had already made adjustments to another sector and had already foreseen a temporary path which would require changes to the costs and income of the SES in order to rebalance it. It was also aware of the international financial crisis situation with the uncertainty this entailed as regards its consequences. However, the Claimant omitted these circumstances from its Memorial.

(3) Subsequent to the investment by the Claimant, new legal regulations were put into place which also ensured *reasonable rats of return* to investors:

(3.1) Royal Decree 1614/2010 enacted on December 7th 2010.

592. As has been stated above, with a view to reconciling the penetration of energy from the solar thermal technology Plants with the deficit reduction aims set out in Royal Decree-Law 6/2009,

[278] Royal Decree-Law 6 enacted on April 30th 2009 which adopted certain measures in the energy sector and approved the social bonus. C-0051_ESP.

a series of modifications to the remuneration regime for solar thermoelectric energy were adopted[279].

593. With this in mind the following measures were adopted:

1. Limitation of the number of hours of operation entitled to a premium or premium equivalent[280]in line with that which had occurred with photovoltaic technology.

2. Requirement for thermosolar installations to adopt, during their first year of operation, the regulated tariff regime without the possibility of selecting the pool plus premium regime[281].

3. Temporary extension of Article 44.3 of RD 661/2007 to those Thermosolar Plants which, as a consequence of the regulations in force[282], were going to start up after January 1st 2012[283]. This temporary extension of Article 44.3 provided those Plants that failed to comply with the requirements laid down by said Article 44.3 with the power to adopt it as a consequence of the staggering of the start-up of the Installations introduced by RD-L 6/2009[284] to reduce the tariff deficit. This staggering implied a delay in the start-up of the CSP Plants. This is why Article 4 of RD 1614/2010 allowed them to be exempted from the mandatory revision foreseen in Article 44.3 RD 661/2007 which, in accordance with said Article, would have to be applied to them[285]. However, said temporary extension in no way guarantees and promises the immutability or standstill of the regime set out in RD 661/2007. Let alone does it entail any *stabilisation clause* or commitment of the State to maintain its Regulatory framework unchanged.

[279] The Government also undertook the modification of the economic regime to which solar thermoelectric energy was subject owing to the fact that, unlike what had occurred with wind installations, the 500 MW ceiling set in Article 37 of Royal Decree 661/2007 had not been reached.
[280] Royal Decree 1614/2010 enacted on December 7th 2010, Article 2. R-151Bis
[281] Ibid, Article 3. C-0063_ESP
[282] Said regulation is RDL 6/2009 (C-0051_ESP) and the Resolution dated November 19th 2009 issued by the Secretary of State for Energy whereby the Cabinet Agreement dated November 13th 2009 was published. R-0088. As a consequence of said regulation, Gemasolar and Arcosol were positioned at stage 2 and Termesol at Stage 4 as set out in Documents C-0054_ESP, C-0055_ESP and C-0056_ESP. It should be noted that the translation into English of said Documents uses the term "*Compensation*" which is not exactly "*remuneration"* (payment), as it has the connotation of an "*indemnity*". This also occurs in Documents C-0060 to C-0062.
[283] Royal Decree 1614/2010 enacted on December 7th 2010, Article 3. R-151Bis.
[284] Transitory Provision Five of RD-L 6 enacted on April 30th 2009. C-0051_ESP.
[285] This question is specifically dealt with in the Preambleof RD 1614/2010. After indicating that the objective of this Regulation is to safeguard the principle of reasonable rates of return it stipulates that: "*This is why the present Royal Decree intends to resolve certain inefficiencies in the application of said Royal Decree-Law 6/2009 enacted on April 30th 2009 for wind and solar thermoelectric technologies. This intended to guarantee the economic regime in force in Royal Decree 661/2007 enacted on May 25th 2007 which regulated electrical energy production activity under a special regime for those projects which were in a state of advanced development*". R-151Bis.

4. Possibility of certain solar thermoelectric Plants being able to start supplying electrical energy through the carrying or distribution network on a trial basis nine months before January 1st for the stage with which it had been associated[286].

5. Notice of the setting of a timeframe during which the installation will be entitled to premium or premium equivalent[287].

6. Setting of a timeframe of three months since the coming into force of Royal Decree 1614/2010 so that those who decide not to carry out the implementation of the installation may withdraw from their procedure without this entailing for them the enforcement of those guarantees which had been deposited under Articles 59 bis and 66 bis of Royal Decree 1955/2000 enacted on December 1st 2000 regulating the activities pertaining to the carrying, distribution, commercialisation, supply and authorisation procedures for electrical energy installations as well as Article 4.3.i) of Royal Decree-Law 6/2009[288].

594. Any modifications to the remuneration regime were appropriate and proportionate to the degree of implementation of this technology in the SES and its impact on the tariff deficit. The Claimant itself admits that said modification impacted its planning though it states that said impact was minor[289].

595. The Claimant refers to the "*Agreement dated July 2010*" as the basis for said RD 1614/2010. As has been set out above, what said Royal Decree allows is, when setting out the staggering of the start-up of the installations, the Plants concerned are not affected by the mandatory revision set out in Article 44.3 RD 661/2007. It should not be forgotten that Additional Provision Five RD-L 6/2009 enabled the Government to delay the starting up of the Plants which would have prejudiced the Plants whose V was affected by the mandatory revisions foreseen in Article 44.3 RD 661/2007.

596. However, the Claimant asserts that said Agreement is proof of a pact between Protermosolar and the Ministry which guaranteed the immutability of the remuneration regime and which was set out in RD 1614/2010. There is no Agreement whereby the Government undertook to ensure the immutability of the remuneration regime.

597. Evident proof thereof is the fact that the Preambleof RD 1614/2010 refers to the principle of reasonable rate of return, not to any Agreement. And it refers to the need to resolve certain inefficiencies, not to comply with hypothetic agreements with the Thermosolar Sector[290].

598. Further evident proof is the fact that other alleged party of the Agreement, Protermosolar, does not invoke beforethe Government that any such agreement exists. By making allegations to the CNE in 2012 about the possible reform of the system, it never invokes in these Allegations that there is any agreement with the thermosolar Sector about the immutability of its remuneration

[286] Ibid. Transitory provision one (1). R-151Bis.
[287] Ibid. Transitory provision one (2). R-151Bis.
[288] Ibid. Transitory provision two. R-151Bis.
[289] Claimant's Memorial, paragraph 196.
[290] Royal Decree 1614/2010 enacted on December 7th 2010, Preamble, paragraphs 4 and 5. R-151Bis.

regime. If said Agreement was considered to exist, the logical thing to have done would be to have been to claim it before the CNE who is going to propose the necessary reforms of the electric system.

599. Consequently, RD 1610/2010 proves the continued wish of the Government to maintain a reasonable remuneration. It is also proves that the Claimant was aware of accepted that the remuneration framework could be modified when circumstances made this necessary provided that the reasonable rate of return imposed by LES 54/1997 was maintained.

(3.2) Royal Decree-Law 14 enacted on December 23rd 2010

600. In its Memorial the Claimant merely states that the effects of this RDL 14/2010 solely applied to photovoltaic Plants, stating that it was prejudicial for said technology, but that it was not a surprise owing to the negotiations held with the Government[291]. However, said assertions once again make clear the lack of factual thoroughness of the Claimant, because as we will see later, said RDL also affected the other renewable technologies.

601. In actual fact, the maximum deficit levels set out by Royal Decree-Law 6/2009 for 2010, 2011 and 2012 were raised by Royal Decree-Law 14/2010[292] as a consequence of the impossibility to comply with the previous ones.

602. As far as solar thermoelectric energy is concerned, as with the other SR technologies, Royal Decree-Law 14/2010 stipulates in its Article 1.2 that:

> *"The remuneration of regulated activities will be financed by way of the income collected by tolls for access to the carrier and distribution networks satisfied by the Consumers and the producers."* [293]

603. This is why this Royal Decree-Law extends to all electrical energy producers, both of OR and SR, the obligation to pay a fee for using the carrier and distribution networks[294].

604. The legal regulation was interpreted by some photovoltaic producers as a modification to the economic regime to which they were entitled, going to the Supreme Court which dismissed the challenge, reiterating (yet again) its consolidated Case law[295] as has already been set out above.

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[291] Claimant's Memorial, paragraph 200

[292] Royal Decree 14/2010 enacted on December 23rd 2010 which set out urgent measures to correct the tariff deficit of the Electric Sector. R-151Bis.

[293] Ibid. R-151Bis.

[294] Ibid. Transitory provision one. R-151Bis.

[295] In this regard the Supreme Court also made its opinion known on the occasion of different appeals lodged against the Ministerial Orders setting fees for the year 2011 (starting with Order 1TC/3353/2010), to which said object of indirect challenge pertains. It is worth highlighting the sentence by the Supreme Court dated June 25th 2013 in which, amongst other considerations, it stipulates that:
"The grounds for the auditing of the appellants is limited, in summary, to the fact that the fee payment has a negative impact on its income statement and hence on the profitability of its investments. And as <u>they are based on the premise</u> – even when they do not state it in these terms – <u>that the legal situation set out in Royal Decree-Law 661/2007 is practically immutable or unmodifiable during the subsequent thirty years</u> (and even further years), any unfavourable measure which alters it would breach the principles that are repeatedly invoked (principles of legal safety and legitimate expectations).

605. It once again became clear that the appellants were aware that the set out remuneration could be affected by other measures, both positive and negative, without there being the immutability of the remuneration over time or the mechanism to obtain the remuneration. They were also aware too in accordance with consolidated Case law that the measures should respect the *principle of reasonable ratel of return*.

(3.3) Resolutions dated December 2010, communicating the remuneration regime in force at the CSP Plants Gemasolar, Arcosol and Termesol.

606. The Claimant argues that the Resolutions dated December 28th 2010 *reasserted and confirmed the expectations of the Claimant*"[296] insofar as the Resolutions would undertake to maintain the tariffs set out in "*RD 661/2007"*[297].

607. It is denied that these Resolutions bestow a right to the immutability of the remuneration regime. It is also denied that the Resolutions contain a Government commitment not to modify the regime of RD 661/2007. For these purposes, it is sufficient to merely read (1) the Title of the Resolutions, (2) its content and (3) the appeals it grants. And this is identical in the three Resolutions.

(a) Title of the Documents:

608. The Title is similar in the three Documents and it is clear in terms of setting out its content:

> *"DGPEM <u>Resolution</u> accepting the waiver submitted by [...], registered with the Administrative Register of the pre-assignment of remuneration of starting the discharge of electrical energy prior to a given date within the Stage already assigned and the statement of classification of the installation made is accepted and acepting the <u>Communication</u> by DGPEM of the remuneration conditions and annual electrical energy discharge capacity of the installation."*[298]

<u>The Chamber rejected said premises in the preceding sentences and will do the same.</u> If in the former, referring to the challenge of RD 1565/2010, we maintained that the principles invoked by the appellants did not prevent the holder of regulatory authority - within respect for the "reasonable return" limit set by LSE – from making certain modifications to the remuneration regime foreseen by RD 661/2007, all the more should we confirm that said principles do not prevent the holder of regulatory authority (...) from adopting general tax or non-tax measures which are applicable thereunto.." (emphasis added) R-0089.

[296] Claimant's Memorial, paragraph 202.

[297] Claimant's Memorial, paragraph 200.

[298] Documents C-0065, C-0066 and C-0067 of the Claimant's Memorial. It should be pointed out that the English translation of said documents carried out by the Claimant is not correct as it separates the sentences incorrectly. In actual fact, the sentence pertaining to the "Resolution" is different from the sentence referred to in the "Communication" of the original Document. However, in the English translation carried out by the Claimant, the sentences pertaining to the "Resolution" are mixed up with the sentence pertaining to the "Communication":

609. Merely by reading the Title it can be observed that it contains three different administrative actions:

- The first consists of an administrative "Resolution" whereby the Administration accepts the waiver submitted. This Resolution is contained in Section One, paragraph one.

- The second consists of an administrative "Resolution" whereby the Administration accepts the statements of the petitioner regarding the classification of the installations carried out. This Resolution is included in Section One, paragraphs two and three.

- The third entails a "Communication" from the Directorate-General of Energy Policy and Mining about the remuneration conditions and annual electrical energy discharge capacity of the installation. This communication is set out in Sections Two and Three which we be looking at now. This communication is not - neither in terms of its forma nor its content – an administrative Resolution.

610. The title thus leaves in no doubt about the existence of a *Resolution* which is different from the *Communication* made. The content of the Documents is clear as it is divided up into Sections.

(b) Content of the Documents:

611. Point "ONE" of the three Documents starts off with the term "*Resolves*..." and it corresponds to the part of the Title that starts off with "*Resolution*". The Administration accepts in this First Point the waiver requests and the acceptance by the requesting party of the classification of the installations.

612. In view of the fact that this acceptance affects the rights of the requesting parties, the Documents allow the content of this Point One to be challenged. Hence, the so-called administrative *notice of right to appeal*[299] is set out on the last of its pages:

Resolution issued by the Directorate General for Energy Policy and Mines by which the waiver presented by Mr. Álvaro Lorente López with ID number 16274702V acting on behalf of the operator of the installation CTS SOLAR TRES (duly registered with the Pre-allocation of remuneration register) of its right to start the discharge of electrical energy before certain date within the Phase in which it has already been allocated is accepted. Furthermore, the statement of classification of the installation made and Communication of the Directorate General for Energy Policy and Mines on the remuneration conditions and the annual capacity of discharging electrical energy of the installation are hereby accepted.

This translation may lead to confusion in the English version, but it does not cause any confusion in the Spanish version as the title itself emphasises the two sentences with a capital letter: "Resolution" and "Communication".

[299] In Spanish Administrative Law the so-called administrative *notice of right to appeal* is only envisaged for administrative Resolutions. Article 58 of Law 30/1992 on the Legal regime of Public Administrations and Common Administrative Procedure stipulates that: "*1. The parties concerned will be notified of the Resolutions and administrative acts that affect their rights and interests*, [...]. *2. Any notification* [...], *must contain the whole text of the Resolution, indicating whether it is definitive or not through administrative proceedings, the statement of the appeals which are applicable, the body before which they have to be submitted and the timeframe for lodging them, without prejudice to the fact that the parties concerned may exercise, where applicable, any other that they see fit*." C-0013_ESP.

> *"Against the Resolution included in point one of said notification is it possible to file an appeal to be lodged with the Secretary of State of Energy within one month in accordance with the stipulations of Law 30/1992 enacted on November 26th 1992 regarding the Legal regime of Public Administrations and the Common Administrative Procedure".(emphasis added)*

613. By contrast, Points Two and Three start off with expression "Communicates that..." and this corresponds to the part of the Title: "*Communication by the DGPEM of the remuneration conditions and annual electrical energy discharge capacity of the installation".*

614. Contrary to that asserted by the Claimant, said Points Two and Three do not contain the word "*right"* nor the word "*commitment"* nor the word "*confirmation*", nor the word "*promise"*, nor the word "*guarantee"*, nor the word "*grants*". They do not contain any similar term. In other words, the Spanish Government does not promise, guarantee, commit or confirm with regard to the installations[300] that it will maintain in the future the remuneration stated in RD 661/2007 throughout its working life.

615. It is only communicated the law in force "*at present*" when issuing the Documents. And it does so in such a way that it does not create any doubts about what is being communicated: the regime in force applicable to the CSP Plants. This is why we deny the assertions made by the Claimant during the course of its Claimant's Memorial about the alleged "promises", "commitments", "confirmations" to the Claimant or its investment[301].

616. In other words, in the documents provided by the Claimant, the Spanish Government does not promise, guarantee, commit nor confirm that it will maintain the remuneration stated in RD 661/2007 unchanged "*throughout the working life of the installations*". The Claimant has not proven where these alleged *promises*, *guarantees* and *commitments* are situated which it reiterates throughout its Claimant's Memorial. In any case, in the Resolutions dated December 2010 there is no trace of said alleged *promises*, *commitments* or *confirmations* by the Government.

617. The Ministry informs it of the regime in force regarding the remuneration conditions in force and the *annual* electrical energy discharge capacity of the installations, including the modifications made to date. However, by taking such action it does not no create, modify or eliminate any right such as guaranteeing that this regime will not be modified in the future.

618. What's more, the Ministry's response is consistent with the request for information about its remuneration made by the party concerned[302]. As regards this point we need to clarify the erroneous translation carried out by the Claimant. It states in the Claimant's Memorial that the request was a "*request regarding a Resolution to communicate the compensation conditions*

[300] Self-evidently, nor the Claimant either to whom the Resolutions are not even addressed.
[301] Inter alia, in paragraphs 20, 21, 29, 32, 36, 89, 137, 138, 158, 173, 183, 185, 193, 201, 202, 211, 340, 370, 372, 421 to 428 of the Claimant's Memorial. In para. 138 it is even stated that "*Spain set up a regulatory contract with investors*". In para. 202 is asserted that these Resolutions constitute a "*specific commitment of Spain towards the Claimant investment*".
[302] Background I of the Resolutions: "*Finally, the party concerned requests the pay conditions of the installation over its service life be communicated."* C-0065, C-0066 and C-0067

during the working life of the installations"[303] What it requests is a communication of "the remuneration conditions of the installation". This is important as "Compensation" seems to imply an indemnity deriving from the waiver to discharge energy for one year. However, it only asks to be informed of the remuneration conditions.

619. The Ministry clarifies in the Background that it makes the communication because of the request for the remuneration conditions made by the party concerned[304]. The possibility of requesting information is specifically foreseen in Spanish administrative legislation[305].

620. As regards the wording *per se* of the Documents, the Communication of Section Two has easily understandable content which does not leave any doubt. It should be pointed out that it starts off with a clear prevention:

> *"It communicates that at present, [...] the remuneration applicable to the installation is formed by the tariffs, premiums, limits..."*.

621. Clearly it proceeds to communicate the remuneration regime in force at that time. In fact, it is drawn up in present tense, not future tense. In other words, does not speak of the future.

622. Neither is any reference made to the *operating life* of the Plants nor the *working life* of the installations. The regime applicable "at present" was described.

623. Hence, the Claimant cannot reasonably deduce from this wording a future *promise* or *commitment* of the Government regarding the immutability of Regulation 661/2007 "*throughout the operating life of the installations*". Neither can be it be deduced that this communication confirmed the request for confirmation of the 2010 agreement[306]. The Communication set out in Point Two makes **no** reference to the confirmation of any agreement nor to the promised conditions during the *working* or **operating** life of the installations.

624. Further evidence reasserting the Kingdom of Spain's argument is the content of Point Three.

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[303] Claimant's Memorial, footnotes 552 and 554. In the Spanish version reference is also erroneously made to "*compensation conditions*" when a mere reading of the document refers to "pay conditions" or "remuneration conditions". These footnotes, in turn, contradict Footnote 258 in which reference is made to "*remuneration conditions*".

[304] Background IV of the three documents indicates that:
"*In accordance with the indications set out in section g, Article 35 of Law 30/1992 enacted on November 26th 1992 and Royal Decree-Law 208 enacted on February 9th 1996 regulating the Administrative Information and Citizen Care Services, at the request of the party concerned, communication should be made of the data whose information is requested*". C-0065, C-0066 and C-0067.

[305] Article 35 (g) of Law 30 enacted on November 26th 1992 stipulates that:
"*Citizens, in their relations with the Public Administrations, have the following rights: g) To obtain information and orientation about the legal or technical requirements that the provisions in force impose on the projects, actions or requests that it is proposed to carry out*." C-0013_ESP.

[306] Claimant's Memorial, paras. 423 to 426. In actual fact, it forms the basis for the claim about the breach of the Protection clause in the alleged request for confirmation": "they requested the Ministry to confirm that the regulated tariff would apply during the working life of the installations. The mere reading of the request in its original version (not in the translation provided by the Claimant) states that it not does not request any confirmation. It states in para. 425 that *In these Resolutions, the Government confirmed that the CSP Plants would be subject to economic regime 661/2007 throughout the working life".* Point Two of the Documents C-0065, C-0066 and C-0067 makes it clear that it does not "*confirm*" anything, nor does it refer to the *operating life*" of the requesting CSP installations.

625. In actual fact, Point Three completes the information about the applicable regime in force. Said Point Three sets outs the subsequent legislative modifications to RD 661/2007. This Point also starts off with the expression "Communicates that". And nowhere is it promised, guaranteed, committed or confirmed that there will be no subsequent modifications to the regime set out in RD 661/2007 during the operating life of the installations.

626. Quite the contrary, the communication of subsequent modifications to RD 661/2007 makes it clear that the remuneration regime has already been modified and that, by not guaranteeing nor confirming anything else, it could be modified in accordance with the applicable legislation.

627. Neither can the Claimant reasonably deduce from this point Three any *promise* or *commitment* of the Government regarding the immutability of Regulation 661/2007 during the operating life of the installations.

(c) Notice of right to appeal of the documents.

628. What's more in the Title and the content of the Documents, further evidence against the alleged rights or promises argued by the Claimant, is the fact that the Documents studied do not give any *notice of right to appeal* against the Communication of Points Two and Three.

629. As this is an administrative action merely involving Communication, Points Two and Three do not create nor modify any rights of the parties concerned. This is why the final paragraph of the Documents does not allow any appeal to be lodged against said Communication as the rights of the requesting party are not affected. This was accepted by the party receiving the Communication who did not request any clarifications about the meaning of the documents nor the bestowal to it of any notice of right to appeal so that the act would become definitive the Administration once the appeal timeframe had elapsed.

630. The documents described, both by dint of their Title[307], as well as the wording of its content and the indication of the appeal they incorporate, prove that the administrative action set out in Section two is not an administrative Resolution.

631. They also prove that these Documents do not constitute a *contract* of the State with the installations, nor a *commitment*, *promise* or *guarantee* about the immutability of the remuneration regime of the installations in the future. Nor do they entail the granting by the Government of a right to the Plants to obtain the tariffs of RD 661/2007 throughout its operating life.

632. It is evident that a commitment of the nature argued by the Claimant (the immutability of the economic regime) for such a long timeframe (throughout the operating life of the installations) and with such relevant economic consequences, must be clear, obvious, not deductible temporary sections of remuneration that the rule itself states.

633. Consequently, the sole conclusion that can be deduced from said Documents is that they communicate to the installations (not to the Claimant) the remuneration regime in force whilst

[307] C-0065, C-0066 and C-0067.

requesting the information from the Ministry, considering as such RD 661/2007 and its subsequent modifications.

D. Measures challenged by the Claimant in the present procedure.

(1) The announcement of the reform and the legal measures adopted.

634. At the end of 2011, facing the continuation of the economic crisis and the continuous increase in the price of electricity, in Spain the need to carry out a reform of the electrical sector was decided to establish a new regulatory framework taking into account the changes produced in the electrical sector from the approval of Act 54/1997.

635. This new regulatory framework is configured, as will be explained later, as an evolution of the regulation of the system respecting, in any case, in relation with the installations of renewable energy with a right to a premium economic regime, the principle of reasonable return.

636. On the other hand, the nature of the electrical sector, as a service of general economic interest, and its direct incidence in all of the sectors of society, justifies the announced reform being embodied in different laws with which both the Legislator and the Government have been giving the necessary responses to the questions, both conjunctural and structural, that were asked of them.

637. The reform was not, in any case, surprising, but was announced from the celebration of the general elections of the 20th of November 2011[308]

638. The candidate for the Presidency announced to the Congress of Deputies, on 19th December 2011 the possible measures to be taken regarding the energy sector:

> *"We must be fully aware that Spain has an important energy problem, especially in the Electricity Industry, with an annual deficit of over 3,000 million euros and an accumulated debt tariff over 22,000 million.*
>
> *The electrical tariffs for the domestic consumers are the third most expensive in Europe, and the fifth highest for industrial consumers.*
>
> *[...] If such reforms are not made, the lack of balance will grow unsustainable, and the increase in prices and tariffs will place Spain in a highly disadvantaging situation regarding energy costs throughout the developed world. Therefore, we should apply a policy based on cutting and reducing the average costs of the system, where decisions are taken without*

[308] On the 20th of November 2011, legislative elections were held in Spain. In December 2011 D. Mariano Rajoy, whose Political Party obtained the absolute majority, presents his political programme before the Deputies' Congress in order to obtain the trust of the Chamber and be elected President of the Government. Having obtained such confidence, on the 20th December H.M the King named D. Mariano Rajoy as President of the Government. Royal Decree-law 1822/2011, of the 20th of December, which names Don Mariano Rajoy Brey as President of the Government, published in the Official State Bulletin on the 21st of December 2011. R-0090. On the 22nd of December the Official State Bulletin published the appointments of the other members of the Government, among them D. José Manuel Soria López as Minister of Industry, Energy and Tourism. Royal Decree-law 1826/2011, of the 21st of December, which names the Ministers of the Government, published in the Official Gazzete on the 22nd of December 2011. R-0091.

demagoguery, employing all available technologies -without exception -and we must regulate having in mind the primary objective of the competitiveness of our economy."[309] *(emphasis added)*

639. The Regulatory Body of the Spanish Electrical System, the NEC, emitted on the 28th December 2011 a press release in which, considering its report on the proposed order that would establish the access tolls from the 1st January 2012 and the tariffs and premiums of the installations under special regime, highlights that:

> *"The lack of convergence between the income and costs of the activates regulated in the last ten years have generated a growing debt for the electrical system, which has assumed a progressive increase of the payments to finance it through the present and future access tolls to the consumers of electricity, as well as a temporary impact in the indebtedness of these companies that are obliged to finance the system's deficit. As a consequence the NEC reaffirmed the need for immediate implementation, among other measures proposed concerning the regulation of the activities aimed at the elimination of the structural deficit of the system and at the mitigation of the debt financing costs."* [310] *(emphasis added)*

(2) Implementation of the reform: the first measures

640. In this context of announcement of a structural reform, on the 27th January 2012 the first measures were adopted for the laws relating to the reform of the electrical sector: the approval of a law that avoids the increase of the deficit and the request of a report from the regulating body of the Spanish electrical system on the proposed measures to adopt.

(2.1) Royal Decree-Law 1/2012, of the 27th of January.

641. Firstly, Royal Decree-Law 1/2012, of the 27th of January, is passed, which expresses to suspend pre-assignment remuneration procedures and eliminate economic incentives for new production installations of energy from cogeneration, renewable and residual energy sources (hereinafter "RD-Law 1/2012")[311].

642. The Press Release of the Ministry of Industry, Energy and Tourism, after the Council of Ministers which approved this Royal Decree-law 1/2012, confirms that the reform of the Electrical Sector is being worked:

> *"The complex economic and financial situation, such as the situation of the electrical system, it is recommended to suppress the incentives for the construction of these installations, temporarily, while the reform of the electrical sector is put into operation to avoid the generation of a tariff deficit, that is, the difference between the income coming from the access tolls to the*

[309] Transcription of the Speech delivered by Mariano Rajoy during the inaugural session as President-elect of the Government, Congress of Deputies, Monday, 19 December 2011, www.lamoncloa.gob.es. R-0092.

[310] *The Spanish Energy Commission (SEC) reviews the report on access tolls and on certain tariffs and allowances of the special regime facilities*, press release, 28th of December, 2011. R-0093.

[311] Royal Decree-Law 1/2012, 27January 2012, suspending procedures for the pre-assignation of remuneration and abolishing the economic incentives for new installations for electricity production, via co-generation from renewable energy sources and from waste products. R-0094.

transportation and distribution networks of electrical energy and the costs of the regulated activities of the system."[312] *(emphasis added)*

(2.2) The NEC's report on the Spanish energy sector of the 7th March 2012.

643. The second measure adopted by the Government on the 27th of January 2012 was to request the NEC[313] to prepare a report on the measures of regulatory adjustment that could be adopted by the energy sector. Particularly, the study of measures in order to contain the progress of the tariff deficit in the electric sector[314].

644. The NEC published the Report 2/2012 *"On the Spanish Electrical Sector"*[315]on the 7th of March of 2012 whose first part is dedicated to the *"Measures to Guarantee the Economical and Financial Sustainability of the Electrical System".* For the development of this report, NEC had opened a public consultation period at the beginning of February 2012 in which 477 allegations were obtained from affected companies and sectors[316].

645. Report on SES was accompanied by an Executive and Introduction and Summary [317] in which NEC exposed the situation of the sector[318], highlighting that the economic crisis, the rise in the price of fossil fuels as well as the introduction of measures against climate change have implied growing pressure to prices paid by final consumers.*[319]*

646. In this context, the NEC proposes a set of measures on all activities from the electrical sector, including renewable energies, which reflect the urgent need to undertake changes in its regime. Amongst its proposals, such Report states measures related to the thermosolar sector: The

[312] The Government will temporarily suspend the premiums of new installation under special regime, press release of the Ministry of Industry, Energy and Tourism, 27 January 2012. R-0095.
[313] Copy of the letter of the Secretary of State for Energy to the President of the National Energy Commission of the 27th of January 2012. R-0096
[314] Information on the public consultation regarding regulatory adjustment measures in the energy sector of the 2nd of February and 9th of March 2012 published in the National Energy Commission´web:www.cne.es. R-0097.
[315]Report on the Spanish Electrical Sector Part I. Measures to Guarantee the Economical and Financial Sustainability of the Electrical System, National Energy Commission, 7th of March of 2012. R-0098
[316] Information on the public consultation regarding regulatory adjustment measures in the energy sector of the 2nd of February and 9th of March of 2012 published in the National Energy Commission's web: www.cne.es R-0097
[317] Report on the Spanish energy system. Introduction and Executive Summary. National Energy Commission, 7March 2012. R-0098
[318]These issues will be stated by the manifesto of European Commission in its document European Commission guidance for the design of renewables support schemes Accompanying the document Communication from the Commission Staff working document, SWD(2013) 439 final, Brussels, 52013. C-0096_ESP
[319] Report on the Spanish energy system. Introduction and Executive Summary. National Energy Commission, 7March, page 2: "*In the last years new challenges and problems in regulatory models are arising, which were established at the beginning of the liberalisation of European Energy Markets. Trigging factors are many, and in good part specific for each country. Amongst the common ones, we must point out the decrease in the claim of energy products, la difficulty in financing new infrastructures related to the economic crises, the rise in the price of fossil fuels as well as introducing measures against climate change. All of them can exert upward pressures on prices final consumers pay for the use of energy installations and/or energy acquisition, depending on the regulation and funding mechanisms chosen in each country*" (emphasis added). R-0098.

harmonisation of the premium to solar thermoelectrical technology with regard to its regulate tariff, when noticing a *subprime* with regard to the reasonable return[320].

647. "Laminating temporary paths of premiums thermoelectrical solar centrals registered in the preassignment registry will receive, but without a definitive commissioning record, given that it is the technology with a greatest degree of medium-term penetration and the most committed one"[321].

648. Limiting the use of prioritised support fossil fuels to 5% of primary energy[322]. That is, not including energy generated with the use of non-renewable energies anymore, given that, certainly, that part of the generation was being included in the premium.

649. The range of possible reform measures covered by NEC's report was completed with others with a minor impact such as:

- Avoid the automatic increase of the efficiency X factor in the tariff and premium (CPI-X) index. [323]
- Partial funding of RE premiums charged to the income charged to CO2 auctions, performed under Directive 2009/29/EC[324].

[320] Report on the Spanish Electrical Sector Part I. Measures to guarantee the economic and financial sustainability of the electrical system, National Energy Commission, 7 March 2012, page 23. R-0098

[321] Report on the Spanish Electrical Sector Part I. Measures to guarantee the economic and financial sustainability of the electrical system, National Energy Commission, 7 March 2012, page 52. It continues pointing out that: *"Such measure could soften the temporary evolution of the path of remuneration these installations will receive in a way that the current tariff deficit, the costs increase implied to the system due to the commissioning of these centrals in the next years to be less, making owners of the installations obtain greater income in the future. The determination criteria of the alternative remuneration path would be the equivalence between their remunerations in the current value (discounted value of project's cash flow [...]* ". R-0098

[322] Report on the Spanish Electrical Sector Part I. Measures to guarantee the economic and financial sustainability of the electrical system, National Energy Commission, 7 March2012, pages 23 and 24. "*Article 2 of Royal Decree 661/2007, of the 25th of May, establishes a set of maximum admissible percentages for the use of fossil fuels supporting biomass technology installations, thermoelectric solar energy and waste energy valorisation: 10%, 15% and 30%, respectively, generally (in solar thermoelectrical installations to tariff the limitation would be 12%, but there is a strong incentive for them to offer in the market [...]."*. R-0098

[323] Report on the Spanish Electrical Sector Part I. Measures to guarantee the economic and financial sustainability of the electrical system, National Energy Commission, 7March2012, page 22: *"The tariff or premium that stimulate the facilities which use renewable energy sources is updated with the corrected CPI by an efficiency x factor. Such X factor is equal to 25 basic points until 2012; it will be equal to 50 basic points after that. Indexing the inflation indicator is justified because, lacking fossil fuel, the variable cost of these technologies depends main on the performance of several services (operation, maintenance, insurances...). [...] The proposed measure, [...] would be to increase efficiency factor* 'X'. *This measure keeps the principle of obtaining a reasonable return stated in the Act. For an expected value of the CPI of 2%, the efficiency factor affecting CPI in updating economic incentives of renewable and cogeneration energies should be around 175 basic points, so that only 15% of the value of tariffs and premiums is updated, which is in line of what other regulated activities in the sector propose, and without prejudice of maintaining the price indexation of fuel as for cogeneration or waste. Given that the value of tariffs and premiums is calculated each year (or trimester) as for values of the previous period, this measure has an accumulative economic impact: it would imply a yearly reduction in the global sum of the premium equivalent in the special regime of about 200 million accumulative euros since 2013[...]."* R-0098

[324] Report on the Spanish energetic sector Part I. Measures to guarantee the economic and financial sustainability of the electrical system. National Energy Commission, 7 March 2012, page 40. R-0098

- The possible partial funding of RE premiums partially charges to sectors responsible for the consumption of fossil fuels or alternatively through the State General Budget.[325]
- The modulation of the rhythm of penetration initially foreseen in the REP[326] in line with what Royal Decree-law 1/2012 establishes.
- The establishment of competitive mechanisms (auctions) and premiums based on cost regulatory information and self-consumption encouragement[327].
- The adaptation of the mechanism of guarantees of origin establishing a minimum price for them[328].
- Considering the premium's ceiling and ground, so that the premium is returned back as a net income by the System when the market price exceeds the ceiling[329].

650. The proposal consisting of eliminating tariffs and premiums following the end of the plant's economic life (useful lifetime) deserves more detail. Specifically,[330] it states that "*receiving tariffs and premiums once their economic life is over, this measure maintains the principle of obtaining a reasonable return covered by the Act*".[331]

651. Other measures covered by the process of public consultation undertaken by NEC are analysed in Annex 5 of the Report. Specifically, *"as an alternative proposal to "harmonisation of the premium of thermoelectric solar energy with regard to its regulated tariff", the possibility of voluntarily offering an economic compensation which would recognise beforehand, totally or partially, their estimated investment costs (including a reasonable return) in exchange of giving up the prioritised remuneration regime of their production [...] to promoters of thermoelectric installations registered in the preassignment registry corresponding to Phases 2, 3 and 4, which still do not have a definite commissioning record-.[...]"*[332](emphasis added).

(2.3) 2012 Reforms National Plan, of 27April.

652. On the 27th of April the Government passed[333] the "2012 National Reform Programme"[334]. In section: *"Actions meant to solving the existing disadjustment between income and costs of the*

[325] Ibid, pages 40 and 41. R-0098
[326] Ibid, page 76. R-0098
[327] Ibid, pages 78, 79 and 80. R-0098

[329] Ibid, pages 82 and 83. R-0098
[330] Ibid, pages 81 and 82: "*Currently, the remuneration regime recognised to the production of electric energy in the special regime allows generally to keep receiving the established tariff or premium as long as the installation keeps in operation, without specifying its economic life. Two tariff sections have been defined in the present regulation, the first on with higher premium values and tariffs up to a certain time period, while these are reduced in the second one but not time limit is fixed. Thus, as for (...) Thermoelectric solar energy moves from 299 €/MWh in the first 25 years to 239 €/MWh after then (20% less). (...) The same could be said about premiums from different technologies".* R-0098
[331] Ibid, pages 81 and 82. R-0098
[332] Ibid, pages 80 and 81. R-0098
[333] Reference of the Council of Ministers of 27 April 2012, www.lamoncloa.gob.es. R-0099
[334] 2012 National Reform Programme, Government of Spain. R-0100

electric system" (pages 208 and 209), the commitment of the Kingdom of Spain to eliminate the tariff deficit is repeated, and qualifies the future reform in the electric sector as deep.[335]

653. In this regard, we must say that the Council Recommendation of 10 July 2012 on the National Reforms Programme 2012 of Spain and delivering a Council opinion on the Stability Programme for Spain, 2012-2015is included in the following recommendation to Spain:

> *"To complete the electricity and gas interconnections with neighbouring countries and address the electricity tariff deficit in a comprehensive way, in particular by improving the cost efficiency of the electricity supply chain"*[336].

654. On the other hand, the described reform framed in a set of adopted structural measure following the recommendations of the European Union and the International Monetary Fund that have affected Spanish citizens and companies, who have had to undertake certain sacrifices or charges in a very specific economic context. We must mention, as an example, the measures adopted by the working market, cost reduction in social protection, reducing the size of Public Administrations and public salaries and a long etcetera. Not performing structural reforms in the electric regulation framework as well is completely unjustified, especially in the light of the accumulated tariff deficit which was confirmed by those International Bodies, always according to the national and international legal system.

(2.4) Other Government advances on the reform of the Electric System

655. After a significant worsening of the economic and financial crisis resulting from the financial rescue of banking institutions and some Autonomous Communities, the Government performed different actions to bring to light to the markets the proximity of structural measures announced in the inauguration speech and that both the International Monetary Fund [337] and the Council of the European Union had recommended.

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[335] 2012 National Reform Programme, Government of Spain: *"The Government has a strong commitment with eliminating the tariff deficit and with amortising the accumulated debt in a reasonable term. The effort in achieving such objective will be equally divided amongst consumers, the public sector and the private sector within the framework of a deep reform of the electric sector, which will imply cost reduction measures of regulated activities, an increase in the income from tolls, the revisions of strategic planning and the establishment of a stable regulation framework. Cost reduction of regulated activities: The path costs of regulated activities has been strongly expansive since 2006. Since that year mean income from access tolls have increased by 70% in accumulative terms, while the increase of access costs has been of 140%. The three most significant divisions of costs are currently special regime premiums (40.3% of total costs). Special regime premiums have been those divisions of costs with a greater contribution to the growth in the costs of regulated activities (...). These divisions of costs have multiplied by five since 2006. (...) These measures are to be deepened in the future, in a way that all sectors contribute evenly in the adjustment of regulated costs*." (emphasis added) R-0100

[336] Council Recommendation of 10 July 2012 on the National Reforms Programme 2012 of Spain and delivering a Council opinion on the Stability Programme for Spain, 2012-2015. R-0101.

[337] The International Monetary Fund in "*Consultas del Artículo IV con España Declaración Final de la Misión del FMI, Madrid, 14 de Junio de 2012*" refers in section 19 to: *"The commissioning of other foreseen structural measures will be important to complement the labour reform. (...) and the reform agenda of the government is appropriately focused to (...) eliminating the tariff deficit. I would be important for these reforms to be implemented in a rapid and effective way - a detailed and ambitious calendar would help to structure and communicate efforts".* R-0102

656. The 9th of July 2012 the Government approved the Document "*Six Months of Government: Reform to Grow"*[338]. It transcribes a part of the Inaugural speech of Mr. Rajoy in page 30 and refers explicitly to the future reform of the electric system, mentioning Royal Decree-act 13/2012, of the 30th of March, for which guidelines on national electricity, gas and electronic communication markets are transposed, and for which measures for the correction of deviations due to disadjustments amongst costs and income of the electric and gas sectors are adopted.

657. The Government published another document in September: *The Reforms of the Government of Spain: Determination against the crisis"*[339]. In page 18, in Chapter III *"The planned reforms",* it mentions the "Reform on the energy sector":

> *"The reform of this sector will shortly be approved, through the Draft Bill on Energy Reform, for the purpose of not getting the cost of energy to condition the competitiveness of our economy so much. It`s about giving a definitive solution to the problem of the hefty tariff deficit of our energy system" (emphasis added)*

658. The "Draft Bill of the State General Budget for 2013" was passed by the Government in the Council of Ministers on the 27th of September[340]. The "Spanish Strategy on Economic Policy is passed by such Council on the same day: Balance and structural reforms for the following semester"[341]. The "Energy Reform" is mentioned amongst such reforms in page 70. In point C.8 the next measures to be adopted including the adoption of structural measures in order to correct the tariff deficit definitively are developed, as well as the introduction of a new Act on the Electric Sector in order to improve customer's protection and to resolve inefficiencies that have been detected.

659. In the press conference subsequent to the Council of Minister of the 27th of September 2012, in which Economy and Competitiveness and Finance and Public Administration Ministers appeared next to the Vice-president of the Government[342], the importance of foreseen structural reform and their determination to take these forward was highlighted[343].

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[338] *Six Months of Government: Reform to Grow*, Communication State Secretary of the Ministry of the Presidency, 9th of July 2012: "*This measure implies a first step in the deep reform of the energy system. It divides the 2011 and 2012 3,100 million euros tariff disadjustment among consumers, companies and public* (emphasis added). R-0103

[339] *The reforms of the Government of Spain: Determination in front of the crisis*, Communication State Secretary of the Ministry of the Presidency, September 2012. R-0104

[340] Reference of the Council of Ministers, 27 September 2012, www.lamoncloa.gob.es. R-0105

[341] *Spanish Strategy on Economic Policy: Balance and structural reforms for the following semester. Government of Spain, 27September2012.* R-0106

[342] In this regard, it must be taken into account that Spain, after the weekly meeting of the Council of Ministers, has an appearance of the Vice-president of the Government, Ministry of the Presidency and Spokesperson of the Government, accompanied, in that case, by the Ministers whose Department the initiative of adopted agreement to inform the media on the measures agreed by the Government correspond to.

[343] The released press release highlights:

"*The elapsed period between the beginning of the Legislature has allowed the Government, (...) to plan structural reforms for the following semester "in a meditated strategy and, especially monitored in the calendar. There are 43 new acts that will passed and sent to the Congress which imply addressing all and*

660. In 2012, besides Royal Decree-act 1/2012, the Government passed another two royal-decrees (Royal Decree-law 13/2012[344] and Royal Decree-law 20/2012[345]) which covered important system costs reduction measures. Nevertheless, none of these measures had an impact on renewable generation installations, but they did so regarding ordinary generation installations and holders of distribution and transport installation, whose remunerations were reduced. However, and despite an important increase of access tolls charged to consumers has been adopted simultaneously in Order IET/843/2012[346], this did not avoid the growth of the tariff deficit and the subsequent worsening of the financial unsustainability of the System.

661. On this basis, the Kingdom of Spain introduced four measures which affected thermosolar plants related with the present arbitration which will be down below studies as they as questioned by the Claimant. Before analysing those measures, we must bring to light adopted measures within the Reform affecting the remaining sectors operating in the SES.

(2.5) Impact of the Reform to the remaining sectors of the SES

662. As it has been previously pointed out, the regulation that has affected the installations, such as the Claimant´s, has had an impact on installations receiving remunerations charged to the electric system. A global and proportioned response has tried to be given as for the unsustainable unbalance problem in the SES and it has been performed, amongst other things, in accordance with a deep analysis of remunerations that has an impact on almost all activities of the electric system.

(a) Transport and Distribution Activities

663. The reform reviews remuneration methodologies of Transport and Distribution activities in accordance to the necessary costs in order to have the activity undertaken by an efficient and well managed company and applying standard criteria in all the Spanish territory[347].

664. Nevertheless, they were not guaranteed a reasonable return but an *appropriate remuneration*. This concept has been materialised in setting the mean return of State Obligations in a ten year period in the secondary market increased with a 200 basic points differential[348]. Therefore, a 6.398 %, that is, a substantially low remuneration for these activities in comparison to those payments received by the renewable energy production facilities.

665. Six year regulatory periods and revisions according to remuneration parameters are set, which impact on the reception of remunerations of each one of these activities to their investments.

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every key sector and competence in order to achieve an improvement of competitiveness and to create employment. "It is the roadmap of this Government" in order to "launch key reforms in our economy".

[344] Royal Decree-act 13/2012, of the 30th of March, for which guidelines on national electricity, gas and electronic communication markets are transposed, and for which measures for the correction of deviations due to disadjustments amongst costs and income of the electric and gas sectors are adopted. R-0107

[345] Royal Decree-law 20/2012, of the 13th of July, on the measures to guarantee budgetary stability and the encouragement of competitiveness. R-0108

[346] Order IET/843/2012, of the 25th of April, which established access tolls since the 1st of April 2012 and certain tariffs and premiums of the special regime. R-0109

[347] Royal Decree-law 9/2013. Article 1. C-0086_ESP

[348] Ibid. Article 6 (1).

This new regulation impacts all installation regardless their start-up date and is developed through regulative regulations which were passed on the 27th of December of 2013[349], remaining the unitary values corresponding to these installations outstanding for approval to the date of this document.[350]

(b) Production Remuneration regime in non-peninsular systems.

666. Very relevant changes have affected the remuneration of the electric regime of energy production in non-peninsular electric systems (Balearic Islands, Canary Islands, Ceuta and Melilla).

667. Adopted measures which are still in processing phase have led to a reduction in the remuneration received by companies generating electricity higher than 600 million euros in those territories. They have affected the net value of assets to the non-remuneration of installations, in the accrual period of the sums, to the price update of used fuels, to the criteria of system technical management and to the processing of the installations.

668. The regulation has been introduced in Royal Decrees 13/2012[351], 20/2012[352], 9/2013[353], in Act 24/2013[354] and in Act 17/2013[355], of the 29th of October, to guarantee the supply and increase of competence in insular and extrapeninsular electric systems.

(c) Payment by capacity

669. Payments by capacity are those subventions paid to holders of certain electric generation installations, mainly combined cycles, in order to ensure safety to the electric supply even if its energy is not poured into the system. They were granted given the increase in renewable generation and the nature of renewable energies of not being manageable by human beings.

670. That is, wind production every day cannot be managed, nor in certain areas with more intensity. As it is explained when exposing the SES [356], a "backup power" guaranteeing the supply in front of production reductions is necessary.

671. The sum corresponding to incentive to investment in capacity in the long term for production installation was reduced from 26,000 to 10,000 €/MW/year and it was doubled in the remaining term to cover the 10 year period.[357]

[349] Royal Decree 1047/2013 of the 27th of December, establishing the methodology for the calculation of the remuneration for electric energy transport (R-0092) and Royal Decree 1048/2013 of the 27 of December, establishing the methodology for the calculation of the remuneration of the activity of electric energy and other regulatory provisions R-0111
[350] Royal Decree-law 9/2013. Articles 3 to 5 and Second Transitory Provision. C-0086_ESP
[351] Royal Decree-law 13/2012, of the 30th of March. R-0107.
[352] Royal Decree-law 20/2012, of the 13th of July. R-0108.
[353] Royal Decree-law 9/2013, of the 12th of July. C-0086_ESP.
[354] Act 24/2013, of the 26th of December 2013. R-147Bis.
[355] Act 17/2013, of the 29th of October, for the security of supply and increased competition in insular and non-mainland electricity systems. R-0114.
[356] Section IV.A.3 of this Statement.
[357] Royal Decree-law 9/2013. Article 7. C-0086_ESP.

(d) Interruptibility system

672. The interruptibility system has suffered a very relevant regulatory change as well, which has led in a decrease of 300 million euros on a lower remuneration to 700 million euros in 2014[358].

673. For this purpose, an auction system has been established in a way that all companies who want to offer the service tell what price they can interrupt their electricity consumption at so that the energy they were to consume is used to cover situations of lack of generation.

(e) Restriction procedures for the guarantee of the supply.

674. The restriction procedure for the guarantee of the supply that subsidised the functioning of coal centrals with a partially native use has been suppressed. Its annual sum was greater than 480 million euros[359].

(f) Contributions of the State General Budget to the electric system to promote renewable energies

675. Finally, it must be underlined that the State General Budget has included budgetary items that are direct contributions in the electric system in order to mitigate the existent deficit situation in 2013[360], 2014[361] and 2015[362] budget headings that mean direct supply to the electric system in order to reduce the effect of the existing deficit situation.

676. On one hand, in 2015[363] a contribution of 887 million euros in order to finance electric energy generation in non-peninsular systems is performed. There is a 330 million euros second budgetary item to fund the remuneration system of renewable energies and a third 2,989 million euros budgetary item with the same purpose.

677. This implies that Spanish contributors provide to the electric system a total sum of 4,206 million euros in order to promote remuneration regime installations generating electricity with renewable energies. Even though other public policies are taken given that the State has decided to maintain these subventions according to the principle of reasonable return.

(g) Social bonus

678. The social bonus consists on a significant reduction of the electric bill for society groups such as unemployed people, pensioners, large families and other.[364]

[358] Order IET/2013/2013, of the 31st of October, regulation the competitiveness mechanism of the management service of interruptibility claim. R-0115.
[359] The sole Article of Royal Decree 134/2010, of the 12th of February, establishing the restriction resolution procedure for the guarantee of the supply and modifying Royal Decree 2019/1997, of the 26th of December, organising and regulating the electric energy production market. R-0116.
[360] Extract of the General Budget of the Spanish state for 2013. R-0053.
[361] Extract of the General Budget of the Spanish state for 2014. R-0054.
[362] Extract of the General Budget of the Spanish state for 2015. R-0052.
[363] Extract of the General Budget of the Spanish state for 2015. R-0052.
[364] Article 45.2 and tenth transitory provision of Act 24/2013. R-147Bis.

679. This aid moves from being a cost charged to the electric system to be assumed by head offices of groups or societies that develop simultaneously production, distribution and commercialisation of electric energy, affecting specifically traditional electric companies and not to companies like the Claimant.

680. That is, there are a set of companies who must assume a cost even when this affects their return and even when they are holders of renewable energy installations, being inside SES.[365]

(3) Questions measured by the Claimant.

681. The Claimant has questioned some certain measures, whose most concrete analysis will be performed when answering their allegations on the violation of the ECT as a consequence of these measures which, nevertheless, are cursorily described down below:

(i) Tax on the value of electricity generation (TVPEE)

(ii) Limiting the economic regime prioritising renewable energies installations before electric energy that is not attributable to the use of fuel.

(iii) The update on activity remunerations, fees and premiums from the electric sector linked to the Consumer Price Index to constant taxes without neither elaborated food nor energy products.

(iv) Reducing the premium to 0 euros in the remunerative pool option plus premium.

682. In any case, before referring to such measures, we must make two important warnings:

- The possible economic repercussions that the four measures could generate in the plants have been absorbed by the retribution system implemented since July 2013. This is, the final adopted measure has taken the cost of the tax on electric energy production tax and the rest of measures into account, in a way that the economic impact of the measures has been neutral.

- Such measures did not affect the guaranteed reasonable return to plants as we will see further on.

(3.1) Tax on the Value of the Production of Electrical Energy (TVPEE)

683. This measure was introduced by Act 15/2012[366]. Act 15/2012 is a tax regulation which came into effect on the 1st of January of 2013.[367]

684. Act 15/2012 creates three new taxes: the TVPEE, the Tax on the production of used nuclear fuel and radioactive waste resulting from the generation of nucleoelectrical energy and the tax on the storage of used nuclear fuel and radioactive waste in centralised installations. In

[365] Royal Decree-law 9/2013, Article 8. C-0086_ESP.
[366] Act 15/2012. R-0018.
[367] Act 15/2012, Fifth Final Provision:
"Fifth Final Provision *Coming into force.*
This Act shall come into force on 1 January 2013." R-0018.

addition, Act 15/2012 created a canon for the use of continental waters for the production of electrical energy. Likewise, Act 15/2012 modifies Act 38/1992, of 28 December, on Excise Duties[368] to, among other issues, to introduce variations on the Tax on Hydrocarbons and the Excise Duty on Coal. Specifically, tax rates established to natural gas and coal are modified, and the tax exemption planned to the energy products used at the electric generation and cogeneration of electricity and useful heat are supressed.

685. As for the TVPEE, as it has been stated in section III.E of the present document, this tax taxes the production and incorporation to the electrical system of electrical energy in the Spanish Electrical System.

686. TVPEE applies to all installations for electricity production, both from renewable and conventional sources. This is, the new tax is a general application measure falling both on traditional production installations as well as renewable energy production installations with and without a recognised economic regime.

687. The tax base of TVPEE will be made up of the total corresponding sum to be received by the taxpayer for the production and incorporation to the electrical system of electrical energy, for each installation, in the taxable period. The applicable tax rate is 7%.

688. As it will be established afterwards in this document, upon analysing the current emoluments regime to renewable energy producers like the one we are discussing about and particularly upon analysing the concepts integrating the remuneration to get the investment back, the impact of TVPEE on renewable energy producers has been neutralised, being this one of the imposed costs that are payed to such producers through the specific payment that they perceive.

689. Moreover, Act 15/2012 establishes that system costs will be financed both with income from access tolls and the remaining regulated prices and with relevant consignments from the State General Budget.

690. Besides collecting these taxes for an approximate annual sum of 2,700 million euros, an equivalent amount has been included in the State General Budget in order to finance the costs resulting from the boosting renewable energies in the electric system.

691. Therefore, Act 15/2012[369] complemented with Act 17/2012, of 27 December, on National General Budgets for the year 2013[370], establishes a set of environmental and State taxes

[368] Act No.38/1992, of December 28, on Excise Duties, consolidated version on 28 November 2014. R-0117.
[369] Act 15/2012. Second aditional provision:
"*Second additional provision. Electricity system costs.*
The State General Budget Laws for each year will include an amount to finance the electrtcity system costs included in Article 16 of Law 54/1997, dated 27 November on the Electricity Sector, and this amount will be equivalent to the sum of the foliowing:
a) The calculation of the State's annual revenue collection derived from taxes and assessments included in this Law.
b) The estimated revenue generated by auctions of greenhouse gas emissions rights, with a maximum of 500 million euros ". R-0018
[370] Act 17/2012, 27 December, on National General Budgets for the year 2013. Fifth Provision:
"*Fifth Provision for the financing of the Electrical Sector*

according to the State General Budget in 2013, 2014 and 2015 An important consignment equivalent to the collection has been set so that the electrical system can pay all investment costs of the generating installations that use renewable energies as their energy source.

692. Moreover, it is also foreseen that amounts obtained from auctions on CO2 emission rights shall be used for the promotion of renewable energies up to 500 million euros, being this sum given to the electric system. In 2013 and 2014 these amounts have exceeded 300 million euros.

(3.2) Limiting the economic regime prioritising renewable energies installations before electric energy that is not attributable to the use of fuel.

693. This measure was introduced by Act 15/2012, which modifies Article 30 of Act 54/1997 to specify that electric energy attributable to the use of fuel in a generation installation using some of renewable energies as a primary energy will not be considered into a prioritised economic regime[371]. That is, it will be only subject to this rewarded economical regime the electricity from renewable energy sources.

694. Until the modification introduced by Act 15/2012, the prioritised remuneration for renewable energy production attributable to the use of fuel was permitted, although limited to certain exceptional cases.

695. In the original writing of Royal Decree 436/2004[372], regulation foreseeing the use of fuel the generation of renewable energies, a possibility to embrace the special regime for thermosolar energy installations included in a certain classification and solely for the maintenance of the temperature in the heat accumulator is established[373].

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1. In the General Budget of the State of each year an amount equivalent to the sum of the following will be destined for the purposes of financing the costs of the electric system provided in the Law of the Electrical Sector, concerning the promotion of renewable energies:
a) The estimation of the annual income derived from taxes included in the law on economic measures for energy sustainability [Act 15/2012].
b) 90 per cent of the income estimated from the auctioning of greenhouse gas emission rights, with a maximum of 450 million euros.
c) 10 per cent of the revenue derived from the auctioning of greenhouse gas emissions rights, up to a maximum of 50 million euros is allocated to the policy on the fight against climate change." R- 0118.

[371] First permanent provision of Act 15/2012 adds section 7 to Article 30 of Act 54/1997 on the following terms: "*Electric energy attributable to the use of a fuel in a generation installation that uses as its primary energy source a type of non-consumable renewable energy, will not be the object of any feed-in tariff except in the case of hybrid installations that combine non-consumable and consumable renewable sources, in wtiich case the electric power attributed to the use of the consumable renewable energy source may be subject to a feed-in tariff. For these purposes, by order of the Minister of industry, Energy and Tourism, the methodology for calculating the electric power attributed to the fuels used will be published.*" R-0018.

[372] Royal Decree 436/2004, dated March 12th, establishing the methodology for the updating and systematisation of the legal and economic regime for electric power production in the special regime C-0024_ESP.

[373] Article 2 of Royal Decree 436/2004: "*Subgroup b.1.2 Installations that use solar radiation as primary energy for electricity generation. These installations may use equipment that use a fuel to maintain the temperature of the heat transmission fluid in order to offset the lack of solar irradiation*
that might affect the forecast delivery of energy. Electricity generation using that fuel must be less than 12% as an annual calculation of the total production of electricity if the plant sells its energy in accordance with

696. This foreseeing of the use of gas is modified few months after through Royal Decree 2351/2004, of the 23rd of December, modifying the procedure for solving technical constraints and other electricity market rules and regulations[374] to compensate for the lack of solar irradiation that might affect the foreseen delivery of energy.

697. This way, it can be stated that the use of gas in the production of renewable energy included in the special regime since the beginning of the implementation process of thermosolar energy in Spain has been limited to those cases meeting two circumstances: that it is necessary in order to compensate the lack of solar irradiation and that the lack of gas usage might affect the predicted delivery of energy.

698. Royal Decree 661/2007 is similar to Royal Decree 436/2004, insisting that it can be used to compensate the lack of solar irradiation that might affect the predicted delivery of energy[375]. This retribution could be justified when the deployment of thermosolar technology installations was beginning from the technical point of view. Nevertheless, once that first stage was overcome, the premium would be contrary to the efficiency principle and contrary to the environmental objectives consequence. [376].

699. Avoiding the gas usage to lead to it being used as a source of electric energy production and not barely as a support made the National Energy Commission propose, in its *Report on the Spanish Energy Industry,* the limitation of the use of prioritised support fossil fuels to 5 percent of the prioritised energy, literally mentioning the following:

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option a) of Article 22.1. That percentage may be as high as 15% if the plant sells its energy in line with option b) of Article 22.1". C-0024_ESP.

[374] Article 5 of Royal Decree 2351/2004, of the 23rd of December, modifying the procedure for solving technical constraints and other electricity market rules and regulations: "*Installations that use solar radiation as primary energy for electricity generation. These installations may use equipment that use a fuel to maintain the temperature of the heat transmission fluid in order to offset the lack of solar irradiation that might affect the forecast delivery of energy. Electricity generation using that fuel must be less than 12% as an annual calculation of the total production of electricity if the plant sells its energy in accordance with option a) of Article 22.1. That percentage may be as high as 15% if the plant sells its energy in line with option b) of Article 22.1"* R-0119.

[375] Article 2 of Royal Decree 661/2007. C-0020: "*Subgroup b.1.2. Facilities using thermal processes solely for transforming solar energy, as a primary energy, in electricity. These installations will be able to be used in equipment using fuel for the maintenance of the heat transmission liquid's temperature to compensate the lack of solar irradiation that might affect the predicted delivery of energy. The electrical generation from such fuel, as an annual figure, shall not exceed 12 percent of electricity production and only during the periods when electrical generation is interrupted, if the installation sells its energy in compliance with option a) of Article 24.1 of this royal decree. Such percentage will be able to reach up to 15 percent, without a time limit, if the installation sells its energy in compliance with option b) of Article 24.1*." C-0038_ESP.

[376] In 2005, the Renewable Energies Plan refers to the thermosolar sector in the following terms: "*Its application (thermoelectric solar energy) can even become a way of generating competitive energy generation, with the advantages relevant to a renewable source and being respectful with the environment. Therefore, it is a technology at the beginning of a possible commercial development, and in which Spain counts with favourable starting conditions due to the important technological history that has been undertaken through investigation and development projects and to available resources." "(...) In 1999 (reference date for the Promotion Plan- of Renewable Energies-) gave a start to the Plan without any functioning thermoelectric plant. During the last six years an appropriate economic and legal framework to start promoting projects that are actually in the beginning of the execution phase, no commercial projects being in operation at the end o 2004"*

> *"These percentages (12 and 15% for thermosolar energy) allow the use of conventional fuel in certain starting moments, charge variation or fossil discontinuity or renewable main resource, minimising the affection on the plant's operation and efficiency. However, similarly, it supposed to incentivise fossil energy to a renewable energy price."*[377] *(emphasis added)*

700. Therefore, the measure grants technical coherence to the goal of subsidising renewable energies itself and not that of energy production through gas. This goal is precisely responded by Act 15/2012 whose Memorandum begins stating that:

> *"the purpose of the present law is to harmonise our fiscal system with a more efficient, sustainable and environmentally-friendly use, values that inspire this taxation reform, and therefore aligned with the basic principles ruling the taxation -and of course environmental- policy of the European Union."*[378]

701. Indeed, the European Union, with regard to guidelines on State aids relating to the environment, is strong in establishing the area of public intervention related to promoting renewable energies.

702. Moreover, in this context, it must be taken into account, that adopting the regulation relevant to the mentioned energies, due to their own progress and the conclusions from implementing support systems from which there was no previous experience, implies the necessity to introduce modifications by the State. And such modifications serve for adjusting the regulation to the principles and foundations justifying public intervention and, through it, the promotion of renewable energies. The European Commission states so itself:

> *"In its recent Communication, the Commission explained that as renewables producers become significant players in the internal energy market, and as the energy market nears completion, public interventions developed to assist immature technologies enter nascent markets need to evolve. Moreover the efficiency and effectiveness of different instruments varies with circumstances; so as circumstances change, support schemes need to be reformed, instruments need to change and become market based and support levels will decline and eventually be phased out."*[379] *(Emphasis added) (footnotes omitted)*

703. Based on these principles, the lack of prioritised remuneration to the energy from fossil fuels is expressly excluded from the applicable regulation from Act 15/2012. Act 24/2013, of the 26th of December, on the Electric Industry, established that, regarding the specific remuneration regime on the production from renewable energy resources of new installations, the following shall be taken into account:

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[377] Report on the Spanish energy sector Part I. Measures to guarantee the economic-financial sustainability of the electrical system, National Energy Commission, 7March 2012, page 24. R-0098.

[378] Act 15/2012. R-0018.

[379] European Commission guidance for the design of renewables support schemes Accompanying the document Communication from the Commission Delivering the internal market in electricity and making the most of public intervention, Commission Staff working document, SWD(2013) 439 final, Brussels, 5 november 2013. C-0096.

> *"Electrical energy attributable to the use of fuel in a generation installation using some of non-consumable renewable energies as a primary energy will not be considered into a prioritised economic regime, except for hybrid installations between non consumable renewable energy sources and consumables. In this case, electrical energy attributable to the use of consumable renewable energy sources will be considered into a specific prioritised economic regime."*[380]

704. And regarding the installations with the right to receive the prioritised economic regime at the enforcement of Royal Decree-law 9/2013, it established that, in order to set remuneration parameters relevant to each installation, the mentioned provision will be also applied[381].

705. However, this lack of prioritised remuneration of renewable energies produced with the use of gas does not imply that the use of this fuel in the process of energy generation does not receive any economic compensation.

706. In second place, the use of gas in thermosolar installations has been taken into account in the costs estimation of each type installation set out in the new regime developed in Order IET/1045/2014, from the 16th of June, approving the remuneration parameters of type installations applicable to certain electric energy production installations from renewable energy resources, cogeneration and waste. This regulation specifically states:

> *"On the other hand and between fluctuating exploitation costs according to the production of the type installation, the following are found in a non-stating and limitative way: assurance costs, administration expenses and other general expenses, market representation expenses, access to transportation and distribution networks tolls costs that electric energy producers must fulfil filration and maintenance (both preventive and corrective), tax on the value of electric energy production established by Act 15/2012, of the 27th of December, on taxation measures for the energy sustainability as well as the rest of taxes regulated in this law. In this case, the auxiliary consumptions (water, gas, etc.) and fuel costs associated to the operation of the type installation have also been taken into account".*[382]

707. In third place, the largest investing costs incurred by the promotor allowing the use of gas in its installation have been taken into account in establishing the investment cost of the relevant type installation.

708. In light of the foregoing, it can be deduced that the provision of not prioritising electrical energy attributable to the use of fuel in a renewable energy generation installation responds to the need to adapt to the basics that must rule the promotion of renewable energies, according to the principles acknowledged at a national and European level that justify their own existence.

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[380] Article 14.7.d) of Act 24/2013, of the 26th of December, on the Electrical Industry. R-0043. Article 11.6.b) from RD 413/2014, of the 6th of June, refers to this Article, which regulates the production of electric energy from renewable energy resources, cogeneration and waste. R-0112.

[381] First Transitory Provision, section 7 of Royal Decree 413/2014. R-0112

[382] Order IET/1045/2014, of the 16th of June, approving remuneration parameters of type installations applicable to certain electric energy production installations from renewable energy resources, cogeneration and waste. C-0112_ESP.

(3.3) Update on activity remunerations, fees and premiums from the electrical sector linked to the Consumer Price Index to constant taxes without non elaborated food or energy products.

709. This measure was implemented by Royal Decree-Law 2/2013, of the 1st of February, on urgent measures in the electrical system and in the financial sector (hereafter "**Royal Decree-law 2/2013**")[383]. The constitutionality of this Royal Decree Law is declared in the Constitutional Court of the Kingdom of Spain's judgement 28/2015 of the 19th of February 2015.[384] The Supreme Court has backed the lawfulness of such a measure, as these indexes, as the Spanish Supreme Court has pointed out, "*do not have to be the same for the different activities and do not have to remain inalterable through time*" [385]

710. Consumer Price Index, which regulated the update of remunerations, tariffs and activity premiums of the electric sector, amongst them the production of renewable energy, is substituted by Royal Decree-law 2/2013 with effect from the 1st of January 2013, by constant taxes without unprocessed foods or electrical goods (hereinafter CPI-PI).

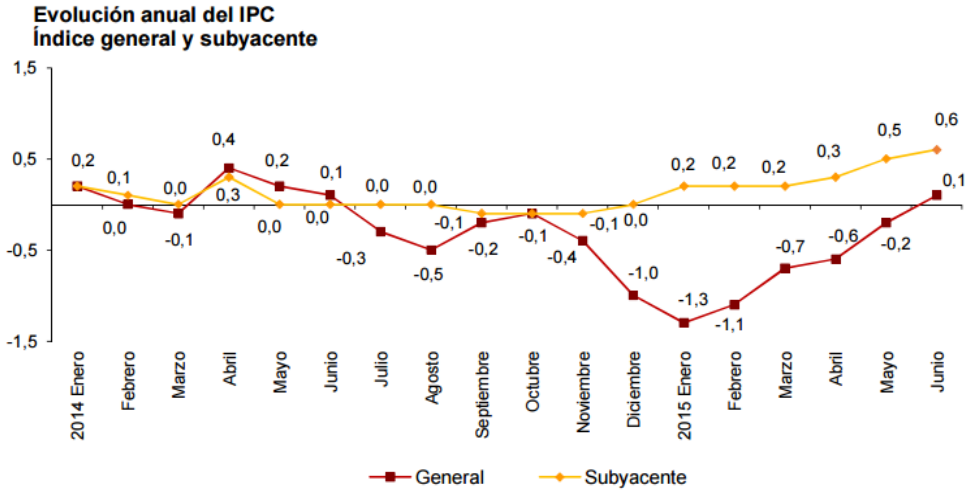
711. This measure, which is justified both from the scientific and legal points of view, has produced effects that do not affect the Claimant, since the adopted measure has been beneficial for the plants. The CPI to constant taxes has progressed over CPI in certain periods in 2013, 2014 and 2015. Such a progression is stated in the following chart, which proves that CPI-PI (yellow line) has been higher than the Consumer Price Index (red line)[386]:

[383] Royal Decree-Law 2/2013, of 1st February 2013, on urgent measures in the energy sector and in the financial sector C-0083_ESP.

[384] Constitutional Court of the Kingdom of Spain's judgement 28/2015 of the 19th of February 2015, action of unconstitutionality 6412-2013. Legal basis 3: "*the situation that the contested measures had to deal with was the diversion of costs of the electrical system caused by various factors (overrun of the premiums in the special regime, consignment of costs of the extrapenninsular electrical system costs and an increase in the deficit due to the decrease in the demand of electricity) that are mentioned in the memorandum or in the validation parliamentary debate. Factors whose conjunction had led to incur in a greater deficit than the one initially set out by the Government. Thus, we can consider that, without entering in the political judgement that is forbidden to this Court, the Government has fulfilled the demand of explaining and reasoning the existence of an extraordinary situation and an urgent need, without being able to admit the generic allegation [from the counsel of the Junta de Andalucía] with regard that the existence of the tariff deficit in the sector could not, given it was not a new situation, be a basis to establish questioned precepts of Royal Decree-law 2/2013... Furthermore... it is evident that the proposed measures, given that they pursue an adjustment of costs in the electrical sector, have the necessary connection between the extraordinary situation and an urgent need and the adopted measures to deal with it*". R-0120.

[385] Judgement of the Supreme Court of the Third Chamber, of the 26th of March 2015. Fifth Legal Basis. R-0121.

[386] Information from the INE available at: http://www.ine.es/daco/daco42/daco421/ipc0615.pdf. Such information does not include the taxation issue, quantitative despicable at the period at the review.



712. The methodology change that this measure implies consist uniquely of modifying the general CPI by a CPI modality subjacent to constant taxes. In this regard, the use of consumer price indexes subjacent to constant taxes is widely accepted in the global economic doctrine [387] y and avoids distortions in the general index attributable to the volatility of some of its elements or changes on indirect taxes.[388]

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[387] For instance, these types of indexes are covered in the analysis methodology of price indexes in the "Consumer Price Index Manual. Theory and practice", developed jointly by the International Labour Organisation, the International Monetary Fund, the Organisation for Economic Co-operation and Development, the Statistical Office of the European Union, United Nations and the World Bank. 2006. R-0122.

Likewise, the main report on the economic situation at a global level, the "World Economic Outlook" of the International Monetary Fund, uses price indexes in its Methodology subjacent to World Economic Outlook and the International Monetary Fund, April 2014. R-0123.

The same analysis method for subjacent inflation is used by the United States Federal Reserve. What is inflation and how does the Federal Reserve evaluate changes in the rate of inflation? Board of Governors of the Federal Reserve System, available on www.federalreserve.gov, from the 10th of April 2015 (Last access). R-0124.

[388] In terms of the report on the subject of the Organisation for Economic Co-operation and Development (hereinafter, OECD) *Measuring and assessing underlying inflation*, OECD Economic Outlook, Preliminary Edition, 2005, page 187): "*Headline inflation rates can be volatile, often because of substantial movements in commodity or food prices. Such volatility in a key price index can make it difficult for policymakers to accurately judge the underlying state of, and prospects for, inflation. Therefore, core inflation rates -- excluding or downplaying the more volatile price changes so as to reveal the underlying, more persistent component -- can be helpful."* (added emphasis). R-0125

Precisely, one of the most common methods in order to calculate the subjacent price index is the one used by Royal Decree-law 2/2013, i.e, excluding non-produced food and energy products from the general CPI, as well as indirect taxes or their variations. As the report previously mentioned states: "*A standard core measure excludes food and energy from the overall CPI. This is often the one that receives the most public attention. There are, however, other variants that are readily available or in use: for example, there are versions for the euro area and the United Kingdom that exclude energy and unprocessed food; in Japan, fresh food is removed; and in Canada, the eight most volatile components, as well as indirect taxes, are taken out of the index. […]The economic argument for excluding these components from the calculation of headline inflation rates is that they are the ones most likely to be subject to disruptions in supply, as opposed to reflecting aggregate demand. In this case, and provided that the stance of monetary policy has not changed, the influence of such large, one-off price changes (either positive or negative) will fade over time.*

713. That is, the methodological change in the update performed by Royal Decree-law 2/2013 responds, in general, to usual consumption price indexes calculation standards in the global economy and its purpose is to avoid distortions in the consumption price index, which are unconnected to the bases of economy. As it is shown in detail in the analysis of standards of protection of ECT. Moreover, it is a change endorsed by European Union regulations and criteria[389].

714. This change was also announced through proposals in various reports from the National Energy Commission [390] and from the National Market and Competence Commission[391].

715. Predictability by a prudent and diligent ecomic operator, as a measure adopted in a certain economic situation that demanded the adoption of urgent measures as the NEC had pointed out, has also been acknowledged by the Supreme Court in various declarations in which it has been stated that:

> *"A "prudent and diligent economic operator" could not, therefore, feel surprised by the adoption, in 2013, of a measure of this kind, even less so because that was not even predictable, it had been suggested already by the energy regulator, nor -in the words of the judgement of the Justice Court before mentioned "economic agents can legitimately trust that an existing situation persists, which can be modified in exercising discretionary power of national authorities". In a scenario of a generalised crisis, such as Spain's at the end of 2012 and the beginning of 2013, analogue modifications in update*

Hence, excluding them provides a better picture of existing underlying inflation pressures." (added emphasis). Measuring and assessing underlying inflation, OECD Economic Outlook, Preliminary Edition, 2005, pages 188 and 189. R-0125.

389 In regard to this reform, the proposal from the Commission dated from 2009 and this is the reason why the National Statistic Institute, the Spanish authority in charge of statistics, began to publish the ACPI-CI in September that year. Of course, once the reform from the 26h of September 2012 was passed, the SNI incorporated this in the field of the CPI and published on October 11th 2012 in a press release in its web page, explaining, amongst other issues, the following: "*The purpose of this indicator is to discount from the variation of the part that may be due to modifications of taxes on consumption. For this purpose, the progress of CPI is measured under the assumption that these taxes have not changes from the moment of reference. [...] CPI-CI will vary only in a different way from the CPI when there are changes in taxes considered in its calculation: value-added tax (VAT), taxes on fuels, taxes on tobacco, vehicle registration tax, and taxes on insurance premiums*." Regulation (EC) no. 2494/95 of the Council, of the 23rd of October of 1995, relating to APIC (R-0126, page 1), developed in respect of subindexes by the Regulation (EC) no 2214/96 of the Commission of the 20th of November 1996 relating to ACPI: transmission and diffusion of ACPI subindexes (R-0127, page 8). This last one was modified by the proposal passed on the 26th of September 2012, creating the Commission's Regulation (EU) no. 119/2013, of the 11th of February 2013, modifying (EC) judgement no. 2214/96, with regard to the establishment of the ACPI (R-0128, page 1).

390 Report on the Spanish energy sector Part I. Measures to guarantee the economic-financial sustainability of the electrical system, National Energy Commission, 7March 2012, page 16. R-0098.

"*In line with that observed by the Council of European Energy Regulators (CEER)" and highlighted that "it is necessary to review current updating mechanisms with X and Y efficiency fixed factors, and linking them to goal efficiency improvements. Temporarily, as long as the study on such parameters according to efficiency analysis is not performed, a downward revision of updates, taking into account the current economic situation, is proposed*". R-0098.

391 National Competition Commission Report 103/13 to the preliminary bill on the Electrical Industry, page 11. R-0129

indexes of economic values were performed in this and other industries of economic life."[392]

Precisely, the Spanish Supreme Court has spoken on the subject pointing out that the modification undertaken by Royal Decree-law 2/2013 has a limited scope as differences between both updating methodologies are not especially significant.

(3.4) Reducing the premium to 0 euros in the remunerative option pool plus premium

716. The second measure introduced by Royal Decree-law 2/2013 was to reduce the sum of the premium to a value of 0 € in the option of pool plus premium in Royal Decree 661/2007[393], with the purpose of guaranteeing the principle of reasonable rate of return [394].

717. Such measure has been caused by the need to correct the inconsistency existing in the determination of premiums that led to an excess of payment. So was warned by the NEC in the Report on the Spanish Energy sector of the 7th of March 2012[395]. The CNE declared that such measure correction did not affect to the expectation of obtaining a reasonable return from plants as long as their economic feasibility studies are made with the regulated tariff.

718. In this respect we had already mentioned that the Claimant has not provided the Basis Case that appears as Annex I of Project finance signed with banks. An inspection of such Annex will prove that the plant's financial model was executed under the regulated tariff option. As a consequence, the measure has an harmsless effect on the income estimates that were taken into account when establishing the plants financial model related to the current arbitration.

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[392] Judgement of the Supreme Court of the Third Chamber, of the 26th of March of 2015, RCA 133/2013, CENDOJ reference: 28079130032015100087. Ninth Legal Basis (R-0121 and Judgement of the Supreme Court of the Third Chamber, of the 16th of March 2015, RCA 118/2013, reference CENDOJ: 280779130032015100072 (R-0130) and Judgement of the Supreme Court of the Third Chamber, of the 26th of March 2015, RCA 133/2013, reference CENDOJ: 28079130032015100087. Ninth Legal Basis. R-0131.

[393] Royal Decree-Law 2/2013, of 1st February 2013, on urgent measures in the energy sector and in the financial sector. Article 2. section one. C-0083_ESP.

[394] "*On the other hand, taking into account the volatility of the price in the production market, the option of remunerating generated energy in a premium special regime complementing such price, makes it difficult to accomplish the double goal of guaranteeing a reasonable rate of return for these installations, and to avoid at the same time an over remuneration of these, which would revert on the rest of the electrical subjects. Therefore, it is necessary for the prioritised economic regime to be based solely on the regulated tariff option, without prejudice for installation holders to be able to sell their energy freely in the production market without receiving premium."* Royal Decree-law 2/2013. C-0083_ESP.

[395] *"The current regulation is not consistent with regard to relative values of the premium and those of the tariff on thermoelectric solar technology (the current tariff has a value of 298.96 €/MWh while the premium's value is 281.89 €/MWh, which supposes a theoretical market price of 17.1 €/MWh). As the economic-financial study regarding installations is performed under the regulated tariff, supposing a market average price of 50 €/MWh, the premium should have a value of 249 €/MWh, which is 12% less than the current one. In a first approach, the relevant premium to thermoelectric solar plants already previously registered should be reduced by 12%. Doing so, a 47 million euro savings in the access tariff could be achieved in 2012, 90 million in 2013 and 200 million from 2014 onwards. In any case, it should be taken into account that this measure would be justified in correcting an incoherence in the establishment of premiums. The sole premium correction keeps the principle of obtaining a reasonable rate of return covered by the Law, given that studies on economic viability of new installations are performed with the regulated tariff. Report on the Spanish energetic sector Part I. Measures to guarantee the economic-financial sustainability of the electrical system*, NEC, Report on the Spanish Electricity Sector 7March2012. Page 23. R-0098.

719. Nevertheless, we must highlight that the effect of this measure has been limited from a temporary point of view. The effects of such measures disappeared with the enforcement of the new subsidies model introduced by the global reform of the SES.

(4) New model of remuneration for certain energy production installations from renewable resources.

(4.1) Goals of the new system.

720. The obliged analysis by national regulators on regulatory aspects of the electrical system highlighted that retributions that are being paid, through an electricity bill, had to be reviewed in order to comply with European regulations, as well as the internal legal system, to ensure the guarantee of a reasonable rate of return.

721. The complex economic situation the Kingdom of Spain was going through due to a deep crisis demanded that basic principles previously referred were fulfilled in the electric system.

722. In this context, the different preliminary analysis, the regulation evolution itself, the technical knowledge and the technological progress, revealed the existence of remunerations that, due to defect or excess, did not meet the criterion of *reasonable return* established for remunerations from the so-called special regime and the *appropriate remuneration* for the rest of regulated activities, specifically transport and distribution activities.

723. The regime covered by Act 24/2013 has been developed by Royal Decree 413/2014[396] and by Order IET/1045/2014[397], whose main characteristics are expressed below.

(4.2) Remunerative regime. Establishing the reasonable rate of return.

724. The reasonable rate of return and the criteria for its revision every six years have been set in a concrete way, according to regulatory mechanisms that we will state below[398].

725. In line with the provisions of Act 54/1997, of the 27th of November, on the Electrical Sector and the known and accepted jurisprudence on it, the remuneration system is established from a project return, which will be around, before taxes, the average return in the 10 year secondary market of the State's Obligations applying the appropriate differential.

726. The specific sum for installations already in operation is about 7.398 percent of profitability over the project for a type installation[399].

[396] Royal Decree 413/2014. R-0107
[397] Order IET/1045/2014. R-0113
[398] As the Memorandum of Act 24/2013, of the 26th of December states, investments in certain installations of these technologies: "will keep being protected and promoted in Spain by this new regulation framework, enshrining the principle of a reasonable rate of return and establishing the revision criterion of remunerations parameters every six years in order to comply with the stated principle. Thus, the continuous adaptation experimented by the regulation must be consolidated in order to maintain this reasonable rate of return through a predictable system, subjected to a temporary concretion." R-149Bis.
[399] In the order and as a reference of the installations' reasonable rate of return, the average performance in the secondary market of the previous ten years to the enforcement of the mentioned decree-law has been

727. This sum is not a return limit. Such profitability is set out for that installation whose investment and operation costs match the applicable parameters of type installation.

728. In this regard, if the investor is efficient and can reduce their investment costs under the established parameter for the applicable type installation, they will obtain a greater remuneration per investment. Equally, if the installation reduces its operation expenses and keeps the established parameter for the type installation below, it will certainly obtain a greater remuneration per operation. Therefore, if the installation beats investment and operation parameters, it will obtain a profitability greater than 7,398.

729. Profitability has been calculated over the entire project, taking IRR (internal rate of return) into account and the regulatory useful life.

730. This profitability has not been set taking into account the funding of the project, i. e., it is not a system taking into account the mode or funding amount of a company or companies of the sector. Therefore, if a company obtains the amount of funding requested, costs and benefits from indebtedness will be taken over besides the remuneration model.

(4.3) Remunerative regime. Recovery of investment costs.

731. As it has been previously stated, the recovery of general investment costs is one of the essential elements of the new model. The order that the remuneration regime had to take into account the recovery of investment costs is covered in the Spanish law for this concrete remuneration regime from the original writing of Article 30 of Act 54/1997[400].

732. With the new regulation the principle that the remuneration system must ensure the return of the investment costs is maintained and it is given more development and concretion [401][402].

733. Act 24/2013 states with confidence the investment value that has been assigned to the installation cannot be revised, in order to maintain the security and stability of that value [403].

734. Based on these principles, the retribution system or scheme will be based on the definition of some type or standard installation; the calculation of the investment and operation costs of each

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taken into account for the calculation of remuneration parameters on one hand, and for installations with the right to a prioritised economic regime upon the enforcement of Royal Decree-law 9/2013, of the 12th of July, i.e., the period comprised between the 1st of July 2003 and the 30th of June 2013, of the 10 year State Obligations, as established by the third final provisions of Act 24/2013, of the 26th of December, and the second additional provision of Royal Decree 413/2014, of the 6th of June, for installations with the right to receive the prioritised economic regime. Royal Decree-law 9/2013. Article 1 (Two) and the First additional provision C-0086_ESP

[400] Article 30.4 last paragraph of Law 54/1997 original draft: " *In order to establish the premiums, the level of voltage on the power on delivery of network, the effective contribution in improving the environment, the saving of primary energy and energy efficiency, and investment costs that have been incurred will be taken into account, with the aim of obtaining reasonable return rates with regard to the cost of money in the capital market".* R-149Bis.

[401] Articles 14, 21, 26, 27, 33, 53, and 61 and the following to Act 24/2013. R-147Bis.

[402] The new regulation is also coherent with what the regulating organism stated, National Energy Commission, in its report of the 7th of March 2012. R-0098

[403] Artícle 14.4 2º of Act 24/2013: "*In no case, once acklowledged the regulatory useful life or the standard value of the initial investment of a facility, those values may be revised*"*".* C-102_ESP.

one of these types; and the establishment of the remuneration to be received by each of them to guarantee the reasonable rate of return.

735. To establish the standard value of the initial investment of each installation, new main equipment has been taken into account, as well as the remaining electromechanic equipment and systems, on regulation and control, measuring equipment and connection lines, including its transport, installation and implementation, together with engineering and direction of associated works, among other items.

736. The establishment of the investment value has been performed according to a detailed and specific study of real data obtained through regulatory reports, scientific documentation and the knowledge of regulatory authorities with their wide experience on the matter[404].

737. The specific establishment of standard values is explained in detail in Mr. Carlos Montoya's witness statement. [405]

738. The fixed investment value does not include the benefits the first holders of the plants have obtained through its transmission. That is, the investment has been set over the value of the initial investment, not over the value of second and later transmissions which already include capital gains and benefits obtained by transmitters. Remuneration systems cannot protect nor include benefits that installations' holders and successive purchasers have obtained, due to the sale or other legal business affecting the installation.

(4.4) Remunerative regime. Concepts comprising remuneration to recover the investment. Price from the sale of energy in the market.

739. The remunerative regime of renewable energies, cogeneration and waste is based, as well as the previous one, in the necessary participation of these installations in the electrical market. Therefore, the establishment of the reasonable rate of return in a remunerative regime is based in receiving income resulting from the participation in the market, with an additional remuneration that, if necessary, covers those costs of operation that an efficient and well managed company does not recover in the market.

740. The system takes into account the remuneration that installations obtain by their participation in the market. Nevertheless, higher and lower limits to such estimation are set in order to reduce uncertainty on the estimation of energy price in the market that is applied in the calculation of remuneration parameters, directly affecting the obtained remuneration by the installation through the sale of energy that it generates[406].

[404] This way, the remuneration regime is based on the standard parameters according to different type installations that were established later on after an exhaustive analysis in Order IET/1045/2014. R-0113.
[405] Mr. Carlos Montoya's Witness statement of the 13th of April 2015. RW-0001
[406] The order establishes higher and lower annual limits of the current market annual average price during the first regulatory semiperiod, i .e until December 31st 2016, to apply what Article 22 of Royal Decree 413/2014, of the 6th of June, states. When the average daily market price is out of those limits, a positive or negative balance is generated as an annual figure, which will be called adjusting values by deviations of the market prices, and that will be compensated throughout the useful life of the facility.

741. Market price estimation for each year of the first regulatory semiperiod has been calculated as an arithmetic average of contributions of contracts of relevant future annuals negotiated in OMIP during the last six months of 2013[407].

742. In order to establish the obtained income from the installations until the enforcement of Royal Decree-law 9/2013, of the 12th of July, real average income published by the Market and Competence National Commission were used for each installation type.

743. Thus, given that they are technologies that cannot obtain the recovery of investment costs only with the remuneration obtained from the market, a specific regulated retribution is fixed allowing these technologies to compete on a level of equity with the remaining technologies in the market and to obtain the repeated reasonable rate of return to its investment.

(4.5) Remunerative regime. Concepts comprising remuneration to recover the investment. Return on the investment (Ri) and Return on the operation (Ro).

744. This complementary specific remuneration is enough to reach the necessary minimum level to cover costs which, unlike conventional technologies or other renewable energies with hydraulic energy, cannot recover in the market and allows them to obtain an appropriate profitability referring to the type installation applicable in each case.

745. This additional remuneration is comprised by the concepts of Return on the investment (Ri) and Return on the operation (Ro). The Ri is the specific remuneration composed of a term per installed power unit covering "the costs of investment for each Facility Type that cannot be recovered by the sale of energy on the market". The Ro is the specific remuneration covering, in turn, the difference between the operating costs and the revenue from the participation in the market of this Installation Type".

746. To calculate the return on the investment and the return on the operation, the standard revenue from the sale of energy valued according to the market price, the standard costs of operation to perform the activity and the standard value of the initial investment have been taken into account, all of this for a profitable and well managed company.

747. To calculate operating costs, those costs associated to electric generation for each technology, which are necessary in order to perform the activity in an efficient and well managed way, are taken into account.

748. Among the fluctuating exploitation costs according to the production of the installation type, the following are found including, but not limited to : assurance costs, administration expenses and other general expenses, market representation expenses, access to transportation and distribution networks tolls costs that electrical energy producers must fulfil and maintenance (both preventive and corrective).

[407] Appointment coefficient have been applied to obtain electrical market prices applicable to each technology. These appointment coefficient have been obtained through the average of available values from the Market and Competence National Commission.

749. Also costs resulting from the payment of the tax on the value of production of electric energy established by Act 15/2012, of the 27th of December, on taxation measures for the energy sustainability as well as the rest of taxes regulated in such law, such as the tax on hydrocarbons, mainly gas.

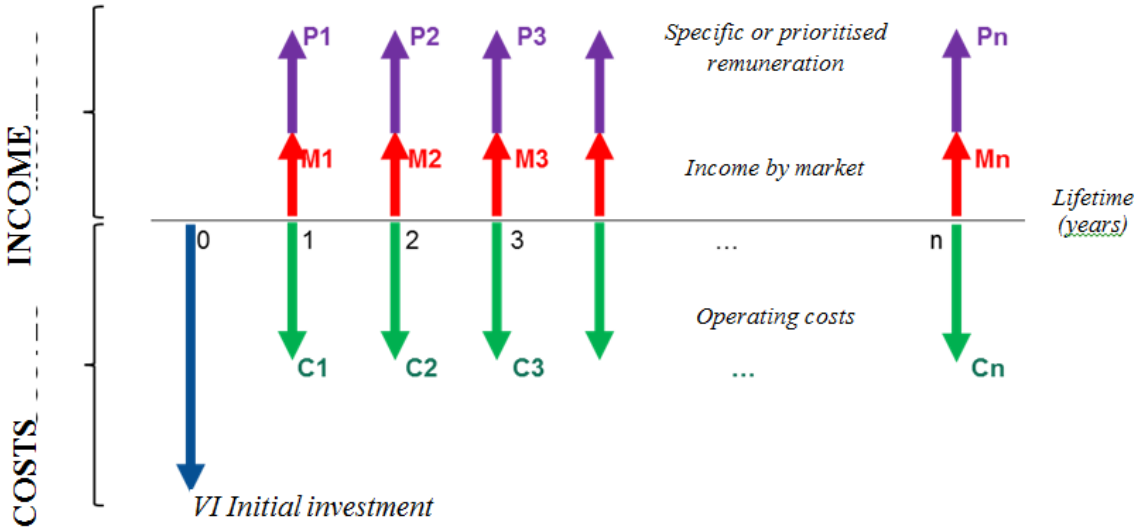
750. In such case, the auxiliary consumptions (water, gas, etc.) and fuel costs associated to the operation of the installation type have also been taken into account.

751. Additionally, amongst fixed operating costs, the costs of renting the grounds, installation security associated costs and the tax on real estate with special features (REWSF) have been taken into account among others.

752. Moreover, costs or investments established by regulations or administrative actions that are not applicable throughout the Spanish territory nor those do not respond exclusively to electrical energy production, are specifically excluded[408].

753. The concrete establishment of standard values is explained in detail in Mr. Carlos Montoya's witness statement. [409]

754. The following chart explains fluctuations for different concepts [410]



755. Thus, as we have seen until now, an installation holder has some investment costs and also some operational costs.

[408] Royal Decree-law 9/2013. Article 1 (Two). R-0091. Article 13.3 of Royal Decree 413/2014, from the 6th of June R-0112.
[409] Mr. Carlos Montoya's Witness statement of the 13th of April 2015. RW-0001
[410] Source: Page 12 of the Analysis Memory of Regulatory Impact included from the Administrative record on the draft order approving remuneration parameters of type installations applicable to certain electric energy production installations from renewable energy resources, cogeneration and waste. R-0114 (Processing, document. 09.01.02)

756. And they receive an income from the electrical system which is the sum they receive by the sale of energy in the electric market and the additional remuneration granted to them by the electric system in order to cover the difference between costs and income obtained by the marked including Ri and Ro.

(4.6) Remunerative regime. Reception period of the additional remuneration. Regulatory useful life.

757. The remunerative regime is complemented with another parameter: regulatory useful time. The number of years fixed for technology is representative for each installation type, according to the design of main equipment and taking into account appropriate preventive and corrective maintenance actions are carried through.

758. This useful lifetime will remain invariant for each installation type according to Article 14 of Act 24/2013, of the 26th of December. Therefore, it is foreseen that they will stop receiving remuneration to their investment and remuneration to the operation once they exceed their regulatory useful life[411].

759. The end of the regulatory life establishes the moment when the investor has recovered all investment and operating costs, having received a sufficient amount due to the sale in the market and Ri and Ro concepts.

760. Besides, setting the useful life allows the calculation the annual remunerative regime and it is necessary to establish the reasonable return rate[412].

[411] Limiting the reasonable rate of return to the regulatory useful life of the plant is the visualisation of the jurisprudence of the Supreme Court of the Kingdom of Spain at a general level, the accomplishment of the European Commission, ENC and VMNC Recommendations. Regarding the link between receiving premiums and the regulatory useful life, the ENC already highlighted that its limitation, together with the adoption of a set of measures like those that have been adopted according the new model, was necessary. It is important to remark that the adoption of these measures is framed within its consideration according to the principle of reasonable return.

[412] The views of the Council of State regarding the regulation itself and specifically on that related to its remunerative regime must be remarked as well, as it concludes that taking into account the installation's total useful life with regard to the payment of remunerations as a figure of those received is a legal imposition. State Council Report of the 6th of February 2014: "*In short, data from the installations' total regulatory useful life, including, therefore, those prior to the enforcement of the present reform, are used as a base to calculate the specific remuneration. The analysis report on regulatory impact performs a laudable effort to state in economic terms that the concept of "reasonable return", whose collection should be assured to the installation holders, "being indifferent, from the financial point of view, that income (or cost) fluctuations take place at the beginning or at the end... is the covering legislation which designs a remuneration model for existing installations based in taking into account the total project's useful life. Thus, the final third provision of Act 24/2013, of the 26th of December, on the Electrical Sector from sections 3 and 4 -previously transcribed- (incorporated to the project sent for its processing to the General Courts, but did not proceed in the draft informed by this State Council). Indeed, section 3 of this provision defines the reasonable rate of return that must be assured for existing installations by reference to "the total regulatory life of the installation".* And, especially, section 4, strongly avoids that the new remuneration model to result in "the claim of remunerations received by the energy produced before the 14th of July 2013, even if it was proven that such profitability could have been exceeded in such date". This limit is impassable as the contrary solution would have totally fallen in the field of authentic retroactivity prohibited by the Constitution (added emphasis). R-0133. (document 11.01)

761. In addition, the investor remains the holder of such installations and can remain in operation receiving the retribution obtained by the sale of energy in the market.

762. Again, given that a prudent regulatory life in connection with the life of the equipment that comprises the installation has been set and, moreover, given that the investments in their renewals in the remuneration concepts, a diligent and well managed company can continue obtaining a return on their investment.

763. That is, the smaller the regulatory life is, the larger the additional remuneration that the investor will receive will be, as the installation's investment value takes less years to be paid. Consequently, setting a regulatory life is totally coherent with the purpose of adopted support mechanisms that cannot keep prioritising an installation once they have received the sum that allows them to amortize their installation, operate during the fixed regulatory life and to obtain a reasonable rate of return. Regulatory life for thermosolar installation is set to 25 years[413].

764. Such prediction fully coincides with Sener prediction when making the Gemasolar Plant model[414].

(4.7) Remunerative regime. Cost calculation criteria. Efficient and well managed company.

765. To calculate the parameters, income and costs, we have focused on those relevant to an "*efficient and well managed company*"[415]. We have considered as such that this company with all the necessary means to develop their activity, whose costs are that of an efficient company in such an activity and taking into account a reasonable return for the performance of their functions.

766. The purpose of this regulatory parameter is to guarantee that high costs in an inefficient company are not taken as a reference, as the electric consumer is the one who must face these costs and given that the Spanish regulation has always been based on the principles of managing efficiency, minimum possible cost and reasonable rate of return.

767. This principle was already covered in laws on the electrical sector that have been successively pointed out in the present document, as there has always been the obligation to guarantee that all consumers can access electrical energy in equal and quality conditions, but at the lowest cost possible.

768. Consequently, it will be difficult to argue that the previous system protected inefficient businessmen during the building or operation of the plants generating an artificial cost in the SES. In fact, Claimant's Companies, Arcosol and Termesol, do recognise in December 2014 that to reduce operational costs is possible in more than 16%[416] and 17%[417] respectively. These

[413]Article 5 Order IET/1045/2014. R-0113.
[414]Due Diligence BNP, sections 4.3.5, 4.5.5; 5.3.4; 5.5.5, C-0043
[415] Royal Decree-Law 9/2013. Article 1 (Two). R-0091. 14.7 and third final provision of Act 24/2013, of 26 Decembre, on Electrical system. C-0086_ESP.
[416] Document BQR 76, Proposal of reestructuring of Arcosol company´s senior debt, section 4.2, page 8/11, the calculated reduction is of 16,87% in the year 2016.

figures are quantified by both companies once excluded the impacts of electricity generation from gas consumption and the 7% tax to the generation and without compromise the correct maintenance of the plant[418].

769. With regards to that alleged by the Claimant, it is obvious that given that 81%[419] of their total income would come from direct contributions of Spanish consumers is in conformity with the fact that an efficient and well managed action is demanded to the individual. This term forces to exclude from the parameters those costs that do not correspond with such principle.

(4.8) Remunerative regime. Installation type in conformity with standard costs and remunerations. Establishing remuneration parameters. Order IET/1045/2014.

770. Installation types have been set from the described legal framework and in conformity with estimations of investment and operating costs. The procedure and standard content has been backed by regulation bodies[420].

771. The classification criterion used responds to the renewable resource used in the generation of electric energy, for instance, wind, solar or biomass resources. From this classification, standards have been elaborated in conformity with the technology used, power range, fuel type and definite exploitation authorisation year, amongst others.

772. Therefore, standards have been produced taking into account the average real costs incurred by the plants' holders.

773. Order IET/1045/2014[421] contains all standards and the details on its investment and operating costs, income from the sale of energy and the consumption of auxiliary services, as well as the equivalent hours of operation.

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[417] Document BQR 77, Proposal of reestructuring of Termesol company´s senior debt, section 4.2, page 7/11, the calculated reduction is of 17,34% in the year 2016.

[418]Document BQR 77, Proposal of reestructuring of Termesol company´s senior debt, section 5.2, page 8/11, the calculated reduction is of 17.34% in the year 2016 "*The new finacial model includes a proposal of reestructuring the company to reach medium and minimum ratios of coverage of debt service of 1,20x consisting of:*

- *Mantaining the present levels pf production, which are 11.30% superior to the original base case. This increase is possible thanks to the optimization of the operation process undergone*.
- *Reducing the costs of electrical production (EUR/MWh) by 17.34% with regard to the original base case. This reduction is possible thanks to the O&M experience acquired and does not endanger the correct maintenance of the plant."*

Arcosol expresses itself in similar terms in Section 5.2 of Document BQR 76.

[419]According to data published by Arcosol and Termesol, BQR-0076, page 6/11 and BQR-0077, page 6/11.

[420]Administrative record with regard to the draft of Royal Decree 413/2014); State Council Report of the 6th of February 2014: "*For these installations, the standard value of the initial investment cannot be set through a competitive procedure, for which we shall take a look at the ministerial order on remuneration parameters of type of installations, which will be classified according technology, power, antiquity, electric system as well as any other segmentation considered necessary. In this regard, in compliance with the analysis report on regulatory impact, "an exhaustive analysis with a much higher level of detail to that performed until now, with the purpose of recalculating all remunerations of the approximately 63.000 installations of this group correctly, classifying them in approximately 900 installation types" is being performed.".*. R-0133.

[421] Order IET/1045/2014. R-0113.

774. Remuneration parameters of installation types are established according to the previously mentioned and to categories, groups and subgroups setting the different installation types and their relevant codes for the purpose of determining the applicable remunerative regime to each one of the latter.

775. The Order, of 1,761 pages, has covered 1,967 different installation types. As stated in Mr. Carlos Montoya's witness statement, each installation type has a set of remuneration parameters linked to it that pinpoint the specific remuneration regime and allow its application to associated installations to such installation type. Return on investment (Rinv) and return on operation (Ro) outstand amongst those remuneration parameters. At the same time, a set of elements have been taken into account for its calculation, amongst the following must be outlined:

- Initial standard value of initial investment of the installation type.
- Production of electric energy.
- Operating costs. For instance: land rental, general costs and management costs, insurances, Property Tax of Special Characteristics (BICEs), wind canon operating and managing expenses, representation expenses and deviations, generation toll, generation tax.
- Income received by the installation type.
- Regulatory useful life.
- Equivalent minimum operating hours and threshold for operation

776. The establishment of such a high volume of installation types and the calculation for each of them from a set of parameters implied a technical job of a much larger scale than previously expected. This job was performed on a documentation of around 150,000 pages and meant the move of a remuneration framework to the new regulation with a level of detail extraordinarily higher than previous regulations.

777. In the current case, the Claimant did knew that Torresol could lodge pleadings and it participated at the establishment of standars applicables to its CSP Plants. In fact, the Claimant's company, Torresol expressly admits that it participated in determining the standards[422]. The explanations contained in its Bulletins confirm that it perfectly knew the

[422] Document BQR 63, Monthly Activity Report January 2014, page 4: "*the Ministry of Energy decided to circulate a draft version of the Order containing the numerical values of the new retributive parameters, for the 1020 categories of renewable and CHP installations considered by the Government, on January 31st. This new retributive scheme is based in the following elements:*

- *Retribution is assigned on the basis of providing a reasonable return on investment, fixed by the Government as an IRR of 7,4 % (indexed to long term debt)*
- *Each plant type has been assigned an average investment, and an average P&L accounts for the past activities, as well as a projection on the future power sales (at market prices, expected to be 49,6 €/MWh) and running costs.*
- *According to these figures, for each type, a variable price has been calculated (if the running costs are higher than the expected power sales to the market), corresponding to the difference between those two concepts.*
- *A fixed payment, based on the estimated investment, is calculated to provide the expected profitability.*

• *Values for TEI's plants are the following*: [...]

• *<u>This order is open to allegations by all the agents involved in power production until the end of February, approximately. We will be filing our own claims</u>, since in all the cases we disagree with some of the values considered by the government."*

calculation procedures that IDAE was carrying out: That clearly refutes the Claimant statement on the lack of transparency and on the uncertainty while passing the MO[423].

778. This statement also confirms that conditions established by the RD 661/2007 have been respected, as well as the predictions from the 2005-2010 Plan, when envisaging to give returns "*close to 7%*".

(4.9) Regulatory periods. Invariability of the investment value.

779. The different regulatory periods set out are another important element from the legal and economic regime applied to the Claimant's facilities. They are flexibility regulatory tools with the purpose of adapting the remunerations to cover costs and grant a reasonable rate of return[424].

780. Stability and predictability needs to combine in the economic regulations and criteria with the demand of adapting remuneration regimes [425] in order to comply with its goals and the legal system. They respond to a regulatory technique accepted in many countries, allowing the predictability of modifications and adaptations in order to comply with the purpose of economic regimes. Therefore, they allow the total recovery of costs and to obtain a reasonable rate of return for the investments.

781. They are the appropriate mechanism to avoid keeping insufficient remunerations due to price variations and other circumstances that have an impact on the costs. Nevertheless, coherently with this purpose, the value of investment nor the regulatory useful life cannot be modified in any of the regulatory periods.

782. That is, once an installation's regulatory useful life or its initial investment standard value have been recognised, such values will be able to be reviewed in such a way for the investor to see the sum of the investment in their standard and is not altered in the future regarding this matter[426].

783. It is an extraordinary guarantee and it is especially substantial to protect investments already performed or that might be performed in the future on the basis of new economic regimes and is not covered by the rest of the activities within the electrical sector.

784. This win-win situation derived from the new regime has been expressly recognised by Arcosol and Termesol companies.

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[423] Claimant's Memorial, para. 27, the claimant declared that after the RDL 9/2013 and Act 24/2013 the Claimant's CSP Plants were left "*operating completely in the dark*" for 11 months until the approval of parameters by the MO IET/1045/2014. The monthly Bulletins of Torresol produced as Document BQR 63 do prove that, month by month, the Torresol company was knowing the draft circulated by the Ministry, the proposed values, being able to lodge pleadings to those drafts.

[424] In 2010 PANER, the need for the remuneration model of renewable energy production to be based on flexible formulas that allowed its adaptability to different concurrent circumstances was confirmed. Likewise, the European Commission has demanded the flexibility of the remunerative regime when it comes for the establishment of the support regime to renewable energies by member States. The new regulation only shows such dynamism. Vid. Relevant section to the Spanish National Renewable Energies Action Plan. R-0134.

[425] Act 24/2013. Article 14 (4). C-0102_ESP.

[426] Act 24/ 2013. Article 14 (4). C-0102_ESP.

785. The Company Arcosol affirms in December 2014:

> *"The new energy regulation has dramatically changed the remuneraion model of renewable energy power plants. In the event of Arcosol, the 68% of revenue originates from the return on the investment. Such revenue is constant within the regulatory period and separated from production (once the minimum threshold has been reached).*
>
> *The 13% of revenue originates from the return on the operation and the remainder 19% comes from the sale of generated power at market prices.*
>
> *This regulatory change provides more safety to the future cash flows and it essentially does improve the risk profile of the company."*[427]

786. In similar terms expresses Termesol itself in December 2014:

> *The new energy regulation has dramatically changed the remuneraion model of renewable energy power plants. In the event of Termesol, the 68% of revenue originates from the return on the investment. Such revenue is constant within the regulatory period and separated from production (once the minimum threshold has been reached).*
>
> *The 13% of revenue originates from the return on the operation and the remainder 19% comes from the sale of generated power at market prices.*
>
> This regulatory change provides more safety to the future cash flows and it essentially does improve the risk profile of the company."[428]

787. As a clear proof that this new system is more advantageous, when restructuring Arcosol and Termesol the debt with financial entities, the debt interests have been reduced from 3,25% to 2,40%, almost one basis point[429].

788. Financial entities admit such interests reduction because of the depletion of the project risk profile. In that sense, both Arcosol and Termesol state:

> *"The new financial model includes [...] To establish the margin over EURIBOR at 2,40% since 2015. This reduction is found on the significant depletion of the project risk profile, given the production levels reached within the operating 30 months and that the 68% of revenue of the project originates from return on the investment (Ri) and it is separated from production."*[430]

789. Moreover, financial entities also admit the omission of the reserve account for emergencies, the reduction of the reserve account for debt servicing and the reduction of conditions in which a restricted account should be supplied.[431].

[427] Document BQR 76, Proposal of restructuring of Arcosol company´s senior debt, section 4.1, page 6/11.
[428] Document BQR 77, Proposal of restructuring of Termesol company´s senior debt, section 4.1, page 6/11
[429] Section 5.3 of Document BQR 76 and BQR 77, both relating Arcosol and Termesol, respectively.
[430] Section 5.2 of Document BQR 76 and BQR 77, both relating to Arcosol and Termesol, respectively.
[431] Section 5.3 of Document BQR 76 and BQR 77, both relating to Arcosol and Termesol, respectively.

790. These new conditions, in particular the reduction of interests, demonstrate the security of the new regulatory framework, which forms more stable conditions to the reception of returns by the investor, as it does reduce the dependance upon an element like the electricity production.

791. Stability is related to the permanence of regulatory periods. According to the new regime, each regulatory period is valid for 6 years [432]. Adaptations will take into account the economy's cyclical situation of economy, electricity demand and the reasonable rate of return of the activity [433].

792. In the relevant review for each regulatory period all remuneration parameters will be able to be modified and, amongst them the value on which the reasonable rate of return will focus during the remaining regulatory life of the installation types.[434]

793. Each regulatory semi period is valid for 3 years [435]. In the semiperiods, income estimation from the sale of generated energy will be reviewed, and this energy will be measured at market price and the predictions of hours in operation with regard to the estimations performed for the previous three year period.

794. Remuneration values of the operation are also subject to annual revision for those technologies whose operating costs depend essentially on the fuel price [436] in order to adapt its price. Its purpose is to adapt according to market fluctuations so that improper quantities are not perceived, being of a greater or lower sum. Likewise, it is expected that the remuneration parameters will be able to be reviewed after the end of each semiperiod or remuneration period in the terms foreseen in it.

(4.10) Legal regime. Maintenance and strengthening of the priority in the dispatch of energy and in accessing and connecting to the network.

795. The Regulation maintains the principles of access and dispatch electric energy generated by installations with renewable energies sources and high efficiency cogeneration priorities.

796. This regulation extends even further than expected in European regulations[437] and implies a novelty as an explicit acknowledgement of this privilege as it was not covered in the same way in the previous regulation.

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[432] As for the six year regulatory periods, it is established that the first regulatory period is comprised between the enforcement date of Royal Decree-law 9/2013, of the 12th of July, and the 31st of December 2019 Royal Decree 413/2014. First additional provision. C-0086_ESP.

[433] Article 14.4 of Act 24/2013, of 26 December. C-0102_ESP.

[434] Royal Decree 413/2014. Article 20 (1). R-0107.

[435] Each regulatory period is divided into two three-year regulatory semiperiods. The first regulatory semiperiod corresponds to the existing one between the entry into force of Royal Decree-law 9/2013, of the 12th of July, and the 31st of December 2016. Royal Decree 413/2014. C-0086_ESP.

[436] Act 24/ 2013. Article 14 (4). R-147Bis.

[437] Directive 2009/28/EC of the European Parliament and of the Council of 23rd April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. Article 16(2) (c): "Member states will ensure that, when the dispatch of electricity generation installations takes place, operators of the transport system prioritise generation

797. As for dispatch priority, Article 26 of Act 24/2013 states that[438]:

> *"Electrical energy from installations using renewable energy sources and, after them, from high efficiency cogeneration installations, will have dispatch priority in the market in equal economic conditions, without prejudice of requirements related to the maintenance of the system's reliability and security, in the regulatory terms established by the Government.*
>
> *Without prejudice of the system's supply security and efficient development, producers of electrical energy coming from renewable energy sources and high efficiency cogenerations will have access and network connection priority, in the established regulatory terms, based on objective, transparent and non-discriminatory criteria."* [439]

798. A plain reading of this regulation it is understood that dispatch, access and network connection priority are rights that energy producers from renewable sources have. This right can only be limited due to the SES's reliability and security maintenance reasons. What is more, unlike what the previous Regime established, that dispatch priority is prioritised even with regard to high efficiency cogeneration installations.

(4.11) Legal regime. Rationalising the system. Maintaining and strengthening investments' legal guarantees.

799. The remuneration regime of certain energy production installations from renewable energy sources has been regulated in a detailed and exhaustive way in regulations with the range of law, Parliament being the only authorised body to modify it.

800. The importance of energy production installations from renewable energy sources receiving economic aid from the SES has made them to be half of the costs of the system itself. Therefore, a remuneration scheme allowing the participation of these installations in the SES's adjustment markets has been established.

801. In these markets, energy prices are higher and allow to compete with the rest of the installations once they comply with the relevant technical requirements. However, this unification has taken place without prejudice of unique concerns that must be established and maintained with regard to existing installations.

802. Dispatch, access and network connection priority previously analysed is an example of this. The obligation for the assignment of an economic regime like the one of the Claimant have to be performed through a competitive concurrence procedure has also been regulated.

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installations using renewable energy sources as long as the national electrical system allows to do so and in compliance with transparent and non discriminatory criteria.". C-0050.

[438] Act 24/2013. Article 26 (2). R-147Bis.

[439] Such writing of the Law has been repeated in Article 6(2) of Royal Decree 413/2014, stating that: "Electrical energy from installations using renewable energy sources and, after them, from high efficiency cogeneration installations, will have dispatch priority in the market in equal economic conditions, without prejudice of requirements related to the maintenance of the system's reliability and security, in the regulatory terms established by the Government. Royal Decree 413/2014. Article 6 (2). R-0112.

803. These procedures can only take place when there is an obligation to comply with energy goals resulting from European Directives or other legal regulations of the European Union or when its deployment implies a reduction in energy costs and foreign energy dependence.

804. This measure is also in line with EU directives and policies supporting renewable energies and environmental protection. Nevertheless, in order to protect investments performed already, it does not affect existent installations like the Claimant.

805. In addition, an Administrative Register of a specific remunerative regime has been created, which is necessary for the tracking and correct application of the economic regime to electrical energy production installations from renewable energy, cogeneration and waste sources with a specific remunerative regime[440].

(4.12) Legal regime. Participation of the stakeholders in the followed regulatory procedures. Reports release.

806. All the rules included in the new regulatory economic trademark have been adjusted to the procedure set out by Spanish law. All the reports necessary for guaranteeing the full conformity of the new legal text with the Spanish legal system have been gathered. Reports have been requested even when they were not mandatory[441] and several public hearing procedures have been offered where all the stakeholders have been able to participate. In addition, a significant part of the public comments from stakeholders who have submitted several observations have been accepted.

807. The State Council, supreme advisory body of the Government, has delivered three legal opinions[442]. These legal opinions respond to different procedures followed where observations from stakeholders have also been provided to this body. The State Council has backed the new remunerative regime, specifically acknowledging the legitimacy of the regulatory change, as the previous regulation did not contemplate the right to the regulatory petrification. The State Council also insists on the notoriety of the need of the reform for all participants in the system, such as the Claimant.[443]

808. The State Council also confirms the absence of retroactivity in the past regulation as well. Thus, it states that it lacks "*retroactive application*" given that the amounts indeed received before the enforcement of Royal Decree Law 9/2013 are not affected[444]. The State Council

[440] Royal Decree-law 9/2013. Article 1. Four. C-0086_ESP.

[441] For instance, in the release of Legal opinion of the State Council to Order IET/1045/2014, which was not mandatory, as specifically stated by this advisory body. Regulatory dossier with regard to project Order IET/1045/2014. R-0135.

[442] The State Council, is a constitutionally enshrined body as the supreme advisory body of the Government. Article 107 of the Spanish Constitution of 1978. R-0050.

[443] Legal opinion of the Permanent Commission of the State Council 937/2013, of the 12th of September 2013. General Observation VI: "*On the other hand, with regard to the principle of legitimate confidence, the reform of the electrical system must not be taken as unexpected, given the progressive deterioration of the electrical system's sustainability. Individuals dedicated to different electric supply activities, knowing such deterioration, could not legitimately trust in the conservations of the parameters that had led to the described situation.*.**"**(added emphasis) R-0136.

[444] Legal opinion of the Permanent Commission of the State Council 937/2013, of the 12th of September 2013. General Observation VI: "*it lacks retroactive vocation in the draft, because it is not set to establish the*

itself, in its reports, commends and explains the complex procedures and effective public participation in it.[445]

809. All of this processing took place over almost a year in order to the let stakeholders participate in every step of the legislative procedure, before different bodies and without limitations to their public comments [446].

810. National Market and Competition Commission delivered four reports during the procedures for these regulations as well. All of them were favourable and acknowledged that set remuneration was reasonable and even higher than the one reflected in some of their reports[447]. The regulatory body insists that both the procedure and used values are correct, focusing on the predictability and operators' knowledge of values [448].

811. What is more, the National Commission for Markets and Competition is surprised to see the incrise of the remuneration produced for certain facilities that have also had their remuneration

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past remuneration of existing installations, but the one new or existing installations may receive, after the enforcement of the reform initiated with Royal Decree-law 9/2013 of the 12th of July." (added emphasis) R-0136.

[445] Administrative record with regard to the draft of Royal Decree 413/2014); State Council Legal Opinion of the 6th of February 2014: *ENC Report 18/2013 had multiple observations with regard to the drafts content, many of them were included in the project,). According to what the analysis report on regulatory impact stated, important changes were introduced in the text after the analysis of this Opinion and public comments on the text submitted through the Electricity Advisory Council, which justified to start again its procedures from the project of the 26th of November 2013. This lead to the Market and Competence National Commission (MCNC) Report of the 17th of December 2013 with a second participation in the Electricity Advisory Council. This report took into account public comments on the period for comments held in the Electricity Advisory Council, which were an annex in the report itself.*

Yet in this record Council, various requests for hearing were received and were granted. Thirteen public comments documents were submitted in this procedure. In the submitted documents in this procedure the participating bodies remitted or repeated the arguments used within the Electricity Advisory Council, adding allegations they considered convenient to their right,." (added emphasis). R-0133.

[446] Regulatory dossier of the project of Royal Decree regulating the electrical energy production from renewable energy, cogeneration and waste sources (Royal Decree 413/2014); State Council Report of the 6th of February 2014: *"The restart of the procedure allowed a new participation of the Electricity Advisory Council and the Market and Competence National Commission (MCNC), the period for comments for the stakeholders must be considered fulfilled, as all affected sectors by the project have had a chance to participate in the development of the regulation -in this case, in addition, twice-, through the Electricity Advisory Council."* (added emphasis) R-0133.

[447] MCNC report stated that*: "Generally, we can see that investment ratio data, in euros per installed MW, used then by the ENC to estimate tariffs and premiums, were, with some exceptions, near or lower compared to those proposed now, despite the fact that they were not statistically significant in some cases. Therefore, reduction in the remuneration is not generally attributable to applying low investment ratios.* Thus, the remuneration reduction is due mainly to the establishment of a rate of return applicable to the regulatory useful life of each installation lower than the implicit one in premiums and current tariffs in the remuneration framework prior to Royal Decree-Law 9/2013. It must be highlighted that these premiums were, in many cases, significantly higher to those covered by the Commission in its mandatory reports to regulatory change proposals that have occurred in the last decade." (added emphasis). Administrative record with regard to project Order IET/1045/2014; MCNC Report. R-0137 (Processing, document 01.04).

[448] Administrative record relative to project Order IET/1045/2014); MCNC Report: *"the classification used is, despite its complexity, possibly the most objective one, and probably the strongest as well*" R-0137 (Processing, document 01.04)

adjusted to the fixed reasonable return[449]. At the same time, this regulatory body subjected the forwarded texts to the Electricity Advisory Council.

812. In some of these procedures, more than 600 public comments from all stakeholders belonging to all sectors that participate in the electrical system and the remaining different Public Administrations of the State were made. These public comments were explained and answered in the procedure reports of the regulatory norms.[450].

813. The Claimant's company, Torresol itself, recognises that submitted public comments invoking the reasonable return principle. And submitted public comments in triplicate. At the Torresol's Bulletin of May 2014 states that both Gemasolar, and the Valle Complex, and Torresol itself defended on their public comments to the State of Council that the new system introduced since 2013 did not guarantee the "*investments rate of return*"[451].

(4.13) Legal and remunerative regime. Conclusions.

814. The Spanish State, through its legislative and executive powers, has given a new legal regime to renewable energy installations receiving or being able to receive future remunerations charged to the electrical system.

815. This legal regime is framed within a complete reform of different activities of the electric system that has been developed, mainly, from January 2012 until now.

816. The reform has had the purpose of reviewing all the costs faced by the electrical system in order to comply with the current legal system, both internally and from European Union Law and that the electric consumer did not face overruns in the different activities.

817. This reform has resulted in that certain activities and their facilities have had their remuneration adjusted upwards and other facilities have had it adjusted downwards. And that in order to respect basic investment recuperation principles, keeping the operation and obtaining a reasonable return.

818. The new legal regime has respected fixed principles in the regulation, developed and validated by jurisprudence and known by each diligent operator.

[449]The regulatory body points out that: "*One of the paradoxical aspects from the Proposal, in a strong adjustment and possible closure of plants context, is the rise in remuneration of some installations, at least in the first operating years.*" Administrative report related to project Order IET/1045/2014); MCNC Report. R-0137 (Processing, document 01.04)

[450] Regulatory dossier related to the project Order IET/1045/2014); Analysis Memory of Regulatory Impact included of the Regulatory dossier on the draft order approving remuneration parameters of type installations applicable to certain electric energy production installations from renewable energy resources, cogeneration and waste. Point 3 (2). R-0138 (Processing, document 14.03)

[451] Document BQR 63, "Monthly Activity Report May 2010: •[Torresol Energy] ***took part in the public comment process opened by the State Council,*** *through Gemasolar (as single plant), Valle complex (as part of a group of PT plants with storage), and Torresol (as partner of PROTERMOSOLAR),* ***arguing that the new system does not effectively assure the "reasonable return on investment***".

819. The new regulation is exhaustive and performs a detailed test on costs of about two thousand facilities type; due to the publicity of the procedure that lead to the settlement of IT, parameters and the thoroughness of its settlement.

820. Different remuneration parameters have been calculated in compliance with prudent valuation criteria, in compliance with observable data and perfectly replicable in the activity of the renewable energy sector.

821. Parameters are reviewable as required for regulatory periods with total predictability and certainty in time[452]. The investment value and the regulatory useful lifetime will remain unchangeable and it is not subject to the review in regulatory periods. At the end of the installations' regulatory lifetime, investors continue to be their holders even though they are still working, being able to sell energy with priority of dispatch in the electric market and without taking into account this income in any way.

822. Consequently, it is not possible to keep receiving more public aids after the regulatory lifetime, as there would be an over remuneration or unjustified remuneration contrary to the legal system.

823. The assessment of the impact that different measures adopted within the last year have had on certain facilities must be performed according to the new remuneration regime and its future projection on income, costs and return.

824. The new remuneration regime has taken into account both positive and negative measures so that the installation's return remains reasonable.

825. For this reason, it has been considered the Tax on the Value of the Production of Electrical Energy, the BICES and all those costs that did not exist under previous regulations as costs to be included in the Ro.

826. The new remuneration regime responds to the new model set by the European Commission for State aids in the subsidised renewable energy sector.[453]

827. Therefore, this regulatory framework gives a global response to the investors' protection and its promotion in Spain.

828. The Kingdom of Spain keeps its commitment to subsidize installations like the Claimant´s.

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[452]We must also highlight that changes in the remunerative regime are not exclusively foreseen for electricity generation from renewable sources. Act 24/2013, of the 26th of December, of the Electrical Sector. Article 14(4): Specifically: *"Remuneration parameters of transport, distribution and production activities from renewable energy, high efficiency cogeneration and waste with a specific remuneration regime and production in non-peninsular electric systems with an additional remuneration regime will be set taking into account the cyclical situation of economy, electrical demand and appropriate return for these activities during six year regulatory periods."* R-147Bis.

[453] Guideline on state aids for environmental protection and energy 2014 - 2020, 2014/C-2020, point 129. *"Aids will only be granted until the installation is totally amortised according to usual accounting standards and any aid to investments that would have been previously received shall be deduced from current aids".* R-0064.

829. In Order IET/1045/2014 Economic Report, the following estimation on costs still pending to be paid to installations included in this economic regime[454]:

TECHNOLOGY	Received premiums 1998-2013 estimation (millions of €)	Premiums pending to be received from 2014 until the end of the useful lifetime estimation (millions of €)	Total received premiums during all the useful life estimation (millions of €)
COGENERATION	12,917	19,504	32,421
PHOTOVOLTAIC	14,617	64,234	78,851
THERMOSOLAR	2,640	32,464	35,104
HYDRAULIC	4,263	1,250	5,513
WIND	15,400	20,500	35,900
BIOMASS AND BIOGAS	2,003	6,685	8,688
WASTE TREATMENT	2,626	4,220	6,846
WASTE COMBUSTION AND BLACK LIQUORS	1,827	1,708	3,535
TOTAL RENEWABLE ENERGIES, COGENERATION AND WASTE	**56,294**	**150,565**	**206,859**

(5) There is a State aid procedure of the European Commission related to Order IET/1045/2014 and the regulations substituting it.

830. As it has already been pointed out, remuneration policy favouring renewable energies is subject by the European Union to guidelines passed by the European Commission.

831. Until recently, there were different interpretations about the State aid condition of the sums recived by producers through bills paid by consumers. Such interpretation doubts have been clarified by the Ruling of the 22nd of October of 2014 of the Court of Justice of the European Union, ruled on the preliminary ruling C 275/13 (Subject ELCOGAS) regarding Spain, concluding the following in paragraph 33[455]:

> *"Article 107 TFEU, section 1, must be interpreted in the sense that the sums attributed to a private company producing electricity funded by final electricity users settled on the national territory and that are distributed to companies of the electrical sector by a public body according to default legal criteria are an intervention of the State or through State funds".*

832. Resulting from this legal resolution, Spain communicated the support measures for renewable and cogeneration energies adopted through Order IET/1045/2014 to the European Commission. The Commission has opened procedure SA.40348 2014/N to the effect.

[454] Administrative record with regard to project Order IET/1045/2014; Economic Report on Regulatory Impact, page 101. R-0138 (Processing, document 14.04)

[455] Decision of the Court of Justice of the European Union, issued on the preliminary judgement C 275/13 (Subject ELCOGAS) 22nd of October of. R-0030.

833. Article 4.3 of the Treaty of the European Union (TEU) sets obligations faced by the State according to the principle of loyal cooperation. According to the second and third sections of this Article:

> *"The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*
>
> *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."*

834. This precept does not establish a mere stating principle, but it imposes demandable obligations to States whose failure of fulfilment can lead to, in accordance to Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU), a Judgement of the Court of Justice of the European Union imposing an economic penalty and/or a coercive fine to the State.

835. Within the obligations imposed by TFEU to Member States, there is the prohibition of granting public aids, except in cases allowed by the Treaties. According to Article 107.1 TFEU:

> *"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.".*

836. Due to Ruling Elcogas' definition on the concept of State aid, the Claimant was obliged, as stated by Articles 107 and 108 TFEU to notice the European Commission about support measures for renewable and cogeneration energies in Spain, related with arbitral proceedings which this Tribunal is hearing.

837. The notification on aids allows the State not only to comply with the obligations resulting from the Treaties but, in addition, to request the Commission to declare their compatibility based on the Guidelines regarding state aids on environmental protection and energy 2014-2020. The declaration of compatibility through a Decision from the Commission is the only legal path so that these aids must not be recovered, according to Articles 107.3.c) and 108 TFEU.

838. According to Article 108 TFEU, the Commission has sole competence to declare on the compatibility of an aid with European Union law. The only body that is competent to review the lawfulness of this Decision is the Court of Justice of the European Union, according to a much consolidated jurisprudence.

839. Both the Commission's exclusive competence to declare the compatibility of the aids as well as that of the European Court of Justice to review this declaration's lawfulness are imperative regulations that do not admit any possible repeal and are part of the public order of the European Union.

840. Thus, due to transparency reasons and good faith in the development of arbitral proceedings, the Kingdom of Spain lets the Arbitral Tribunal know on the existence of such procedure.

841. Such communication is especially relevant according to the decision of the Commission of the 26th of May 2014[456], ordering the suspension of debt payments by Romania of an award rendered in a CIADI arbitration, Micula v. Romania.

842. Afterwards, in the decision from the 30th of March 2015[457], the Commission has ruled that "the payment of compensations by Romania to two Swedish investors according to the repealed aid regime violates EU State aid regulations" and that "*with the payment of the compensation granted to the claimants, Romania actually grants an equivalent advantage to the repealed aid regime*". Therefore, the Commission has concluded that such compensation is equivalent to an incompatible State Aid and must be returned by the recipient companies.

E. The Kingdom of Spain respected the standard for Fair and Equitable Treatment set out in Article 10.1 of the ECT.

(1) Introduction.

843. The Claimant asserts that the measures adopted by the Kingdom of Spain entail a breach of Article 10(1) of the ECT. It breaks said alleged breach down into three obligations: (1) to grant Fair and Equitable Treatment at all times to the investments of the Claimant; (2) not to harm the investments of the Claimant by way of abusive measures; and (3) to comply with the obligations contracted with the Claimant or its investments (the protection clause).

844. Before starting to examine the breaches which the Claimant attributes to the Kingdom of Spain, it is worth highlighting five issues which are essential for examining the legitimate Expectations (EL) of the Claimant and for deciding about the existence of the breaches of Article 10(1) of ECT that the Claimant attributes to the Kingdom of Spain:

(a) The Claimant starts from a basic error by reducing the Regulatory framework of the Spanish Electric Sector to a Regulation: RD 661/2007. The Claimant argues in its Memorial on the Merits that invested under RD 661/2007 as if there were no other Act, Regulation or Case law concerning it. Hence, the Claimant offers the Arbitral Tribunal an unreal, distorted image of the Regulatory framework in place in Spain in 2008 and 2009. RD 661/2007 was not an "island" separate from all the principles and rules governing Spanish Legislation and the applicable Case Law. The Claimant could not reasonably be unaware of this Legislation when investing in Spain.

(b) The Claimant omits throughout this Section of the Memorial the validity of the legal principle of *reasonable rate of return* which has formed the basis for Spanish legislation on Renewable Energies since 1997. This principle was known by any

[456] Final Document of the Commission C(2014) 6848 of the 1st of October 2014, ordering the suspension of debt payments by Romania of an award rendered in a CIADI arbitration, Micula v. Romania. R-0139.
[457] Decision of the European Commission of the 30th of March 2015 declaring that the recognised compensation in the matter award Micula v. Romania (Press release from the Commission, English version). R-0140.

operator on the Spanish electrical market as the basis and the limit of the Government's powers[458] when establishing returns to RE producers.

(c) The Claimant continuously reiterates that there have been promises, contracts, agreements or commitments between the Government and the Claimant. At no time did the Kingdom of Spain assume any commitment deriving from neither a contract, nor a concession, nor a license, nor a memorandum of understanding with the Claimant. The Kingdom of Spain has regulated the SES according to the provisions of the Law and the economic circumstances, maintaining the economic Framework stable at all times on which the subsidies to RE producers are based.

(d) The Claimant states in its Memorial: "*For the avoidance of doubt, it is not the Claimant's position that the obligation to accord FET in the ECT means that a host State must completely freeze its regulatory regime*". However, it claims that all measures of RD 661/2007 have to be maintained, without accepting any modification or reduction in any of those measures (economic and non-economic) in its claim for damages. It is clear that the Claimant's intention implies *de facto* a standstill of the CSP regime in a regulatory level until 2051.

(e) The object of the present arbitration is not the loss of the Claimant's investment. The SES guarantees the investor the recovery of the investment made in the long-term. It also ensures it the recovery of its operating costs. And, what's more, it ensures it the obtaining of reasonable rates of return[459]. There are no different commitments between Spain and the Claimant. Hence, the object of the present arbitration must focus on the evaluation of these guarantees. In particular, whether these guarantees that the Law grants to the Claimant are fair and equitable or not.

845. This analysis will be carried out in line with the system followed in the Claimant's Memorial.

(2) Spain has not breached the FET Standard as it has not breached the statements of the Standard that the Claimant alleges.

846. The Claimant argues that the FET standard has been breached, breaking down various manifestations of this standard, which it deems to have been breached. In this way it argues that (a) Spain breached the reasonable and legitimate expectations of the investor when making the investment. (b) Spain failed to establish a legal and commercial framework which is stable and foreseeable for the investment, (c) Spain acted in a manner which was arbitrary and excessive; (d) the measures adopted by Spain were disproportionate.

847. The Kingdom of Spain will prove that it has not breached the legitimate expectations of the Claimant when making its investment. What's more, in the absence of any breach of the legitimate expectations, the Kingdom of Spain will also prove that the measures challenged by the Claimant were adopted for justified reasons in the public interest and that the mentioned

[458] This is how it was enlightening explained by the President of SENER, the distinguished partner of the Claimant in Spain. R-0141.

[459] The specific figure for those installations already in operation is around 7.398 per cent of profitability on the standard installation project as a whole as set out in Section IV.D.4.2 of the present Memorial.

measures are reasonable and proportionate. In this way the Respondent will prove that it has not breached any of the manifestations of the FET alleged by the Claimant.

848. These arguments will be set out once again following the system adopted by the Claimant.

(2.1) The Kingdom of Spain did not breach the legitimate expectations of the Claimant.

(a) Claimant's arguments.

849. The Claimant states that certain regulations and actions of the Spanish State constitute specific "promises" or "commitments" which legally bound or limited its power to regulate on Renewable Energies matters. Hence, the Claimant sets out its concept of legitimate expectations. It states the duty of protection by the State of the legitimate expectations based on the *"legal framework at the time of the investment"*[460]. However, the Claimant referes to the *"applicable regulatory framework"*[461], the *"legal and commercial framework"*[462], the *"legal and commercial environment"*[463] and the *"stable and equitable conditions*" referred to in Article 10(1) of the ECT. In other words, it intentionally identifies all these concepts as if they were equivalents. In any case, it acknowledges that the point of departure for assessing the legitimate expectations is the time when the investor made the investment[464].

850. In this way, it stipulates what it considers as its legitimate expectations at the time of the investment: the inviolability of all the economic rights set out in RD 661/2007 throughout the operating life of the Plants. This inviolability of the remuneration regime of RD 661/2007 reiterated serves throughout the Claimant's Memorial as grounds for the expectations of the Claimant[465].

851. Then the measures into which the legitimate expectations of the Claimant can be broken down are listed. Those measures refer to each and every one of the economic rights of RD 661/2007, including its tariffs and its immutability: "*the Claimant also expected that any future changes to RD 661/2007 would only apply pro-spectively, i.e. to new installations, while existing installations would remain unaffected.*"[466] [Emphasis added]

[460] Claimant's Memorial, parag. 359.
[461] Claimant's Memorial, parag. 361
[462] Claimant's Memorial, parags. 359, 362, 364 and 366.
[463] Claimant's Memorial, parag. 365.
[464] Claimant's Memorial, parag. 359 and 366.
[465] Examples of said reiterated assertions are:
- *"The Claimant understood [...] that the tariffs in the RD661/2007 special regime were guaranteed for the operational life of the CSP Plants."* [Emphasis added]. Claimant's Memorial, parag. 183.
- *"the Claimant held well-informed beliefs that the economic rights provided by RD 661/2007 were inviolable and would be respected by Spain."* [Emphasis added]. Claimant's Memorial, para. 185
- *"the Claimant has invested [...] based, inter alia, on the expectation that, [...] the CSP Plants in which they invested would be entitled to the economic regime of RD 661/2007 for their entire operational lifetime, without being affected by potential future changes to that regime."* [Emphasis added] Claimant's Memorial, parag. 340.

[466] Claimant's Memorial, parag. 369.

852. The basis for said legitimate expectations is formed, according to the Claimant, by the alleged stabilisation clause which would be contained in Article 44.3 RD 661/2007[467] and the 2010 Resolutions [468].

(b) Unsustainability of the allegations set out by the Claimant.

853. The Claimant's reasonings can not be upheld: (1) because of the intentional omissions of the Claimant itself, (2) because of the tests provided by the Claimant itself and (3) because of the specific contradictions of the Claimant.

(i) Omissions of the Claimant as regards the Regulatory framework applicable at the time of investment.

1) General regulatory framework at the time of the investment.

854. From the Claimant Memorial´s arguments, it seems that the Regulatory framework which set up its legitimate expectations was limited to an Act that it mentions generically (Act 54/1997), and a specific Regulation (RD 661/2007). In this way, the Claimant asserts that RD 661/2007 was a bait thrown to international investors and that Article 44.3 of RD 661/2007 was a *stabilisation clause* to freeze the regime established in it, during the operating life of the Plants included within its scope. In other words, Claimant wishes that the "Regulatory framework" to be examined by the Arbitral Tribunal were limited to a sole regulation, from 2007.

855. The Claimant intentionally omits from its arguments the principles of Spanish Legislation and the *"Principle of reasonable rate of return*" set out by the legislation and interpreted by the Case law of the Supreme Court. In particular, the Claimant argues the configuration of its legitimate expectations omitting: (a) relevant, legally binding regulations such as Act 54/1997 or RDL 6/2009; (b) relevant subsequent regulatory standards such as RD 1578/2008 and (c) the interpretation of this matter by the consolidated Case law of the Spanish Supreme Court. This is the "*Regulatory framework*" to be examined by the Arbitral Tribunal and not that limited to an Article of a regulation as the Claimant desires.

856. To determine whether there has been a breach of the FET standard, due consideration must thus be given to the legitimate expectations that the Claimant had about the treatment that its investment would receive at the time of making it. Said expectations must be reasonable and legitimate with regard to the existing general regulatory framework. In line with this evaluation, the knowledge of the investor about the general regulatory framework when making its investment must be analysed, or better said, what its knowledge should have included.

857. International arbitration Case Law is clear in this regard. At the time of making its investment an investor must be aware of and understand the *regulatory framework*, how it is applied and how it affects its investment. An investor makes its investment based on this knowledge. An investor must be aware of the risks and assume said risks when it makes its investment.

[467] Claimant's Memorial, parag. 370 and 371.
[468] Claimant's Memorial, parag. 372 to 376.

858. As it was stated by The Arbitral Tribunalin the Case MTD v Chile:

> *"The BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen."* (Emphasis added)

859. In the *Case Electrabel v Hungary* the Arbitral Tribunal also stressed that when determining whether the modifications made to the regulatory regime are fair and consistent, due consideration must be given to the background and information that the investor had or should reasonably have known when it made the investment[469].

860. It is thus an unavoidable obligation of any investor who invests in Spain to be aware of the *general regulatory framework* governing the investments and which includes the regulations and case law which will be applicable to its investment. It does not seem to be acceptable that the investor, being unaware of (or claiming to be unaware of) the applicable legal regime, makes the investment and subsequently resorts to International Law to try to avoid applying Spanish Law[470].

861. Neither does it seem to be acceptable that the Investor claims from the Arbitral Tribunal the application of only part of the regulatory framework or claims that it is excluded from that part of the regulatory framework which harms it.

862. In the present arbitration procedure, there are relevant elements of the general regulatory framework that the Claimant was aware of or should unavoidably have been aware of when it made its investment and to which it does not attribute any effect in the configuration of its legitimate expectations.

863. As has already been set out above, the Claimant was aware of, or should have been diligently aware of that Act 54/1997 stipulated when it made its investment the right to achieve "*reasonable rates of return by reference to the cost of money in the capital market*."[471] It should be pointed out that the Claimant, when describes Act 54/1997[472] and the renewable energies' remuneration system, omits any reference to this basic principle to understand the remuneration regime laid down by law.

864. This right configured the basic legitimate expectations of what the investor could expect and require when making the investment in Spain. And this basic legitimate expectation was respected with the reform of the Electric Sector carried out by Spain. However, Act 54/1994

[469] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19; Decision on Jurisdiction, Applicable Law and Liability 30 November 2012, Part VII, page 21, 7.77- 7.78. CL-0081

[470] As we will see, the Claimant has not proven that has carried out any legal Due Diligence to ascertain the legal consistency of the alleged *promises* or *commitments* it deduces from RD 661/2007.

[471] Act 54/97, enacted on November 27th 1997 regarding the Electric Sector, Article 30.4, last paragraph: "*In order to determine the premiums, account shall be taken of the level of delivery voltage of the energy to the grid, effective contribution to improvement of the environment, saving in primary energy and energy efficiency, production of economically justifiable useful heat and the investment costs which have been incurred, in order to achieve reasonable rates of return by reference to the cost of money in the capital market*." R-0149 BIS.

[472] Claimant's Memorial, parags.70 to 79.

did not limit the possibility of carrying out reforms nor did it undertake to maintain the validity of its implementing regulations for any timeframe.

865. What's more, before making its alleged investment, the Claimant was aware or should have been diligently aware of that the Supreme Court interprets the Laws and that said interpretation is invocable as Case law before Courts in Spain.[473] As regards Article 30 ESL 54/1997, the Claimant was aware or should have been diligently aware that this Case law recognised the possible modification of the regulatory regime on premiums within the legal limits of ESL 54/1997. In other words, modification was possible within the limit set out by ESL of granting investors a *reasonable rate of return*[474].

866. In this regard, the following pronouncements of the Supreme Court are extremely relevant. All these Rulings are prior to the investment made by the Claimant and they specifically refer to the remuneration of companies under a special regime:

> *a) "Producers do not have an unchangeable right to the immutability of the economic regime regulating the modification of premiums. Said regime does not ensure its permanence without any modifications in the future."*[475]
>
> *b) "They have alleged that they made their investments trusting that the Administration would not change the legal conditions [...].That which Article 30 of the ESL allows companies is to aspire to obtain premiums which incorporate [...] reasonable rates of return with reference to the cost of money on the capital market, in other words, a reasonable return on its investments. There is no guarantee for those holding installations under a special regime of the intangibility of a certain benefit or income regime [...], nor the indefinite permanence of the formulas which can be used to set the premiums. The variations must be maintained within the legal limits."*[476]
>
> *c) "Companies that freely decide to set up on the energy generation market under a special regime, [...] are or must be aware that these incentives may be modified within the legal guidelines by said authorities. One of the* ***regulatory risks*** *they are subject to – and which they will necessarily have to bear in mind – is precisely that of the variation of the parameters of the premiums or incentives. ESL moderates but does not exclude said variation."* [477] (emphasis added)

867. These Judgements are prior to the alleged investment of the Claimant and a diligent investor could not avoid them to configure its legitimate expectations, as they specifically declare the

[473] Article 1.6 of the Spanish Civil Code, in the Chapter on the Common-law source stipulates that: "*Case law will complement legislation by the doctrine which is repeatedly established by the Supreme Court when interpreting and applying the law, standard practice and the general principles of the law*." R-0059.
[474] This principle is set out in Section IV.B of the present Counter-memorial.
[475] Judgement of the Third Chamber of the Supreme Court on December 15th 2005, Legal Basis Eight. R-0073
[476] Judgement of the Third Chamber of the Supreme Court dated October 25th 2006, Legal Basis (FD) Three, (R-0071); and Judgement of the Third Chamber of the Supreme Court dated March 20th 2007, Legal Basis Two (R-0074).
[477] Judgementof the Third Chamber of the Supreme Court dated October 25th 2006, Legal Basis (FD) Three, (R-0071); and Judgement of the Third Chamber of the Supreme Court dated March 20th 2007, Legal Basis Two (R-0074).

existence of a regulatory risk whose limit will be granting to investors a *reasonable rate of return*.

868. The Claimant was also aware or should diligently be aware that the Regulation it invokes (RD 661/2007) is a lower-ranking regulation under the Law, laid down to develop and apply the Law. And hence knew that it could be modified by a subsequent Law or other Regulation when the economic circumstances or the development of energy technologies have made it clear that the remunerations received breached with the principle of reasonable rates of return.

869. In fact, not even in RD 661/2007 itself is any mention made to any commitment or promise that said RD will not be modified in the future by some other legal or regulatory rules. Hence, the Claimant could not reasonably deduce that said commitment did exist and that it could last until 2051[478] as it now claims in its Memorial on the Merits.

870. This is a circumstance which is certainly relevant. In addition to the conclusive Case law set out and the possibility of the reform of Legislation according to the hierarchy of regulations, the Claimant was aware that before RD 661/2007 there were different modifications of the regulatory regime of the Electric Sector because of public interest reasons. Hence, it was aware of the reforms of 1998, 2004 and 2007. To be precise, was aware that RD 661/2007 repealed RD 436/2004 with a similar mandatory revisions' regime, as it will be proven.

871. In the same way, the Claimant was aware before its first investment that, in fact, the remuneration regime of RD 661/2007 was modified in September 2008 by RD 1578/2008. This made clear to the Claimant the Government's determination to avoid over-remuneration situations and its intervention on the market to put out the excessive cost of the SES.

872. What's more, before its second investment[479] the Claimant was also aware of the publication of RD-L 6/2009 which referred to the international economic situation and its impact on the tariff deficit and on the sustainability of the system. There is no record of the Claimant consulting the Government about the consequences of said reform on its future investment.

873. The Claimant, omitting these regulations and Case law, states that the Resolutions from December 2010 "reasserted" its legitimate expectations. As has already been proven[480], said Resolutions did not imply nor contain a commitment by the Government towards the installations as regards the future immutability of RD 661/2007. Hence, they could not reassert any legitimate expectation about the immutability of RD661/2007 until 2051.

874. In addition to this evidence, the Claimant itself recognises that any examination of the legitimate expectations must be carried out in line with the legitimate expectations set out at the time of the investment[481]. The Claimant's investments were made in November 2008 and July 2009 when it signed the Project finance for the three Plants. Hence, the Resolutions from

[478] "*Our analysis shows that the CSP Plants of Masdar could keep on working for 40 years without the need to make any significant investment*. (...) *Our damage calculation is conservative as it does not bear in mind the possible prolongment of the working lives*. Brattle Repor to damage quantification, parags. 65 and 66.
[479] Upon signing the Project finance for the Projects Valle-1 and Valle-2.
[480] Section IV.C.3.3 of the Counter-memorial
[481] Claimant's Memorial, parags. 359, 360, 366 and 369.

December 2010 could not really be taken into account by Masdar Solar, Masdar or Mubadala when subscribing to the Project finance with the banks. Based on these two items of evidence, in no way could said Resolutions affect the legitimate expectations of the Claimant.

2) Objective economic circumstances at the time of the investment

875. In order to consider a breach of the FET standard, the legitimate expectations cannot be subjective expectations of the investor, but rather they must conform to objective expectations deriving from specific circumstances at the time of investing in the host State. Expectations are only legitimate when they are objective and are not *"unrealistic or the result of misplaced optimism"*[482]. This means not only bearing in mind the existing regulatory framework but also all the circumstances in place when making the investment and referred to by the Statement of Purpose itself of RD-L 6/2009[483]:

> *"The growing tariff deficit, [...] and the real costs associated to said tariffs is causing major problems which, in the current context of an international financial crisis, is deeply affecting the system and puts at risk not only the financial situation of companies in the Electric Sector, but also the very sustainability of the system."*

876. The objective economic circumstance referred to in the Statement of Purpose itself of RD-L 6/2009 cannot be just ignored or omitted by the Claimant, particularly when its first and second investments are contemporary with said international circumstances. This international economic crisis circumstance added an element of uncertainty which, at least, should have been evaluated and assessed by the Claimant when planning its investment in Spain. In fact, this written record on the Statement of Purpose of a binding Law is proof that such economic circumstances were relevant. This relevance was not sufficient for the Claimant. There is no record of it having requested any report to ascertain its relevance or the effects on the alleged future *immutability* of the remunerations' regime of the CSP Plants.

877. In the *Case Saluka v Czech Republic* the Tribunal stipulated the need to assess the expectations from an objective and reasonable perspective - and not subjective – of the investor:

> *"The scope of the Treaty's protection [...] against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances."*[484] (Emphasis added)

[482] *Mr. Franck Charles Arif v. The Republic of Moldova,* ICSID No. ARB/11/23, Award on April 8th 2013, paragraph 532. RL-0037.

[483] "*The growing tariff deficit, [...] and the real costs associated towith said tariffs is causingbringing about major problems which, in the current context of an international financial crisis, is deeply affecting the system and putsting at risk not only the financial situation of companies in the Electric Sector, but also the very sustainability of the system"*.

[484] *Saluka Investments B.V. v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶304. CL-0042

878. This criterion was subsequently assumed in much arbitration Case law[485]. In the *Parkerings v Lithuania Case* the Tribunal required a due diligence to anticipate the circumstances that could affect its investment:

> *"The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment."*[486]

879. Hence, the regulations set out in the General regulatory framework and the applicable Case law referring to the RE sector[487] affected the legitimate expectations that the Claimant could consider when making its investment in Spain.

880. In the same way, the international circumstances in place in 2008 and 2009 affected the legitimate expectations that the Claimant could configure when making its investments in Spain and their possible affectation of SES.

881. Consequently, the Claimant could not reasonably have configured legitimate expectations that implied the commitment or promise of the Government to the immutability of RD 661/2007 until 2051, the year in which it now estimates the end of the operating life of the CSP Plants.

3) Knowledge of the regulatory risk by the most authorised Doctrine.

882. The regulatory risk of the Spanish regulatory framework was known by the most authorised Doctrine. On several occasions the Claimant quotes the Manual by Mendonça, Jacobs and Dr. Sovacool about the FIT[488]. The Respondent agrees with the Claimant in terms of the authority and relevance to this case of this Doctrine as it is the Manual whose use is most widespread

[485] *Perenco Ecuador Limited v. Republic of Ecuador and State Company Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability, 12 September 2014, RL-0038, parag. 560 and 593; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, parag. 533 and 671, CL-0085; *Ulysseas, Inc. v. Ecuador*, UNCITRAL, Final Award, 12 June 2012, Fn 250 RL-0039; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13; 8 October 2009, 219, RL-0040; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, 224, RL-0041; *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, Fn 60, RL-0042; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, 365, CL-0077; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, 121, RL-0043; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 ,192 RL-0044; *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award, 3 November 2008, 175 CL-0060; *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007, 298, CL-0055.

[486] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 sept 2007, para 332. RL-0045

[487] Set out in Sections IV.A to IV.C of the present Counter-memorial.

[488] Claimant's Memorial, paras. 52 and 56

regarding FIT. This Manual sets out a general assertion about the existing regulatory risk on the energy market world [489] and said general assertion affects the Claimant:

> *"8.2 POLITICAL AND REGULATORY OBSTACLES*
>
> *"Political and regulatory obstacles play their part as well. The most obvious barrier relates to the inconsistent political support for renewable energy systems. Unlike subsidies and incentives for fossil-fuelled technologies, policies aimed at encouraging renewables have changed frequently, greatly discouraging widespread adoption of the technologies."*
>
> *[...] As **any renewable energy investor**, manufacturer or operator already **knows**, the variability of policy relating to renewable energy technologies serves as a serious impediment."*

883. This assertion is categorical and relevant for the present case. By setting out these regulatory obstacles, the Manual of Mendonça, Jacobs and Dr. Sovacool does not consider any exception, nor does it mention Spain as an exception to the other countries for having committed to an unmodifiable remunerations' regime.

884. Furthermore, the Manual studies the regime in force in Spain at the time of the investment by the Claimant[490]. It sets out the evolution of the regulations during the years 1994, 1998, 2004 and 2007. However, it does not mention that the Government has guaranteed or promised investors the immutability of the remuneration regime of RD 661/2007 during the operating life of the Plants. Self-evidently, if this commitment or promise of the Government had existed, the authors would have referred in their Manual to said exceptional regulatory framework.

885. Furthermore, the Manual mentions as a characteristic of the Spanish regulatory framework the regulation of the FIT by means of a regulatory-rank rule. It is clear that it refers to the possibility of being reformed more easily than a Law, with another rule of legal or regulatory rank:

> *"the Spanish FIT scheme has the legal rank of a Royal Decree. Even though it is 'stronger' than for instance a ministerial order, the Spanish renewable energy **associations** have **long called** for a FIT law."*

886. It has been precisely proven that the Association of thermosolar producers, PROTERMOSOLAR, submitted Public Comments to the CNE. And the existence of a possible immutability of remuneration in the CSP sector was never sustained. Furthermore, this Association proposed the application of the concept of "*reasonable rates of return"* to other technologies[491]. It confirms that the perception of the writers of the Manual set out above was

[489] Miguel Mendonça et al., (Posibilitando la Economía Verde – Powering the Green Economy) in the Manual of the System Feed-In Tariff (The Feed-in Tariff Handbook) (Earthscan, 2010). It is provided partially by the Claimant as exhibit C-0068. It is provided in full. Pages 134 and 135 R-0058

[490] Miguel Mendonça et al., (Posibilitando la Economía Verde – Powering the Green Economy) in the Manual of the System Feed-In Tariff (The Feed-in Tariff Handbook) (Earthscan, 2010). pages 85 to 87, R-0058

[491] In its proposals' document, with RD 661/2007 in force, it is stipulated that: "*it is suggested* [to the CNE] *to study the following actions:- To apply a discharge for the excessive profits that the generation activities at nuclear and large hydraulic plants have achieved since the introduction of the tariff deficit model in*

the correct one: there was neither commitment of the Government nor any promise to investors to maintain *immutable* the specific remuneration foreseen in RD 661/2007. Quite the contrary, the fact it was regulated by a regulatory rule entailed the possible modification of such remuneration to be adjusted to the principle of reasonable rates of return enshrined by Law, as currently occurs.

887. This exposition by the most authorised Doctrine of the Spanish regulatory regime proves that the Claimant could not reasonably have at the time of its investment any legitimate expectations implying the immutability of RD 661/2007 until 2051, the year in which it estimates the end of the operating life of the CSP Plants.

888. Quite on the contrary, the Regulatory framework in force at the time of the alleged investment by the Claimant and the other factual circumstances omitted by it, make it clear that the Claimant examined the risk and accepted that the regulations could change owing to political or economic circumstances.

889. In other words, the Claimant accepted the regulatory risk in place in the Spanish General regulatory framework knowing that it would obtain, in any case, *reasonable rates of return* for its investment in Spain. Consequently, the Kingdom of Spain has not breached said legitimate expectations by adopting the measures challenged.

(ii) Proof provided by the Claimant.

890. The Claimant, without prejudice to the subjective appreciation of its witnesses, has not provided any consistent proof confirming its arguments about the existence of a clear commitment by the Kingdom of Spain to maintain the remuneration foreseen in RD 661/2007 during the operating life of its Plants. Quite the contrary, the proof that the Claimant itself provides confirms that there were neither specific commitments nor a promise by the Government at the time of making its alleged investment:

1.- BNP Paribas Report dated January 24th 2008[492]: This Report is not a legal Due Diligence Report, but rather a financial one[493]. Notwithstanding, this Report neither include nor conclude that there exist a *commitment* or *promise* by the Government to maintain RD 661/2007 unchanged. Quite the contrary, it refers in the regulatory risks to the *stability* of the legal framework regulating renewable energies in Spain[494]. This *stability* does not exclude changes as a result of new relevant circumstances.

In other words, *stability* does not mean *commintment of inmutability*. This evidence provided by the Claimant confirms the thesis maintained by the Kingdom of Spain. The

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accordance with the Supreme Court theory regarding "reasonable profit" which already justified in the past certain measures regarding said Renewable Energies." (emphasis added) R-0083.

[492] Document C-0043

[493] The Claimant recognises this in its Document C-0042, page 34: "*Project Advisory Services:*
- Technical Advisor.- Lahmeyer GmbH; -Legal Advisor.-Mubadala Legal; -Financial Advisor.- BNP Paribas." (emphasis added)

[494] "*The legal framework regulating Renewable Energies in Spain is very stable. The special regime provides premiums and incentives for Renewable Energies in general and for solar Plants generators in particular." Document C-0043, pages 48 and 63*

Claimant invested, assuming in its legitimate expectations, the regulatory risk of the Legal framework in force in Spain at the time of subscribing to the Project finance.

2.- Pöyry report dated March 2009[495]: this is the only regulatory Due Diligence report requested by the Claimant when making its invoked investment. This Report refers to facts which are relevant in shaping the legitimate expectations of the Claimant:

a) The report affirms that RD 661/2007 was very generous with the FIT of the Solar PV Producers and, consequently, the Government has reacted by reducing by 25% the remuneration that RD 661/2007 initially established for the Solar PV Producers[496].

b) The report states that when the Government considered that the profits were supra-normal in the RE Wind sector, the Government also intervened to place a cap on its profits, modifying RD 436/2004 and publishing RD 661/2007 to replace it[497].

c) The report considers that the Government will continue to dominate the electricity industry, seeking to limit the profits of generators. It states that it is more likely that the Government will intervene by creating taxes on excessive profits or by limiting profits. Such intervention, faced with a possible direct intervention of the Goverment on the whole market or by limiting prices[498]. Pöyry Report does not say anything about a promise or commitment of the Government not to reform the RD 661/2007. On the contrary, it foresees that the intervention will be aimed at reducing profits rather than a full-scale intervention on the market.

d) When explaining the "*risks evaluated for the Spanish CSP market*"[499], it indicates the "*regulatory risk*" as the principal risk. And when developing this risk in a Section, Pöyry considers as the *principal* risk, but not *the only one*, the risk of falling outside the timeframes foreseen in Article 44 RD 661/2007. The Claimant

[495] Document C-0049

[496] Document C-0049, pages 6 y 7: "*In fact **RD 661 has proved to be too generous** with regards to the level of the FIT and this has led to un-sustainable levels of growth. **As a result, the Government has recently issued a Royal decree** that is specific to the Solat PV industry (RD 1578/2008) in attempt to slow the growth of the market"*[...] *" Solar PV projects that were not fully permitted and operational before 28th of September 2008 (RD 661) are forced on to the recently published RD 1578. In essence, **the tariffs under RD 1578/2008 have been reduced by about 25%** compared to the tariffs under RD 661."* (emphasis added)

[497] "*Furthermore, given recent high Pool prices, Special regime generators, in particular wind farms, had, according to the Spanish Government, been making **supra-normal profits**. As a result of these excessive profits **the government has intervened in order to cap profits** by modifying RD 436/2004 [...] and publishing RD 661/2007 to replace it*." Document C-0049, page 113

[498] "*Due to this major changes by the government, Pöyry believes the Spanish electricity industry will continue to be dominated by the government, with it **actively managing the market** to **try and maintain a cap on generator profits**.*[...] *Thus **the government is more likely to intervene** to tax companies for windfall profits (i.e. clawback of allowances), **or cap revenues** (RD 661/2007 & RD 1587/2008), than it is so directly intervene in the wholesale market and cap prices".* Document C-0049, page 113.

[499] "*Poyry has identified a number of key risks applicable to acquiring and/or developing solar projects in Spain: Regulatory risk.* [...] ***Regulatory risk**. The main risk we perceive for the CSP industry relates to the projects that are currently in development but not under construction and are therefore subject to the regulatory risk of a downward revision of RD 661*" Document C-0049, page 127

cannot reasonably disregard any other risk and consider that the "*principal*" risk regarding the start-up of the installation was the "*sole*" risk of its investment.

e) The immutability of the remuneration regime is not to be found amongst the conclusions drawn by the Pöyry report. Furthermore, the conclusions confirm the thesis mantained by the Kingdom of Spain, contradicting the Claimant.

In fact, in the final chapter of the Report ("*The 2020 horizon and the development of the Spanish renewable industry*"), Pöyry sets out the projection that, in its opinion, this industry will have in the coming years. So, it does not conclude that the Government has promised the immutability of the remuneration regime laid down by RD 661/2007. On the contrary, it confirms that the Government is determined to provide "*reasonable rates of return"* for investors by means of subsidies:

> *"The Spanish government has stated publicly in a number of occasions its full* commitments to it *[the "renewable" business]*. In addition, recent history tells us that even though renewable are expensive; **the government is willing to provide a reasonable return for investors by keeping the subsidies**, even in the event of tariff deficits being generated over time."

The regulatory Due Diligence provided by the Claimant does not argue that the Claimant had any guarantee or promise regarding the immutability of the remunerations set out in RD 661/2007. Rather, it can be concluded from it that: (1) in cases of over-remuneration the Government have intervened by limiting remunerations, (2) the Government´s determination to intervene was clear and (3) the Government was determined to provide "reasonable rates of return" to investors through *subsidies*, not through the *remuneration measures of RD 661/2007*.

The evidence provided by the Claimant to prove the Due Diligence that configured its legitimate expectations does not really prove that which is stated by the Claimant. Furthermore, from this evidence we can only deduce a possible expectation of obtaining reasonable rates of return (under a "2020 horizon"). That is, precisely, what the Plants currently receive: reasonable rates of return.

3.- The alleged Project Finance Contracts between the CSP Plants with the Banks. The Claimant has provided the incomplete drafts of the contracts, as the Annexes have been omitted[500]. Throughout their Articles the mentioned drafts set out the possible modification of the remuneration regime of the CSP Plants as well as the consequences of the modification or replacement of RD 661/2007 in the future. Such contracts and their Annexes are relevant to make clear the true expectations of the Claimant.

This evidence makes it clear that the possibility of a modification of RD 661/2007 was subject to negotiation and it was accepted by the parties to the contracts. Hence, the Claimant, as well as the so-called "*Guarantees of Abu Dhabi*" (Mubadala and Masdar), gave their consent to this possible modification. The consecuences of a modification in the

[500] Documents BQR-73 (Arcosol); BQR-74 (Termesol) and BQR-75 (Gemasolar).

CSP Plants returns were incorporated to the contract, including the recalculation of the basis case and the possible rescission of the contract.

The drafts of the contracts provided by the Claimant contain numerous Clauses[501] which were allegedly accepted by the Claimant and which refer to the regulatory risk. This regulatory risk is foreseen during the construction of the installations and after their start up. These Clauses do not lead to doubt that for the parties the regulatory risk did not entail any commitment by the State not to modify the regime of RD 661/2007[502]. On the contrary, it was a risk which had been clearly foreseen and whose consequences had been specifically agreed and accepted by the parties.

In light of such Clauses it does not seem credible that a diligent investor could have reasonably configured its certainty that the remuneration measures of RD 661/2007 would remain unchanged during the contracts´ period. Thus, even less credible is the Claimant's belief that the measures would maintain unchanged until 2051.

891. Consequently, the evidences provided by the Claimant prove that at the time of the investment, the Claimant could not reasonably have a solid expectation that all the measures of RD 661/2007 would remain unchanged throughout all the operating life of the CSP Plants. In other words, the evidences provided by the Claimant prove that the Kingdom of Spain did not breach the Claimant´s legitimate expectations with the adoption of the measures challenged.

(iii) Contradictions in the arguments of the Claimant.

(a) The Claimant does not defend the standstill of the Regulatory framework but *de facto* is claiming its standstill until its regulatory level.

892. The Claimant, in making its allegations, falls into contradictions which determine the inconsistency of its arguments. In this way, a categorical clarification is made in the Claimant's Memorial which seeks to delimit the object of its Claim.

893. The Claimant states that "*it is not the Claimant's position that the obligation to accord FET in the ECT means that a host State must completely freeze its regulatory regime*"[503], but rather

[501] Document BQR-73, pages 15 (final paragraph), 17 (definition of regulated tariff), 46 (letter j), 47 (section 11.2.7); 50 (letter g).
Document BQR -74: pages 15 (final paragraph), 17 (definition of regulated tariff), 46 (letter j), 47 (section 11.2.7); 49 (letter g).
Document BQR-75: File "*Gemasolar EIB Loan Agreement (English) - vFinal.docx*": pages 14 (third to last paragraph), 15 (definition of regulated tariff), 29 (Section 4.03(A) "legislative change"); 60 (letter g), 65 (letter g). Also in the file "*Gemasolar - Senior facility_(English) - vFinal.doc*": pages 14 (second to last paragraph), 15 (definition of regulated tariff), 40 (letter k), 45 ((section 11.2.8) 7 48 (letter g).

[502] The three drafts are based on the possible replacement at any time of RD 661/2007: "*Regulated Tariff: shall mean that current tariff set out in Article 25 of Royal Decree 661/2007 of 25 May, for installations of production of electricity equal to the Plant, or the subsequent tariffs that substitute at any time the tariff currently in force.*"

[503] "*For the avoidance of doubt, it is not the Claimant's position that the obligation to accord FET in the ECT means that a host State must completely freeze its regulatory regime. It does, however, mean that, by entering into the ECT, Spain accepted limitations on its power to fundamentally alter the regulatory framework applicable to the Claimant's investments, particularly in ways that would be unfair, unreasonable and*

that the Kingdom of Spain, by using its power to alter the Regulatory Framework, has accepted limitations whereby such alteration cannot be unfair, abusive or non-equitable.

894. Notwithstanding this assertion, Section 15.2(a) indicates that the legitimate expectations of the Claimant were the "*inviolability*" of the economic measures set out in RD 661/2007 and that the Government had *commited* to maintain these measures throughout the operating life of the CSP Plants. In other words, the Claimant is *de facto* claiming the standstill of the Spanish Regulatory framework up to its regulatory level. In the present case, the Claimant is claiming the inviolability of said measures until 2051. Notice that the Claimant is claiming the damages which would have supposedly been caused along the operating life of the Plants: 40 years[504]. Said contradiction is unsurmountable as according to the Claimant's allegations there are two opposing possibilities:

a.1) On the one hand, to ascertain that the Kingdom of Spain breached the legitimate expectations of the Claimant, the Arbitral Tribunal must thus deem it to have been proven that the Claimant reasonably understood that the economic measures of RD 661/2007 would not be revised throughout the operating life of the Plants. In other words, the Arbitral Tribunal must accept that the Spanish Regulatory framework, up to its regulatory level, had undertaken to remain unchanged, at a standstill, at least until 2051. This clearly contradicts that which the Claimant itself states in its paragraph 361.

a.2) Sensu contrario, if the Arbitral Tribunal accepts the clarification made by the Claimant[505], it may thus not consider that the Claimant could have a legitimate expectation that the economic measures of RD 661/2007 would remain unchanged for 40 years. This is in view of the fact that the Claimant acknowledges that the ECT enables States to modify the Regulatory framework in accordance with the circumstances, provided that the reform is not unfair, abusive or non-equitable. This possibility will thus be incompatible with the requested made by the Claimant as it is claiming that it based its legitimate expectations on the immutability of all the measures (economic or not) of RD 661/2007 until 2051.

895. Self-evidently, the Claimant makes such clarification because it is aware of the Arbitration Case law set out in application of the ECT. In actual fact, the Arbitration Case law applicable to the latest ECT denies the investors' right to reasonably have any legitimate expectations of a *standstill* in the Legislation unless the host State has actually promised that it will not modify the applicable regulations in the future.

896. The mentioned Arbitration Case law has already been set out in different Awards which make this question peaceful with regard to the ECT. The present procedure is subject to the arguments provided by the Arbitral Tribunal in the *Case Plama v. Bulgaria*. It is relevant insofar as it examines the legitimate expectations of the Claimant under the ECT and as there were no administrative concessions, licenses, contracts nor promises of the host State about any

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inequitable, including by undermining an investor's legitimate expectations."[emphasis added] Claimant's Memorial, para. 361.

[504] Quantum Brattle Report, paras. 65 and 66. It should be pointed out that no feasible technical justification is offered as regards the timeframe of 40 years referred to in order to quantify the damages.

[505] "*does not wish to defend that* [...] *the Host State must totally freeze its regulatory regime*"

future standstill of its own regulations. Consequently, its conclusion is consistent with the proven facts by the Kingdom of Spain[506]:

> *"the Tribunal believes that the ECT does not protect investors against any and all changes in the host country's laws. Under the fair and equitable treatment standard the investor is only protected if (at least) reasonable and justifiable expectations were created in that regard. It does not appear that Bulgaria made any promises or other representations to freeze its legislation on environmental law to the Claimant or at all."*

897. The Arbitral Tribunal ruled in the same way in the *Case AES SUMMIT v Hungary*. This Award denied, under the ECT, that an investor, from a Regulatory framework, could deduce the existence of a *stability clause*. Consequently, the Arbitral Tribunal in this Case required specific commitments of the State which would make the investor legitimately believe that its regulations would not be modified:

> *"The stable conditions that the ECT mentions relate to the framework within which the investment takes place. Nevertheless, it is not a stability clause. A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts. [...]*
>
> *In this case, however, the Tribunal observes that no specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a stability clause) or that could legitimately have made the investor believe that no change in the law would occur"(emphasis added)*

898. This Arbitral Precedents, as we will explain afterwards, also contradict the standstill that the Claimant is requesting *de facto*.

(b) Contradiction between the alleged *promise* made by the Government and the bases for the argument of said promise.

899. As has been set out above, the Claimant does not provide any verifiable evidence about the alleged *commitment* of the Government to maintain *freezed* the RE remunerations of the Claimant. Furthermore, a contradictory argument is the basis for such *promise* or *commitment* of the Government in a regulatory rule, Article 44.3 of RD 661/2007 which the Claimant interprets totally out of context (1) with regard to its legal framework, (2) with regard to RD 661/2007 itself and (3) with regard to consolidated Case law doctrine on similar previous regulatory rules.

900. In actual fact, the Claimant states that Article 44.3 of RD 661/2007 is a *stabilisation clause* or a *promise* to freeze the Regulation during the operating life of the Plants under its scope. The Claimant deduces this *"promise*" as Article 44.3 sets out a tariff revision regime as from 2010 and states that these revisions would not affect installations already operational prior to the revision.

[506]Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 219, (emphasis added) CL-0058

901. However, Article 44.3 of RD 661/2007 does not revoke nor suspend nor can it affect the legal principle of reasonable rates of return. Furthermore, Article 44.3 of RD 661/2007 must necessarily be interpreted in the context of the legal principle of a reasonable rate of return. This principle enables the Government to determine the remunerations, serving as the basis and limit for its action. This entails the need to act when over-remunerations occurred or imbalance situations contrary to the actual principle of reasonable rates of return. We should remember that this profitability must be *reasonable* for the investors, but also *reasonable* for Consumers, who have to pay the costs of the System.

902. Only in this way does Article 44.4 RD 661/2007 make any sense when it empowers the CNE to comply information about the investments, costs, income and other parameters of the different real installations which configure the standard technologies. This empowerment is only understood within the framework of the supervisory work of the Regulator to avoid imbalance situations in the SES and which breach the mandate of granting a reasonable rates of return to the producers.

903. To put it another way, Article 44.3 refers to *mandatory* revisions, imposed by the regulations, which did not affect the installations which were up and running under the terms of paragraph 2. However, these mandatory revisions do not mean a promise or guarantee which would exclude any other revisions deriving from a System imbalance or a fundamental change in economical circumstances such as over-remuneration situations or unforeseeable circumstances. The mentioned circumstances were, inter alia, the major international crisis which the Claimant omits, and the sensitive decrease of the electrical demand.

904. These extraordinary revisions are the ones which could be carried out, as Act 54/1997 requires the granting of reasonable rates of return to investors. And by investing the Claimant accepted this regulatory risk, aware of this order stated by the Law to the Government, as the basis for and also the limit of Goverment´s power.

905. The interpretation of the Claimant is thus not reasonable: in light of the *mandatory* revisions' regime of Article 44.3 RD 661/2007, the Claimant argues that the Government lost the regulatory authority of revising in any other way all the measures of RD 661/2007. It entails avoiding the legal Principle of reasonable rates of return.

906. Furthermore, the Claimant grounds its expectations on Article 44.3 RD 661/2007. This section refers to the *economic* measures, but it does not refer to other *non-remuneratory* measures such as the possibility of burning gas to produce electricity[507]. However, the Claimant claims the right to produce energy by burning gas, not included in the scope of Article 44.3 RD 661/2007. It is thus not legally reasonable to found a "*Stabilisation clause*" of all the measures of RD

[507] This possibility is regulated in Article 2.1.b.1.Subgroup b.1.2 of RD 661/2007: "*Facilities which use thermal processes alone for the transformation of solar energy, as the primary energy, into electricity. In such facilities equipment may be employed which uses a fuel for the maintenance of the temperature of the heat transfer fluid in order to compensate for a lack of solar irradiation which may affect the planned delivery of energy. The generation of electricity from such fuel should be less than 12% of the total production of electricity, calculated on an annual basis, if the facility sells its energy under Option a) of Article 24.1 of this Royal Decree. Such percentage may rise to 15% if the facility sells its energy under Option b) of the cited Article 24.1*." It is evident that such possibility does not fall between the economic remunerations whose revision is regulated by Article 44.3 RD 661/2007. R-150Bis.

661/2007 (remuneratory or otherwise) on Article 44.3 paragraph 2 RD 661/2007, which only refers to the *mandatory* revisions of the *remuneratory* measures.

907. In addition, it is not reasonable to argue that the purpose of Article 44.3 of RD 661/2007 was to freeze the existing remuneration regime when the Claimant was aware that RD 661/2007 modified the tariff regime set out in RD 436/2004 which established a tariff revision system very similar to that of RD 661/2007. At no time did the Supreme Court decided that this revision system froze the existing tariffs nor did it prevent the Government from exercising its regulatory authority, provided that such modification was in compliance with the principle of a reasonable level of return.

908. The existence of a "*commitment*" or "*promise*" raising the legitimate expectations of the Claimant at the time of the investment must be specific and real to make the host believe that the Government was really and clearly committed to not reforming the measures of RD 661/2007, during the operating life of the Plants of the Claimant.

909. This is the requirement of the Arbitral Tribunal in the *Case Plama v. Bulgaria*:

> *"It does not appear that Bulgaria* ***made any*** *promises or other representations* ***to freeze its legislation*** *on environmental law to the Claimant or at all."(emphasis added)*

910. The Arbitral Tribunal in the case *Total v Argentina* concluded that legitimate expectations may be created by any intentional conduct by the Host State which makes the investor reasonably believe that the former has "*the intent to pursue a certain conduct in the future*". It solely required that the declaration or conduct should be sufficiently specific:

> *"[t]he more specific the declaration to the addressee(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future"*[508]

911. Otherwise, in accordance with that set out by the Arbitral Tribunal, it can be concluded that "the less specific the declaration to the addressee(s), the less credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future".

912. Hence, it is not sustainable to state that the wording of paragraph 2 of Article 44.3 RD 661/2007 is a "*Stabilisation clause"* or a *promise* of the Government to freeze all the measures of RD 661/2007, whether economic or otherwise. In other words, it is not sustainable to state that this sole paragraph entailed a revocation or modification of the principle stated in Article 30.4 ESL 1997 for the CSP sector. This would mean avoiding the Regulatory framework as a whole.

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[508] *Total S.A. v. the Argentine Republic*, Case ICSID No. ARB/04/01, Decision on Responsibility dated December 27th 2010, 119-121, "[t]*he more specific the declaration to the addressee(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future in a context of reciprocal trust and good faith. Hence, this accounts for the emphasis in many awards on the government having given 'assurances', made 'promises', undertaken 'commitments', offered specific conditions, to a foreign investor, to the point of having solicited or induced that investor to make a given investment*" (emphasis added). RL-0043.

(c) Assumption of the regulatory risk by the Banks after the start-up of the Plants.

913. The Claimant argues, when setting out its investment both in Gemasolar[509] and Arcosol and Termesol[510], that once the commercial activity of the CSP plant has commenced, *the Banks would assume any risk deriving from a change in the regulatory regime* during the remaining validity period of the loan agreement. Both assertions prove contradictory with the present claim.

914. During the course of the claim it argues that the State promised and undertook not to modify the remuneration measures of RD 661/2007. However, **the Claimant recognises** in these sections that ***there was a regulatory risk***, but that such risk was assumed by the banks once the commercial activity of the Plants would have commenced.

915. By accepting that there was a *regulatory risk* the Claimant is admitting the possibility of the reform of the remuneration regime in accordance with the applicable Legislation. In other words, within the limits of Article 30.4 Act 54/1997. This is why this recognition contradicts its own arguments. It should be pointed out that paragraph 138 of the Claimant's Memorial actually affirm the existence of a "*regulatory contract*" of the State as from Article 44.3 del RD 661/2007[511]. The existence of a *regulatory risk* and its admission by the Claimant is incompatible with the claim of a *stabilisation clause* which guarantees the unmodifiability of the remuneration regime applicable to the Claimant.

916. Furthermore, the Claimant states that the regulatory risk, once the CSP Plants have been started up, was assumed by the Banks which signed the *Project finance*. This seems to mean that the banks may suffer the possible consequences of a legislative modification. However, this assertion is inconsistent with the fact that it is the Claimant who claims against the measures challenged, seeking a remedy of the supposed damages caused to it.

917. In other words, if it was true that the Banks assumed the regulatory risk, the banks should have suffered all the consecuences (positive or negative) of the new system. However, it is clear that the banks have not brought any action against the new system in this case.

918. Thus, the Claimant should clarify the alleged "*risk*" assumed by the Banks as this assertion is incompatible with the action brought by the Claimant.

(c) Insustainability of the claim in accordance with the applicable Arbitration Case law.

[509] Paragraph 166 of the Claimant's Memorial: "*During the construction and testing stages, Torresol Energy, backed up by the guarantees of its shareholders (and, in the case of ADFEC, with a mutual guarantee from Mubadala), assumed the risk of any changes in the regulatory regime. On starting the commercial activity of the CSP plant, the guarantees would be reduced and the Banks would assume any risk deriving from a change in the regulatory regime during the course of the remaining 20 years*."

[510] "*Once the commercial activity of the CSP planta has commenced, the guarantees would be reduced and the Banks would assume the risk of any potential changes in the regulatory regime during the remaining term of validity of the loan agreement*."

[511] "*In short, Spain established a regulatory contract with investors offering a stable rate of long-term incentives in exchange for investments*."

919. The allegations regarding the breach of legitimate expectations by the Claimant by the Kingdom of Spain must be disregarded as has been set out above (1) owing to the intentional omissions of the Claimant itself, (2) owing to the evidence provided by the Claimant itself and (3) owing to Claimant's own contradictions.

920. In addition, the allegations of the Claimant do not have any basis either in accordance with the recent Arbitration Case law. Clearly relevant to the present case are the Abitral Awards which have interpreted and applied the ECT.

921. The Claimant argues that "*one particularly important element of legitimate expectations is the protection from State action that threatens the stability of the legal and business framework upon which an investor reasonably relied in making its investment*." The Claimant lists various Awards pertaining to FET standard to argue that "*the State's conduct, which may contribute to the creation of a reasonable expectation* [...], *may take the form of the legal framework in relation to, or surrounding, the investment*". The Claimant thus concludes that "*Numerous tribunals have endorsed [that] although there was no direct and specific undertaking to the individual investors; the guarantees included in domestic legislation were held to constitute a promise to foreign investors which founded a legitimate expectation*" [512].

922. Clear consequences can be deduced from this line:

- The Claimant implicitly recognises that there is neither promise nor direct commitment of the Government to the Claimant and its expectations thus derive from the General regulatory framework.

– The Claimant relies the alleged guarantees of the Government on a single regulatory rule, interpreted out of context with regard to the Legal Framework on which it made the alleged investment. As has been set out, the Government neither gave any promise to the Claimant regarding to the standstill of the remunerative measures nor issued any act in this sense at the time the investor made its investment.

923. However, the conclusion it reaches to argue the legitimate expectations on the standstill of RD 661/2007 is not upheld by the latest Arbitration Case law.

924. Indeed, the latest Arbitration Case law assess the breach of the legitimate expectations of investors when these expectations rely on the inmutability of the *regulatory framework* governing such investments. The Claimant, amongst others who are less relevant and prior, quotes the *Case Plama v Bulgaria*. The Respondent only agrees with the Claimant in terms of the relevance and applicability of this *Case Plama v Bulgaria* to examine the legitimate expectations of the Claimant.

[512] Claimant's Memorial, paras. 362 y 366.

925. The *Case Parkerings v Lithuania* is also clear as it sets out a different level of protection in accordance with the commitments assumed by the State vis-à-vis the Claimant investor. According to its criterion, which has been seconded by numerous and more recent cases[513]:

> *"It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment."*[514] *(emphasis added)*

926. It is also necessary to highlight, in view of its clarity, the *Case EDF v Romania*, as it sets out this evolution in the concept the legitimacy of expectations:

> *"The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.*
>
> *Further, in the Tribunal's view, the FET obligation cannot serve the same purpose as stabilization clauses specifically granted to foreign investors."*[515] *(emphasis added)*

927. In the context of the ECT, reference was also made to that decided on by the Arbitral Tribunals in the *Cases Plama Consortium v Bulgaria* and *AES Summit v Hungary*[516]. This criterion was

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[513] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15; Decision by the Ad hoc Committee regarding the application for annulment by the Argentine Republic; September 22nd 2014, 183 and 183, RL-0046; *Perenco Ecuador Ltd. v. The Republic of Ecuador and State Company Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision about pending matters pertaining to jurisdiction and responsibility September 12 2014, 593 RL-0038; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, 378 y 379, CL-0077; *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22; Award 23 September 2010, 9.3.25, confirmed by the Decision of the ad hoc Committee on the application for annulment, 29 June 2012, 95, RL-0047; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability 27 December 2010, 122, RL-0043; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award 5 September 2008, 261.ii) CL-0059.

[514] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8; Award 11 September 2007; 332. RL-0045.

[515] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13; 8 October 2009; 217 and 218. RL-0040.

[516] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22; Award 23 September 2010. Paragraph 9.3.29. *"In this case, however, the Tribunal observes that no specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a stability clause) or that could legitimately have made the investor believe that no change in the law would occur"*. RL-0047.

repeated recently in the case *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*[517].

928. In line with the arbitration Case law set out above, we can thus conclude in line with recent doctrine that:

> *"For an investor to legitimately claim damages as a result of the alteration of the general framework, additional guarantees are needed, such as an express contractual commitment (preferably in the form of stabilization clause) or a specific unilateral declaration attributable to the State that it would not proceed with changes."*[518] *(emphasis added)*

929. In other words, the arguments of the Claimant about the legitimacy and reasonable nature of its expectations can not rely on the latest and most relevant Arbitration Case law. What's more, we should remember that these expectations rely only on the <u>omissions</u> in the wording of a regulatory paragraph: paragraph 2 of Article 44.3 RD 661/2007[519].

930. This lack of any grounds for the claim is more evident, if possible, if due consideration is given to <u>the Regulatory framework actually applicable</u>. In actual fact, as has been set out above, the Claimant refers to RD 661/2007 as the "*legal Framework*" for the investment. However, it has already been stated that the Legal Framework was actually made up of more regulations and Case law that should not be ignored. Worthy of special mention is not only Article 30.4 of the ESL, but also the Case law applicable at the time of the investment. Well before the investment, this Case law had already categorically and repeatedly declared that:

> *"Companies freely deciding to set up on the energy generation market under a special regime, [...], <u>are or must be aware</u> that these incentives <u>may be modified within the legal guidelines</u> by said authorities. One of the* ***regulatory risks*** *to which they are submitted, which will necessarily have to be*

[517] *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 para 617-618: *"Economic, social, environmental and legal circumstances and problems are by their nature dynamic and bound to constant change. It is indispensable for successful public infrastructure and public services to exist that they are adaptable to these changes. Accordingly, State policy must be able to evolve in order to guarantee adequate infrastructure and services in time and thereby the fair and equitable treatment of investments. The legal framework makes no exception. The Tribunal is reassured of its view by findings of other arbitral tribunals. Claimant has introduced AES v. Hungary into the proceedings where the tribunal found: The stable conditions that the ECT mentions relate to the framework within which the investment takes place. Nevertheless, it is not a stability clause. A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative."* RL-0048.

[518] *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a controversial Concept*. Michele Potestà. ICSID Review, Vol. 28, No. 1 (2013), page 113, February 27, 2013. RL-0049.

[519] The Claimant states that this Article configured its expectations that all measures of RD 661/2007 (economic or not) would remain unchanged at least until 2051, when the Claimant affirms that its CSP Plants will finish its operational live.

considered, is precisely the variation in the parameters of premiums or incentives." [520]

931. It is reasonable to conclude that the Claimant was unable to base its legitimate expectations on the basis that the Kingdom of Spain would maintain the measures of RD 661/2007 unchanged until 2051, the date on which it estimates the operating life of its Plants will be finished. This would seem to be unbelievable from any angle. Especially in an economic sector as dynamic as that of Renewable Energies.

932. In conclusion, it is reasonable to assume that the Claimant examined the Regulatory framework in force at the time of the investment and accepted the existing regulatory risk. This in the belief that the remuneration that its *regulatory Due Diligence* it would receive would relate to "*Horizon 2020*":

> *"the government is willing to provide a reasonable return for investors by keeping the subsidies, even in the event of tariff deficits being generated over time"(emphasis added)*

933. In other words, the Claimant´s legitimate expectations, according to the Regulatory Framework, could not be further than obtaining, in any case, *reasonable rates of return* for its investment in Spain.

934. Furthermore, as has been stated above, the expectations of the Claimant included the obtaining of *know-how* which would enable it to lead thermosolar Renewable Energies projects in Abu Dhabi and thereby diversify its economy. This was set out in the *Joint venture* subscribed to by Masdar in March 2008. Its expectations also included the training of students from Abu Dhabi at the installations situated in Spain. Such expectations have been also met as is proven in the Expert report by Accuracy[521].

Consequently, the Kingdom of Spain has not breached the legitimate expectations of the Claimant regarding an alleged immutability of the measures set out in RD 66172007 throughout the operating life of its CSP Plants.

(2.2) Spain has not breached a commitment to provide a stable regulatory framework.

935. The Claimant argues as a second manifestation of the FET that there has been a breach of the obligation to "*provide a stable and predictable regulatory regime*". In its arguments[522], the Claimant: (1) States that this obligation is an *essential* element of the FET. (2) It reiterates that its expectation was the application of the regulated tariff "*for their entire operational lifetime"*. (3) It argues, in conclusion, that "*the stabilisation guarantees under Article 44, section 3 of RD 661/2007 and in Article 4 of RD 1614/2010,* [...] *have to be assessed in the light of Spain's stability obligations under the ECT*." and (4) this conclusion is set out in "*the commitments*

[520] Decision by the Third Chamber of the Supreme Court dated October 25th 2006, Legal Basis Three (R-0071); and Decision by the Third Chamber of the Supreme Court on March 20th 2007, Legal Basis Two (R-0074).
[521] Expert economic report on the Claimant and its claim by Accuracy, pages 15 to 20.
[522] Claimant's Memorial, paras. 381, 384, 385 and 386.

deriving from the 2010 Resolutions" in which it established "*the specific economic regime that would be applying to the CSP Plants for their entire operational lifetime*."

936. The Kingdom of Spain has met the obligation foreseen in Article 10(1) of the ECT to provide stable conditions to the Claimant's investment. The Claimant has also been granted an FET, without any arbitrary, disproportionate or abusive alterations of the existing regulatory framework.

937. To demonstrate compliance by the Kingdom of Spain, there will be explained the mistakes that the Claimant's Memorial assumes as its basis. Then Spain's compliance will be anylized through the requeriments to provide stable conditions in the light of case law under the ECT. It is worth mentioning at the outset that the Claimant in this section has totally ignored said international arbitration case law.

(a) Errors of the Claimant when developing its line of argument.

938. The Claimant's arguments are based on three premises which we deem to be wrong: (1) Limiting the regulatory Framework to a single provision of two royal decrees; (2) Confusing the "Stable conditions" ensured by the ECT with an alleged "*right to immutability*" of the regulatory standards (3) Framing said stability within the Resolutions with an non-existent commitment *throughout the working life* of the Plants.

(i) Error by reducing the "Regulatory framework" to a single provision of two royal decrees.

939. In its arguments the Claimant states that "the stabilisation guarantees under Article 44, section 3 of RD 661/2007 and in Article 4 of RD 1614/2010, [...] have to be assessed in the light of the Spain's stability obligations under the ECT." In other words, it argues that the "stability of the regulatory framework" is identified with the immutability of two regulatory Articles. This erroneous approach has already been made clear in the present Counter-Memorial[523].

940. Hence, to assess and evaluate whether the Kingdom of Spain breached the FET standard, this must be based on the existence of an LSE which included within the remuneration to RE producers a *reasonable rate of return*: Said framework was completed by further legal and governmental regulations as well as by case law from the Tribunals which stated that said principle was the base and limits of the State's powers when setting the remunerations.

941. The Government's aim when setting up said regulatory framework was also made clear before publishing RD 661/2007. Said aim was set out in the Renewable Energies' Plan 2005 to 2010 in which the Government set out its calculations of the remunerations to be granted, seeking a return of "around 7%". It is not fixed, to be precise, nor is it wished to fix it, to allow its adaptation to such circumstances as may occur.

942. This is why the "stability of the economic regime for Renewable Energies" cannot be based on the maintenance of the measures set out in Article 44.3 RD 661/2007, as it implies being unaware of the real framework that the investor accepted at the time of its investment.

[523] Section IV.E.(2).b.i.1 of the present counter-memorial.

(ii) Error when identifying the obligation to grant a stable general regulatory framework with the standstill of the Regulatory framework until its regulatory level.

943. As has been explained, the Claimant, contrary to what it says[524], reiterates the maintenance of all the measures deriving from two single Articles. And it even claims the maintenance of other measures not set out in said provisions such as the possibility of producing energy by burning gas[525].

944. The FET does not assume any right of the investors to a standstill or freezing of the legislation of the States, remaining immutable until a regulatory level. What is for sure is that the regulatory modifications do not breach the FET standard when, in the light of the circumstances in place, they are reasonable. This is true both in terms of the grounds and in the measures adopted. This will also be the case when the economic balance of the investment is respected, guaranteeing reasonable rates of return.

945. An interpretation which required the immutability of the regulatory framework, whatever the economic circumstances, besides being inappropriate or unrealistic, would breach the FET concept in the manner it was conceived of with the enactment of the ICSID Convention. One of the promotors of the ICSID Convention, Aron Broches, argued that the derivative instruments of the Convention allowed the balanced protection both of host States and of investors:

> *"The Convention has sometimes been regarded as an instrument for the protection of private foreign investment. This characterization is one-sided and too narrow. The purpose of the Convention is to promote private foreign investment by improving the investment climate for investors and host States alike. The drafters have taken great care to make it a balanced instrument serving the interests of the host States as well as investors."*[526] *(emphasis added)*

946. In other words, although investors may reasonably and legitimately expect a host State to provide them with a stable legal and business Framework for its investment, this approach has been qualified by arbitratal case law in order to prevent a host State from being unjustifiably prevented from making legitimate and reasonable reforms or regulatory changes imposed by justified circumstances. The possibility of making adaptations or changes is recognised as the most reasonable approach.[527]

947. In this regard Doctrine has had its say. Dr. Christoph Scheurer states that the FET standard:

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[524] Claimant's Memorial, para. 361.

[525] Possible production by burning gas was not a remuneration matter under Article 44.3 RD 661/2007. It was an autonomous measures set out in Article 2 RD 661/2007. This Article is unrelated with Article 44.3 RD661/2007. This is why there are no grounds for claiming the use of gas based on an alleged commitment to immutability under Article 44.3 RD 661/2007. This is the result of the lack of consistency of the arguments for the damages claimed which include the use of said gas.

[526] *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Aron Broches, 136 Collected Courses, Hague Academy of International Law, (1972-II) at p. 335 and p..348. RL-0050.

[527] Report UNCTAD FET, page 67. RLA-[Cont dda ISOLUX]

> *"is not absolute and does not amount to a requirement for the host state to freeze its legal system for the investor's benefit. A general stabilization requirement would go beyond what the investor can legitimately expect. It is clear that a reasonable evolution of the host state's law is part of the environment with which investors must contend"*[528] *(emphasis added)*

948. What the Claimant seems to be seeking is for a dynamic, evolving sector such as that of Renewable Energies to remain unchanged until year 2051 in such a way that it is incapable of reacting in the event of any duly justified needs. This perspective is unsustainable and anti-economic. What's more, it contradicts Arbitral Case law which interprets the ECT as we will see below.

(iii) Error by framing its arguments within a non-existent commitment

949. The Claimant frames this alleged breach within the existence of a commitment by the Government in the 2010 Resolutions. It states that in these Resolutions "*the specific economic regime that would be applying to the CSP Plants for their entire operational lifetime*."

950. As stated above, said commitment did not exist[529]. It has already been demonstrated that the Claimant provided an incorrect translation into English of the request for information of the Plants and of the response provided by the Kingdom of Spain. Likewise it has been stated the content of the 2010 Resolutions. Hence, it has been proven that there is no commitment to which the Claimant refers between the Kingdom of Spain and the CSP Plants.

951. In other words, the evaluation of the measures adopted and challenged must be carried out in accordance with the general regulatory framework that Spain had at the time of the investment. This framework was based on the Principle of a "reasonable" return and this "reasonableness" made it necessary to react in the event of over-remuneration situations. What's more, notwithstanding the serious circumstances the world economy has experienced since 2008, a reasonable rate of return has always been maintained to the benefit of the investors.

(b) No breach of the FET standard set out in the ECT in accordance with its Arbitral Case law.

952. The Claimant quotes in the present section numerous awards to back up its arguments. Surprisingly, all are previous to 2008 and none applies the ECT. Self-evidently, this has been done intentionally as current Arbitratal Case law has interpreted the ECT with regard to the stability of the general regulatory framework in accordance with the doctrine set out. This prevents any unreasonable interpretations of the ECT as the Claimant wishes.

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[528] *Fair and Equitable Treatment in Arbitral Practice*, 6, Journal of World Investment & Trade, 357, at 374 (2005). RL-0051.

[529] Section IV.C.3.3 of the present Memorial stipulates that it is a Communication (not a Resolution) which it is drafting in the present tense; which refers to the regime applicable "at present" and fails to mention at any time the future or the working life of the Plants. It merely sets out the regulatory regime in force in 2010. In actual fact, as it is a Communication, there is no possibility of lodging an administrative appeal against the Section where said Communication is drafted.

953. It should be pointed out the Claimant has brought this arbitration against the Kingdom of Spain under the ECT because Spain has not maintained unchanged all the measures of RD 661/2007 (including non-remuneratory ones) until 2051. And this without the Claimant mentioning evident economic circumstances occurring from 2008 onwards worldwide. It only takes into account the economic crisis for its calculation of alleged damages and when it refers to the promotion by the Autonomous Communities of investments in RE[530]. This silence when talking about the measures challenged certainly isn't reasonable.

954. In this regard, the Arbitral Tribunal in the case *AES v. Hungary* indicated that:

> *"The stable conditions that the ECT mentions relate to the framework within which the investment takes place. Nevertheless, it is not a stability clause. A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts."*[531]

955. This criterion has been followed recently by the Arbitral Tribunal in the *case Mamidoil v. Albania*[532]. Notwithstanding, said Arbitration Case law had already been set out in 2008 in the *Case Plama v. Bulgaria*[533].

956. This adaptation of the Regulatory framework to new circumstances has not prevented the Kingdom of Spain from respecting the stability of the basic principle governing these investments in accordance with the ESL: the principle of reasonable rate of return.

957. Said principle assumes that the subsidies' regime set up to support the deployment of certain renewable technologies must allow all investors to recover the cost of their investment, the operating costs and obtain a reasonable rate of return. This principle was complied with under the regime of ESL 54/1997 and this principle is respected by the measures challenged by the

[530] Claimant's Memorial, paras. 396, 484.b and 487.b

[531] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary,* ICSID Case No. ARB/07/22; Award 23 September 2010. Paragraph 9.3.29. RL-0047.

[532] *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 para 617-618. *"Economic, social, environmental and legal circumstances and problems are by their nature dynamic and bound to constant change. It is indispensable for successful public infrastructure and public services to exist that they are adaptable to these changes. Accordingly, State policy must be able to evolve in order to guarantee adequate infrastructure and services in time and thereby the fair and equitable treatment of investments. The legal framework makes no exception."*
"The Tribunal is reassured of its view by findings of other arbitral tribunals. Claimant has introduced AES v. Hungary into the proceedings where the tribunal found: The stable conditions that the ECT mentions relate to the framework within which the investment takes place. Nevertheless, it is not a stability clause. A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative." RL-0048.

[533] *Plama Consortium Limited v. the Republic of Bulgaria,* ICSID no. ARB/03/24. Award dated August 27 2008, paragraph 177 "*the Tribunal believes that the ECT does not protect investors against any and all changes in the host country's laws. Under the fair and equitable treatment standard the investor is only protected if (at least) reasonable and justifiable expectations were created in that regard. It does not appear that Bulgaria made any promises or other representations to freeze its legislation on environmental law to the Claimant or at all.*" (emphasis added). CL-0058.

Claimant. Furthermore, in this regard Pöyry specifically warned the Claimant in March 2009 that[534]:

> *"There are a number of uncertainties surrounding the development of the Spanish renewable industry. In our view the major obstacles arise from the existing tariff structure which is unable to account for the generation costs. [...] recent historytell us that even though renewable technologies are expensive, **the Government is willing to provide a reasonable return for investors by keeping subsidies**, even in the event of tariff deficits being generated over time."*

958. Furthermore, we cannot talk about instability when the different changes occurring in Spanish Legislation have been specifically aimed at underpinning said principle of reasonable rate of return. It suffices to mention the raising of the rank of the piece of legislation that recognises now the rate of return to appreciate that greater stability for investors in the regulation of a reasonable rate of return is granted. This had been a matter which was widely claimed by associations in the sector in the past[535].

959. Hence, it must be stressed that in the Spanish Regulatory framework, the first time that the return desired by producers of renewable Energies was quantified by a regulation ranked as Law was as from RDL 9/2013 onwards[536]. It is difficult to consider this increased rank and the materialisation of the returns which are going to be paid to the investor would entail a breach of the stable conditions created by a State which is party to the ECT, but rather quite the contrary.

960. In other words, it is hard to talk about instability when the changes made have been aimed precisely at (1) applying the principle of reasonable rate of return; (2) correcting over-remuneration situations not covered by said principle; (3) resolving imbalance situations of the SEE which jeopardised the economic sustainability thereof and (4) strengthening the stability of the regulatory framework through raising some aspects previously regulated by an Royal Decree to an Act's rank.

961. Consequently, reasonably evaluating the existing, present System, it must be concluded that the Regulatory framework applicable to renewable energies has remained stable. The Kingdom of Spain undertook and undertakes to provide the investor with reasonable rates of return on the costs of an investment in a renewable asset, currently determined by Act at 7.398%.

(3) The conduct of the Kingdom of Spain has been transparent.

962. The Claimant argues that Spain's conduct was not transparent. This lack of transparency is specified in various aspects with the following standing out for their inaccuracy:

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[534] Document C-0049, page 131.

[535] *"the Spanish FIT scheme has the legal rank of a Royal Decree. Even though it is 'stronger' than for instance a ministerial order, the Spanish renewable energy associations have **long called** for a FIT law."* Miguel Mendonça et al., (Posibilitando la Economía Verde) (Powering the Green Economy) in the Manual on the System Feed-In Tariff (Earthscan, 2010). It is partially provided by the Claimant, as Proof Document C-0068. It provides full. Page 87. RL-0052.

[536] Final Provision Three of Law 24/2013 of December 26 the specific figure for those installations already brought online is a return of around 7.398 per cent on the Project as a whole for a standard installation as set out in Section IV.D.4.2 of the present Memorial.

a. The alleged "*dismantling*" of RD 661/2007 *"in a manner that was not transparent".* In this allegation it emphasizes that RDL 9/20013 was followed by "*a Transitory Regime of more than 11 months during which the Government gave no indication regarding the precise remuneration that any qualifying plants would be entitled to. In essence, the Operating Companies were left* ***completely in the dark*** *regarding the applicable economic regime*" [537]. (emphasis added)

b. With regard to RD 413/2014 alleges that *"Spain has not offered any guidelines whatsoever on many key aspects of the New Regime. Even when requested to do so, Spain has denied access to the reports issued by Roland Berger and Boston Consulting containing their calculations of the remuneration parameters."*[538]

963. It is denied that there is any lack of transparency as alleged by the Claimant on the grounds it alleges as well be set out below. The conduct of the Spanish Government was clear and transparent in terms of compliance with its international commitments and its internal regulations.

964. The need to reform the legal and economic regime of the Spanish Electric Sector has been a necessary process and continued over time. In fact, it had already started in 2007 to resolve over-remuneration situations in the wind sector as the Pöyry report made clear to the Claimant[539]. RDL 6/2009 already refers the circumstances that in 2013 gave rise to the measures challenges.

965. The need to reform the Electric Sector was, in actual fact, publicly announced and explained years before it occurred in view of the exacerbation of the circumstances of the economic crisis and the sustainability risk of the SES already set out in RDL 6/2009. The public announcements of a new Law on the Electric Sector were made continuously as from December 2011 as has been stated above[540].

966. The general characteristics of the reform announced by the Government are clear and foreseeable:

[537] Claimant's Memorial paragraph 392.a
[538] Claimant's Memorial, paragraph 392.b
[539] "*Furthermore, given recent high Pool prices, Special regime generators, in particular wind farms, had, according to the Spanish Government, been making supra-normal profits. As a result of these excessive profits the government has intervened in order to cap profits by modifying RD 436/2004* [...] *and publishing RD 661/2007 to replace it*." Document C-0049, page 113.
[540] Counter-memorial, Section IV.D.1. Said Section transcribes the investiture speech made by Mr.Rajoy who leaves no doubt as to the need for reform and the impact on all participants in the System, without exception: "*If reforms are not undertaken, the disequilibrium will be unstainable and the price and tariff increases would put Spain at a great disadvantage in terms of energy costs in the developed world. We will thus have to adopt a policy based on restricting and reducing the mean costs of the system in which decisions are taken without resorting populism deploying all the technologies available, without exceptions, and it is regulated with the prime target being to achieve the competitiveness of our economy*." Transcription of the *Speech by Mariano Rajoy at his investiture as Prime Minister*, Congress of Deputies, Monday, December 19 2011, www.lamoncloa.gob.es. R-0092.

- In the announcement of December 2011 the reform was already classified as "*Structural*" and "*vital*", based on a policy to "*slow down and reduce the average costs of the system*".[541]
- In January 2012 there was talk of a reform to the SES "*in progress*" "avoiding the generation of *tariff deficit*." [542]
- In February 2012 the CNE carried out a public consultation about a "*Regulatory adjustment*" to "*tackle the growing evolution of the tariff deficit*" in the Electric Sector"[543]. In March 2012 the CNE includes the "*insustainability*" in its Report setting out the imbalance between the income and costs of the system[544]. In other words, the insustainability of the remuneratory framework whose immutability the Claimant deems to be required.
    - In April 2012 reference is made to a *"profound reform of the Electric Sector", with a "firm commitment" by the Government to "elimination of the tariff deficit"; with a "fair distribution of effort between Consumers, public sector and private sector." It includes the mention of "measures to reduce the costs of regulated activities"*. [545]
    - In July 2012 reference is made in another Document published by the Government to the "*first step in the profound reform of the energy system*" [546]
    - September 2012 sees the announcement of the "*Bill Energy Reform*"[547] on forthcoming dates to resolve the tariff deficit on whose increase the premiums on renewables were decisive. In said month "*Structural Measures to correct the tariff deficit*" were also announced and a "*New Electric Sector Act for the first quarter of 2013*"[548].

967. Not only were the reform announced years before it was carried out. The drawing up of the legal and regulatory standards was transparent. Punctual information and access were given to all the parties concerned in the projects for the public submission of comments and reports.

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[541] "*Another vital structural reform is that of our energy system"* Transcription of the *Speech by Mariano Rajoy at his investiture as Prime Minister*, Congress of Deputies, Monday, December 19 2011, www.lamoncloa.gob.es. R-0092.

[542] *"The complex economic and financial situation as well as the situation of the electric system would recommend the removal of the incentives for the construction of these installations, on a temporary basis, whilst a reform of the electric system is set in motion to avoid the generation of a tariff deficit*, Press release by the Ministry of Industry, Energy and Tourism, January 27 2012. R-0095.

[543] By order of the Secretariat of State of Energy, the CNE carries out a public Consultation on February 2 2012 to obtain proposals with which to draw up a report. During said public consultation, in paragraph 2, the reasons behind said report are explained: "*to overcome the growing evolution of the tariff deficit and the need to take specific measures in this regard*." (emphasis added). This is why reference is made to the consultation of regulatory adjustment measures. R-0097.

[544] On March 7 2012, the CNE issues a Report on the Spanish Energy sector and with regard to the tariff deficit it indicates that: "the *fundamental problem with regard to the Electric Sector is that the lack of convergence between the income and costs of the activities regulated in the Electric Sector during the last ten years has generated a growing debt in the electric system. The disequilibrium between the income and costs of the system is* ***unsustainable*** *owing to the impact of the growing accumulated debt on the present and future access fees of Consumers and the temporary impact on the indebtedness of those companies that are obliged to finance the system deficit*." (emphasis added). R-0098.

[545] National Reforms' Programme 2012, Spanish Government, April 27nd 2012 pages 207 and 208. R-0100.

[546] July 9 2012, in document *Six Months of Government: Reform to Grow*, referring to Royal Decree-Law 13/2012, March 30. R-0103.

[547] In September 2012 it publishes the Document *Spanish Government Reforms: Determination in the face of the crisis* with two objectives: that the energy cost does not place constraints on the competitiveness of the economy and to provide a final solution to the problem of the hefty tariff deficit of the energy system. R-0104.

[548] On September 27 2012 with the Document published by the Government: "*Spanish Economic policy Strategy: Balance and structural reforms for the next half-year*". R-0106.

968. The processing of Royal Decree-Law 413/2014 and the Parameters Order complied with the procedures required by Spanish legislation for their preparation, processing and approval. What's more, maximum transparency was offered for their preparation. And several public consultation processes were started so that companies from the sector, associations and private individuals could put forward their comments and allegations to the draft reforms. A report was also asked from the advisory bodies, the Council of State and the regulator, the National Commission on Markets and Competition [549].

(3.1) Full knowledge by the Plants of the Torresol Group of the processing of the parameters and their effective participation in it.

969. The Claimant asserts that for more than 11 months "the Government failed to provide any indication about the specific remuneration" to which authorised Plants would be entitled. It even argued that "the operating companies were unaware which economic regime was applicable."

970. This assertion is firmly denied. The Kingdom of Spain provided the dossier for preparing the Parameters Order in which there are hundreds of comments made by producers, associations from the sector and private individuals. Even the Claimant itself provided documents that contradict said assertion: Torresol was fully aware of the drafts for drawing up the regulations, playing an active role in their processing and the results were more beneficial for the Plants than the initial proposal.

971. In fact, a mere reading of the monthly Bulletins[550] which Torresol published, suffices to be aware of: (1) the evolution of the proposals made by the Government, (2) the figures

[549] Counter-memorial, Section IV.D.4.4

[550] The Bulletins are provided together in the Document BQR 63.

Bulletin December 2013:

*"The **second draft** Royal Decree on renewables, cogeneration and waste (RECORE), issued by the Ministry in November 2013, received **many objections** from Associations and companies affected, during the public hearing period, although have not been already reviewed by the Regulator (former Spanish Energy Commission, now CNMC).*

The Ministerial Order which defines the values of the new economic framework (market pool plus return on investment and return on operation), still is under development at the Ministry and not has been formally submitted to the CNMC of its review." (page 4/18)

Bulletin January 2014:

"*The draft Royal Decree on RECORE has been positively informed by the Energy Regulator (former Spanish Energy Co mission, now CNMC). After that, has been sent to another legal consultancy body of the Spanish Administration (State Council), in the last legal step to be fulfilled before receiving final approval by the Government. Apparently, publication is imminent (expected for February).*

*Considering this progress, **the Ministry of Energy decided to circulate a draft version of the Order containing the numerical values of the new retributive parameters**, for the 1020 categories of renewable and CHP installations considered by the Government, on January 31st. This new retributive scheme is based in the following elements:*

- *Retribution is assigned on the basis of providing a reasonable return on investment, fixed by the Government as an IRR of 7,4 % (indexed to long term debt)*
- *Each plant type has been assigned an average investment, and an average P&L accounts for the past activities, as well as a projection on the future power sales (at market prices, expected to be 49,6 €/MWh) and running costs.*

- *According to these figures, for each type, a variable price has been calculated (if the running costs are higher than the expected power sales to the market), corresponding to the difference between those two concepts.*
- *A fixed payment, based on the estimated investment, is calculated to provide the expected profitability.*

Values for TEI's plants are the following:

			2013		**2014-2016**	
PLANT	**Id. Code**	**Regulatory lifetime** (years)	**Rinv** €/MW	**Ro** €/MWh	**Rinv** €/MW	**Ro** €/MWh
GEMASOLAR	IT-01011	25	544.201	37,031	1.161.599	38,877
ARCOSOL	IT-01006	25	261.445	24,887	558.056	24,859
TERMESOL	IT-01006	25	261.445	24,887	558.056	24,859

*This order is **open to allegations by all the agents** involved in power production until the end of February, approximately. We will be filing our own claims, since in all the cases we disagree with some of the values considered by the government."* (page 4/19).

Bulletin February 2014

*"Keeping aside the main topic of the new regulation (the final equivalent price) other points drawing attention on this regulatory field are the coverage factor for the initial liquidations (...) and the regulation on gas usage. No firm and definitive information can be given on these points, but, as provisional info, the coverage factor for January Liquidation will fall within 25-30 %; and on the gas use, the **draft Order states** a limit of 15 GWh of gas use, for non power applications in the plant, and that will receive no economic penalty under the new regulation. This figure, for 2014, is higher for the past year (25 GWh)".* (page 4)

*"Preparation of official objections to the draft Ministerial Order. After reviewing the complete list of retributive parameters of GEMASOLAR included in this document, the points that remain to be solved are the Initial Value of the Investment (minor issue) and the Operative retribution to be added to the power market price. **Nothing is to be objected about plant regulatory lifetime, nor about the limits of operation** (maximum and minimum hours of operation to receive specific retribution). The most relevant is the difference in the acknowledged O&M costs, as calculated by GEMASOLAR and estimated by the Government, with a difference in the 40's €/MWh range. We have asked GEMASOLAR consultant (KPMG) to make an additional statement, to be incorporated to their complete study, to highlight this difference; and in parallel, we prepared the allegations document that was filed at the CNMC duly on date*. (pages 5 and 6).

***Globally speaking, GEMASOLAR retribution under the new scheme will be significantly better than before,** even if the set values are not enough to reach the reasonable return as defined in the Law. This was in fact the central point of our allegations."* (page 6)

*"The values published in the **draft regulation** for VALLE PLANTS show also significant differences both on terms of CAPEX and OPEX. On the investment side, the specific ratio of investment (6,2 M€/MW) is slightly lower than ARCOSOL&TERMESOL values (keeping aside financial costs during construction), and well below the average values obtained by our lobbying association (PROTERMOSOLAR) for the whole sector (9 %). On the OPEX side, difference between the **cost estimation of the Ministry**, and VALLE real figures, is also relevant (about 35 €/MWh), being our figure rather close to the average. In this case, being ARCOSOL & TERMESOL joined in the same plant type with other generators, we decided to join PROTERMOSOLAR global allegations against the Order, [...]."* (page 9)

Bulletin March 2014

*"The March results are based on the **draft Ministerial Order** that was **published by the CNMC** on February the 3rd 2014. Please note that accounting wise Torresol is still using the previous economic regime that will be used by the CNMC until the Ministerial Order becomes final."* (page 11)

"During March, the Spanish regulatory body (CNMC) has evaluated the allegations posed by all the agents involved in the RECORE market, filed by the end of February.

According to the new legal provisions contained in the draft edition of the new regulation, we have started to monitor the quarterly figures of plant utilization, to be sure that we surpass the lower limit of power sales. The three plants have exceeded by far those lower limits, despite bad weather during this quarter." (page 4)

provisionally assigned to the Plants (3) The submission of comments by the Plants and in what context (5) The proceedings of the legislative procedure. (6) the messages transmitted by the Government and (6) The favourable outcome of the process for the three Torresol Plants in the light of the Order finally published.

972. In the light of the Documentation provided by both parties, the Arbitral Tribunal may assess and evaluate whether "*the Operating Companies were left **completely in the dark** regarding the applicable economic regime*" or whether the proceedings were reasonably transparent.

973. The Respondent understands that there is documentary evidence of the lack of grounds for the alleged lack of transparency during the proceedings for RD 413/2014 and the Parameters Order.

(3.2) Absence of external Reports used to draw up the parameters.

Bulletin April 2014

*"Please note that revenues are based on the **draft Ministerial Order** that was published by the CNMC on February the 3rd.*

*Development of new regulation for Renewable energy continues at slow pace. **As announced** in the former MAR, **CNMC issued its report** on the Draft Ministerial Order that meant no significant comments on the legal wording of the Order, nor on the retributive values defined on it. According to the most recent **information**, the Ministry has decided to send the draft MO to the Spanish Council of State for its approval, that meaning an additional delay in the final publication, that is now not expectable before Mid-June."* (page 4)

Bulletin May 2014

"Processes around new regulation for Renewable energy have been accelerated during the end of May, according to the political agenda of the Government.

*Firstly, the **Ministry issued a new edition of the retributive values** to be applied to renewable and cogeneration plants (**draft M.O**.) that was sent to the State Council for their review. This shows a major change in the structure of the MO, but minimal in the economic terms applicable to generation plants. TEI's plants showed only a marginal adjustment of Rinv values in Valle, and in both Ro (Valle and Gemasolar). Overall effect on TEI accounts was neutral.*

*TEI took part in the allegation process opened by the State Council, through **Gemasolar** (as single plant), **Valle complex** (as part of a group of PT plants with storage), and **Torresol** (as partner of PROTERMOSOLAR), arguing that the new system does not effectively assure the "reasonable return on investment".*

*At the same time, the **Ministry issued** an **updated edition of the Royal Decree**, adjusted to the changes introduced in the draft MO. The general methodology has not been changed, and the only major new aspects are related to the Extended Retribution after extinguishing Regulatory Lifetime (disappeared), and a greater definition on how the Ministry shall determine the projected values of the Wholesale Electricity Price ("pool"), every 3 years, basic for fixing the Ro values. On June 6th the RD 413/2014 regulating renewables, cogeneration and waste was approved by the Spanish Government.*

The new Ministerial Order is expected to be approved before the end of June." (page 4)

Bulletin June 2014

"The Ministry finished the complete new regulation applicable to Renewable Energies, with the publication of the Royal Decree 413/2014 (containing the basic principles of the regulation and the methodological approach used for calculating the retributive values) and the Ministerial Order OM IET 1045/2014, that contains the complete list of Standard plant types (IT), with the retributive parameters to be applied during the next three years (2014-2016).

Within the multiple aspects of interest of the new regulation, some of them must be highlighted: (...)

- ***Final values show significant improvement when compared to previous draft editions**.*
- ***Retributive parameters approved lead to a substantial increase in Gemasolar income**."* (page 4)

974. Another of the arguments of the lack of transparency refers to the failure to make public the alleged Reports by Roland Berguer and Boston Consulting which allegedly included the calculations pertaining to the remuneration parameters.

975. Te Respondent would like make clear from now on that the contract with the consultant Boston Consulting was rescinded by the Spanish Government owing to breaches in contract performance, without the Kingdom of Spain having received the report alleged by the Claimant. Hence, no report by the Consultant Boston Consulting was borne in mind when determining the parameters.

976. As regards the report issued by Roldan Berger, it is a report issued and received by the Spanish Government subsequent to the approval both of RD 413/2014 and Order IET/1045/2014 of June 16. It has thus not been taken into account in the determination of the parameters of the Order challenged.

977. Notwithstanding, it should be pointed out that the submission or otherwise of the Report does not affect the transparency set out in the ECT with regard to the Claimant as there is no record that Claimant requested its exhibition during the legislative processing of the measures challenged. In any case, from the Bulletins provided by the Claimant itself it can be clearly gleaned that said Reports were never subject to debate nor complaints by the Plants which are the object of the present arbitration.

978. In conclusion, the Kingdom of Spain complied with the commitments of the ECT as regards the creation of "stable, equitable, favourable and transparent conditions so that the investors of other Contracting Parties to make investments in its Area"[551]

(3.3) Non-existence of a lack of transparency owing to the setting up of regulatory periods and the lack of the materialisation of methodologies to ensure a reasonable level of return.

979. The Claimant argues that the new legal regime set out establishes regulatory periods of three or six years and it fails to determine methodologies with regard to certain payments which may be modified in the future.

980. The regulatory periods constitute an element of security for the investor as they are perfectly delimited. Hence:

a. As the Claimant acknowledges, Law 24/2013 stipulates that the investment value and the regulatory working life cannot be changed[552] .

b. Regulatory periods of 6 years are stipulated. In each of them the parameters must be revised so that the Plants maintain their reasonable level of return.

[551] Energy Charter Treaty Article 10.1. RL-0002.

[552] "*Under no circumstances, once the regulatory working life or the standard value of the initial investment of an installation has been recognised, can said amounts be revised*". Article 14.4 2 of Law 24/2013. R-147Bis.

c. Regulatory semi-periods are also stipulated every three years in order to adapt the market price and others which depend on forecasts which may vary[553]. Hence, a market price has been estimated for each regulatory semi-period which if it is not revised and is less than that received by the installation would require it to assume the financial cost for 6 years, thereby avoiding losses for investors. In the same way, if the installations operate for less hours than those foreseen for climatological reasons or owing to an estimate that does not correspond to that which occurred, it will receive less remuneration which would give rise to an adaptation of the parameters.

d. At least once a year the fuel prices may be revised. In this way the gas used by an installation such as that of the Claimant is paid by the system, also in line with a forecast of the evolution in fuel prices and in view of the variability of this market period revisions are scheduled in order to avoid losses.

981. Hence, the setting of remuneration periods is related with the updating of amounts which cannot be known 25 years in advance, but rather for far shorter timeframes and they entail an updating of parameters which set out to achieve the maintenance of the reasonable rates of return of investors as they do not necessarily involve a reduction in the parameters stipulated at present.

982. By contrast, the Claimant states that the methodology has not been indicated to revise certain elements. However, both Law 24/2013[554] as well as RD 413/2014[555] contain regulation to ensure, at all times, that investors receive a reasonable rate of return on their installations. Said guarantees are explained in the statement by Mr. Carlos Montoya[556].

983. Consequently, the setting up of regulatory periods providing security to the investor ensures the maintenance of the reasonable rate of return, maintaining this profitability during the regulatory working life, along with the restitution of the investment value. However, the Claimant insists on not understanding the system by stating that it is unaware when these reasonable rates of return will be complied with.

984. In this regard, the remuneration periods are the logical instrument to this purpose. As can be observed in Order 1045/2014, for each standard the remunerations will be set in line with the start-up year. These revisions will determine whether a plant has received remuneration which will allow it to recover the investment value, obtain a reasonable rate of return on its investment as well as receive additional remuneration which will allow it to operate said installation.

985. It has been proven that the Kingdom of Spain communicated the regime which was going to be applied to investors and accepted its comments. This is recognised by Torresol in its Bulletins. It was also proven that the parameters and rules set out in the legislation challenged do not

[553] During the semi-periods the income estimates for the sale of energy generated are revised. This is valued at the production market lrice in line with the evolution in market prices and the forecast plant operating hours.
[554] Article 14.4 of Law 24/2013 of December 26. R-147Bis
[555] Royal Decree-Law 413/2014. Article 20 (1). R-0112.
[556] Statement by Mr. Carlos Montoya, RW-001

breach the principle of transparency. Said legislation foresaw with sufficient precision the mechanisms which ensure the investor the recovery of the costs of its investment and production as well as receiving a reasonable rate of return.

986. Hence, it was proven that the Kingdom of Spain did not breach its obligation to promote transparent conditions in accordance with Article 10(1) ECT. In view of the fact that the Claimant has evidently not been "*more than 11 months*", "*completely in the dark*"[557], neither did the Kingdom of Spain breach the FET standard in its modus operandi towards the Claimant.

(4) The measures of the Kingdom of Spain were reasonable and proportionate and driven by reasonable grounds.

987. The Claimant, when setting out the FET provisions it deems to have been breached, argues that "*Spain's measures are unreasonable*" in Section 15.2.d). Separately, but reiterating the arguments, section 15.3 stipulates the "*Impairment of Investments as a Result of Unreasonable Measures".*

988. Arbitral Case law has jointly examined the existence of "excessive and discriminatory measures" as part of the FET standard. In fact, the Claimant quotes as a precedent the case Plama Consortium v Bulgaria which assumes this identity[558]. This is also assumed by the Arbitral Tribunal in the Case Saluka v the Czech Republic[559].

989. Hence, both considerations will be answered jointly to prove that the measures were not arbitrary or excessive. What's more, arguments about the reasonableness of the measures also require a reference to their proportionality. Hence, the Kingdom of Spain will jointly answer the allegations about the "*unreasonable*" nature and the "*disproportionate*" nature that the Claimant attributes to the measures adopted by the Kingdom of Spain.

990. It will be made clear that there was reasonableness and proportionality in the measures adopted along with reasonableness of the grounds which determined the measures. Making these three circumstances clear will allow the conclusion to be drawn that the action of the Kingdom of Spain did not breach the FET standard set out in the ECT.

991. The Claimant bases its arguments on the alleged unreasonable measures in the Award Saluka v The Czech Republic. Its relevance does not seem reasonable as it does not apply the ECT. Notwithstanding, we will see how another Award issued by the Arbitral Tribunal in the case

[557] The Claimant reports to the Arbitral Tribunal the transitory period, insisting on these concepts which it reiterates in its paragraphs 27, 234 and 392(a).

[558] *Plama Consortium Limited v. the Republic of Bulgaria*, ICSID no. ARB/03/24. Award on August 27 2008, paragraph 182. "*The host State must also, under Article 10(1) of the ECT, refrain from subjecting the Investor's Investment to "unreasonable or discriminatory measures*." para 183. "*The Tribunal observes that, on a number of occasions, tribunals in investment arbitrations have found a strong correlation between this standard and the fair and equitable treatment standard.***"** CL-0058

[559] "*The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated" Saluka Investments B.V. v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, 460. RL-0053

AES SUMMIT, applies the ECT and extends the elements set out in the Test invoked by the Claimant. The relevance of the AES SUMMIT case to the present case is clear.

992. The Claimant intends to base its assertions on two Judgments by the Supreme Court of the Kingdom of Spain. It is denied that said Judgments conclude a breach of the tariff deficit. A mere reading thereof suffices to understand that said Judgments simply resolve any defects there may have been in the processing of an administrative regulation. To be precise, the absence of a mandatory report. No other conclusion can be drawn from a reading of said judgments.

993. As regards the disproportionate nature of the measures, the Claimant bases its arguments on the test established by the Award Tecmed v Mexico. Without prejudice to the fact that the arguments about its breach are not accepted, said Test is not relevant to the present case, as it was set up to examine the existence of disproportion in alleged expropriation. In actual fact, it refers to the examination of elements that are unrelated to the present case and which the Claimant logically omits[560]. Neither does the Claimant invoke that its rights have been expropriated from it in the present case, nor does the Tecmed Award contain any criterion about proportionality when examining the FET standard. Notwithstanding, it is repeated that the arguments set out are not accepted either. The Test set up, in the case AES SUMMIT also considers the proportionality of the measures. An examination of said Test will make it clear that the Respondent has not adopted disproportionate measures.

994. Notwithstanding, there will be an explanation of compliance with other Tests which are also relevant and which examine the facts from another perspective in order to prove that the Kingdom of Spain is not guilty of the breaches claimed by the Claimant as regards the adoption of unreasonable and disproportionate measures.

(a) Spain complies with the Tests carried out in the *case EDF v. Romania* to assess the absence of arbitrariness in its actions as a host State

995. In the *Case EDF v Romania*[561], the Arbitral Tribunal included the verification criteria listed by Dr. Christoph Schreuer with a view to assessing whether a State action is discriminatory or arbitrary. In this regard Dr. Schreuer considers the following arbitrary:

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[560] "*There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not. On the basis of a number of legal and practical factors, it should be also considered that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitled to exercise political rights reserved to the nationals of the State, such as voting for the authorities (...)"* CL-0032, 122.

[561] *EDF (Services) Limited c. Rumania*, Case ICSID No. ARB/05/13; Award of October 8 2009, paragraph 303: "*In an attempt to give a content to general expressions such as "unreasonable or discriminatory measures," Claimant relies on the categories of measures that its legal expert, PROFESSOR CHRISTOPH SCHREUER, has described in his opinion as "arbitrary":*
a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
c. a measure taken for reasons that are different from those put forward by the decision maker;
d. a measure taken in willful disregard of due process and proper procedure.

"a) A measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b) A measure that is not based on legal standards but on discretion, prejudice or personal preference;

c) A measure taken for reasons that are different from those put forward by the decision maker;

d) A measure taken in wilful disregard of due process and proper procedure."

996. Each of these criteria needs to be examined separately:

a) if it is a measure that causes damage to the investor without serving any apparent legitimate purpose. In the present case it was proven that the purpose of the reform is fully legitimate. It is an action by the Regulator aimed at preventing – by recognising a return higher than that legally guaranteed as reasonable to the investor – Spanish Consumers and Citizens from bearing an unjustified burden. This seeks to resolve an unsustainable imbalance situation in which international and national economic circumstances have determined a fall in demand which made it necessary to rebalance the system. This legitimate purpose was undertaken bearing in mind another legitimate purpose: not to impose an excessive burden on Consumers to obtain said re-equilibrium.

b) If it is a measure that is not based on legal guidelines or regulations, but rather on discretion, discrimination or personal preferences. The reform was put into place with total respect for the existing legal regulations and the case law of the Spanish Supreme Court, ensuring the reasonable rates of return which the ESL required and requires. The measures looked at in the present arbitration set out to stress the principle of a reasonable level of return. A principle on which, historically, the subsidies' system for certain renewable technologies has been founded. What's more, the reform challenged has a general scope. In other words, it is applicable to all operator and all sectors involved in the energy market. This is why it is not discriminatory with regard to any investor, whether they are national or international.

c) It is a measure taken for reasons other than those set out by the party granting the measure. In the present case, the Spanish Government, since the investiture of the Prime Minister in December 2011, set out the reasons which made it essential to reform the Electric Sector. These reasons are the same ones that have founded the measures questioned.

d) If it is a measure adopted with an intentional disrespect for a process with the necessary guarantees and the procedure which is formally applicable. The Spanish Government followed the proceedings laid down by law to set out the regulatory standard for remunerations in the Electric Sector. In the present case it is worth mentioning the Government's effort to transfer to the stakeholders concerned the successive drafts of the measures. It is also worth pointing out the instigation of supplementary public consultations' proceedings as well as the assessment and bearing in mind of those

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The Tribunal will consider the claim of "unreasonable or discriminatory measures" according to the terms proposed by Claimant." RL-0040

comments. In the present case, a mere Reading of the monthly Bulletins of Torresol[562] proves that Torresol was aware of the procedure followed, the consultations carried out, took part in the process and the regulation laid down improved the initial proposal in line with the allegations of the Plants. Under no circumstances were they left totally in the dark as the Claimant claims.

997. None of the four criteria set out in the *Case EDF v Rumanía* to assess arbitrary or discriminatory action occurs in this case. Hence, it can thus be concluded that the Kingdom of Spain was not guilty of any discrimination nor arbitrariness towards the Claimant in accordance with said Test.

998. As the Respondent's action is not unreasonable, it is worth examining whether this action could, notwithstanding, have breached the FET standard set out in the ECT. With this in mind, it is worth looking at the circumstances involved in the measures adopted in accordance with the criteria set out in the cases *AES SUMMIT v Hungary* y *TOTAL v Argentina* which examined through two different procedures whether the State's action breached the FET standard with the investor or not.

(b) Spain complies with the Test in the case *AES SUMMIT v. Hungary* to assess whether a measure is reasonable and in accordance with the FET standard set out in the ECT

999. The test set up in the case AES SUMMIT serves to determine the existence or otherwise of an unreasonable or discriminatory measure which breaches the FET standard set out in the ECT. With this in mind, it develops the most limited criterion that the Arbitral Tribunal had established in the Case Saluka v. The Czech Republic[563] quoted by the Claimant[564].

1000. In the case *AES SUMMIT v. Hungary* the Arbitral Tribunal established that:

> *"There are two elements that require to be analysed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.*
>
> *A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.*
>
> *(…) A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented."*[565] *(emphasis added)*

[562] BQR-0063

[563] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL of March 17 2006, paragraph 307. To assess whether the conduct of a State was reasonable it declared that it: "*must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment*." RL-0053

[564] Claimant's Memorial, paras. 393 and 410.

[565] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. the Republic of Hungary*, ICSID No. ARB/07/22; Award on September 23 2010, paragraph 10.3.7 to 10.3.9. RL-0047

(b.1) The policy adopted by the Kingdom of Spain was rational and met the objective of a public economic policy.

1001. As an initial requirement, in the present case the existence of a rational policy adopted by Spain can be observed, following a logical explanation and with the purpose of dealing with a matter in the public interest.

1002. The renewable energies' support system is based on the legal principle of a reasonable rate of return. The Regulator acted with a view to re-establishing the balance required by the applicable legislation. Said imbalance, besides entailing an excessive burden for Spanish Consumers, was making a decisive contribution to the generation of the so-called tariff deficit.

1003. What's more, the imbalance in favour of producers which the Regulator sought to put a halt to occurred against backdrop of serious economic crisis, both of the SES in particular as well as of the Spanish economy as a whole. In this regard we should recall that the FADE (*electric deficit amortisation fund*) issues were suspended between March and November 2012 as it was not possible to obtain financing abroad at a reasonable interest rate[566]. The seriousness of the economic situation at the same time as the adoption of the measures was omitted by the Claimant. The widespread awareness of the crisis, made clear by the different reform announcements made by the Government, is undeniable. The measures adopted form part of rational policy measures which, because of their effects, have proven reasonable.

1004. The need to protect both those Consumers already affected by electricity bill increases as well as the very sustainability of the SES forced the Kingdom of Spain to adopt those measures subject to examination in the present arbitration. Hence, correcting certain System costs benefitted by an imbalance situation which resulted in losses for Consumers and the SES, constitutes a public policy which fits in with the criterion laid down by *AES SUMMIT*. In the latter, having examined the FET standard set out in the ECT, the Tribunal declared that the reduction in the excessive profits of investors and the burdens on Consumers was a valid rational policy:

> *"the majority has concluded that Hungary's reintroduction of administrative pricing in 2006 was motivated principally by widespread concerns relating to (and it was aimed directly at reducing) excessive profits earned by generators and the burden on consumers.*
>
> *[…] Having concluded that Hungary was principally motivated by the politics surrounding so-called luxury profits, the Tribunal nevertheless is of the view that it is a perfectly valid and rational policy objective for a government to address luxury profits. And while such price regimes may not be seen as desirable in certain quarters, this does not mean that such a policy is irrational. One need only recall recent wide-spread concerns about the profitability level of banks to understand that so-called excessive profits may*

[566] Copy of the certificate of the Interministerial Commission Agreement set out in Article 16 of Royal Decree-Law 437/2010 for the session held on November 26 2012. R-0140.

well give rise to legitimate reasons for governments to regulate or re-regulate."[567] *(emphasis added)*

1005. This assessment was specifically confirmed by the Ad Hoc Committee on the request for annulment of the Award which indicated that:

> *"the Committee is also unable to find that the Tribunal's reasoning was either contradictory or frivolous. The Tribunal [...] found, however, that a state can exercise its legislative powers with respect to consumer protection against overly burdensome prices even if this has the consequence that private interests such as an investor's contractual rights are affected, as long as that effect is the consequence of a measure based on public policy that was not aimed solely at affecting those contractual rights. [...] Hungary acted in furtherance of a distinct, legitimate objective. [...] the Committee [...] finds, however, that the distinction is understandable and thus neither contradictory nor frivolous."*[568] *(emphasis added).*

1006. Consequently, in accordance with the FET standard it is action aimed at protecting Consumers, avoiding remuneration to the investor which is higher than what would be reasonable. We should recall that said remuneration is directly borne by Consumers on their invoices. Hence, the first of the parameters looked at in the case *AES SUMMIT v. Hungary* is complied with: the policy adopted by the Kingdom of Spain was perfectly valid and met the objective of a public economic policy which is to correct and avoid, in order to protect Consumers, the payment of remuneration higher than what would be reasonable. There is thus no doubt as to the relevance and rationality of the measure.

(b.2) The Government action was reasonable bearing in mind the State public policy target and the measure adopted to achieve said target.

1007. The second criterion looked at by the Arbitral Tribunal in the case *AES SUMMIT v. Hungary* requires Government action to be reasonable, demanding an appropriate correlation between the State public policy target and the measure adopted to achieve said objective. In the present case, the reform complies with said requirement of reasonableness. In theory, the reform adopted by the Government affected all parties who form part of the SES. Said reform shared between Consumers and all operators of the system (producers, distributors and carrier) the measures to increase the income and cut the costs of the SES with a view to dealing with the tariff deficit[569].

1008. From the perspective of the measures adopted with regard to producers under a subsidised regime, the measures are also proportionate. The subsidies' regime is maintained which allows

[567] AES Summit Generation Limited and AES-Tisza Erömü Kft v. the Republic of Hungary, ICSID No. ARB/07/22; Award on September 23 2010, paragraphs10.3.31 and 10.3.34. RL-0047

[568] AES Summit Generation Limited and AES-Tisza Erömü Kft v. the Republic of Hungary, ICSID No. ARB/07/22, Ad Hoc Committee Decision on the application of annulment, June 29 2012, paragraph 78. RL-0054

[569] Said measures are set out in Sections IV.A.3.3, IV.A.3.4 y IV.D.2.5. Amongst said measures it is worth mentioning that a consumer paid on its electrical bill 370 Euros per annum in 2003 whereas in 2014 he paid a total of 616.2 euros. The accumulated increase in these years is greater than 66.54%. Notwithstanding, the largest increases occurred in 2008 (10%), 2009 (10.1%) and 2011 (17.7 %).

producers to achieve reasonable rates of return of around 7.398%[570] on its investment costs at the same time as correcting and avoiding any imbalance situations which have harmed Spanish Consumers and helped to put at stake the financial sustainability of the SES.

1009. Consequently, in the light of the criteria examined, it must be concluded that the reform of the Electric Sector undertaken by Spain constitutes a valid, rational policy and it has been carried out by means of a reasonable action which falls within the FET standard set out in the ECT as declared by the Arbitral Tribunal in the case *AES SUMMIT v. Hungary*.

(c) Test carried out in the case *Total v. Argentina* to assess respect for the economic balance of the investment

1010. The Arbitral Tribunal in the case *Total v. Argentina* assessed the minimum conditions required by the FET standard which allow it to be verified whether the State has damaged the State the economic balance of the investment in those cases of investments involving large amounts of capital and in the long-term. Said Arbitral Tribunal reaches a decision about the measures taken by the Government of Argentina in the Electric and Gas sectors. The Arbitral Tribunal decided that in those cases in which legitimate expectations derive from the general regulatory framework, the latter cannot be protected from subsequent modifications. However, in those sectors involving long-term investments and large amounts of capital, the possibility of a State modifying the legal framework should ensure that the investor can (1) recover its operating costs, (2) amortise its investment and (3) obtain a reasonable rate of return during said time period[571].

1011. In the present case the energy sector requires long-term investments to be made and these were made in compliance with the general regulatory framework. Hence, the evaluation carried out by the Arbitral Tribunal to observe any breach or otherwise of the FET standard are applicable to the present case. Said assessment thus requires verification as to whether the reform of the Electric Sector carried out by Spain respects, in the final analysis, whether the investor "*is able to recover its operations costs, amortize its investments and make a reasonable return over time*".

[570] According to Final Provision Three of Law 24/2013 of December 26, the specific figure for those installations already up and running is around 7.398 per cent of profitability for the project as whole for a standard installation as set out in Section IV.D.4.2 of the present Memorial.

[571] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01; Decision on Liability 27 December 2010, 122: "*when the basis of an investor's invocation of entitlement to stability under a fair and equitable treatment clause relies on legislation or regulation of a unilateral and general character. [...] This type of regulation is not shielded from subsequent changes under the applicable law. This notwithstanding, a claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations. This is the case for regimes, which are applicable to long-term investments and operations, and/or providing for "fall backs" or contingent rights in case the relevant framework would be changed in unforeseen circumstances or in case certain listed events materialize.*
In such cases, reference to commonly recognized and applied financial and economic principles to be followed for the regular operation of investments of that type (...) may provide a yardstick. This is the case for capital intensive and long term investments [...]. The concept of "regulatory fairness" or "regulatory certainty" has been used in this respect. In the light of these criteria when a State is empowered to fix the tariffs of a public utility it must do so in such a way that the concessionaire is able to ***recover its operations costs***, ***amortize its investments*** *and make a* ***reasonable return*** *over time*" (emphasis added). RL-0043

1012. This criterion is respected in the economic regime included under RD 413/2014 and Order IET/1045/2014.

1013. It guarantees remuneration for the operation which allows the refunding of all operating costs. To calculate the operating costs, it considers the costs associated with electrical generation for each technology, required to carry out activity in a manner which is efficient and well managed. The remuneration set after the structural reform includes variable and fixed operating costs.

1014. These remunerated costs are listed (in a non-limitative manner) in the Statement of Reasons of Order IET/1045/2014 of June 16[572].

a) The variable operating costs in line with the production of the standard installation include: (1) insurance costs (2) Administrative costs and other overheads, (3) representation allowances on the market, (4) the cost of the fee to gain access to transmission and distribution networks which must be met by the electrical energy producers, (5) operation and maintenance (both preventive and corrective), (6) the TVPEE as well as the other taxes regulated in said law, (7) the auxiliary consumption (water, gas etc.) and (8) the fuel costs associated with the operation of the standard installation.

b) In addition, as regards the fixed operating costs, for each standard installation due consideration has been given to (1) the rental cost of the sites, (2) the expenses associated with the safety of the installations and (3) the tax on real estate endowed with special characteristics (BICES).

c) When income from energy sales on the electrical market does not cover the operating expenses considered, it is complemented by a remuneration for the operation in such a way that the annual calculation of income minus expenses is at least equal to zero. It is thereby guaranteed that in the calculation process the gross operating margin is never negative. In other words, additional remuneration is foreseen over and above the income obtained from the market when this does not cover the operating expenses assumed.

d) It also guarantees remuneration for the investment which includes the repayment of the initial investment. The installations will receive, during their regulatory working life (25 years), in addition to the income obtained from the sale of energy at market prices and the attendant remuneration for the operation (when this income does not cover the operating expenses), remuneration for the investment by installed power unit which allows the recovery of the investment made.

e) What's more, for the repayment of this remuneration it bears in mind the existence of main new equipment as well as the other electromechanical, regulation and control systems and equipment, measurement equipment and connection lines, including their transport, installation and start-up, along with the associated engineering item and works' management, amongst other items. The value of the initial investment remains unchanged

[572] Order IET/1045/2014 of June 16, Statement of reasons, section III, paragraph 14 to 21. R-0113.

for each standard installation until the end of the working life and is remunerated throughout the working life of the plant.

1015. What's more, it guarantees reasonable rates of return which allows a mean annual profit of 7.398% to be received on the investment made, from the start-up of the installation until the end of its regulatory working life. Said reasonable remuneration, we would remind you, is set out in the La won the Electric Sector and the Case law of the Supreme Court recognises it as a basic legitimate expectation of the investor. Its determination is specified in RDL 9/2013 as the mean yield on the secondary market for ten-year State Bonds prior to the coming into force of RDL 9/2013, plus 300 base points.

1016. Said yield of around 7.398% is reasonable and not revisable until 6 years after the coming into force of RDL 9/2013. The calculation of remuneration on the investment and remuneration on the operation are established, objectively and reasonably, for a standard installation. This includes standard income from the sale of energy assessed at the market price, the standard operating costs required to carry out the activity and the standard value of the initial investment, all for an "efficient, well-managed company".

1017. As proven in the Witness Statement by Mr.Carlos Montoya, the amounts applied correspond to reasonable standards at market value.[573]

1018. It can be concluded from the remunerations demonstrated that in the Electric Sector reform Spain has recognised and guaranteed all the remunerations and reimbursement required by the Arbitral Tribunal in the case *Total v. Argentina* as the minimum threshold required so as not to breach the FET standard owing to modifications to the general regulatory framework in large-scale, long-term investments.

1019. It can thus be concluded that the reform carried out by Spain, by guaranteeing the remunerations and reimbursements that respect the principle of the economic balance of the investment, does not breach the FET standard set out in the ECT.

(5) The Kingdom of Spain has not breached the umbrella clause.

1020. The Claimant argues in paragraphs 413 to 430 of its Memorial that the Kingdom of Spain breached the so-called "Umbrella clause" of Article 10 (1), last section, of the ECT[574].

1021. To reach said conclusion, the Claimant's Memorial firstly reproduces the actual wording of Article 10 (1) of the ECT and argues, supported by Resolutions from the International Court of Justice[575], United Nations' publications[576], doctrine[577] and certain Awards[578], that the

[573] Statement by Mr.Carlos Montoya. RW-0001

[574] The Claimant's Memorial refers in other paragraphs to the commitments and obligations allegedly assumed by the Kingdom of Spain, determining, in its opinion, the existence of an umbrella clause which would have been breached by the measures adopted by the Kingdom of Spain. In this regard it is worth mentioning paragraphs 20, 33, 36 c), 134-140, 194-203, 340, 343 c), 370, 372 and 373.

[575] Nuclear Tests (Australia v France), ICJ Rep 1974, Resolution of December 20 1974, p. 253, CL-0004; Case Regarding the Temple of Preah Vihear (Cambodia v. Thailand), ICJ Rep 1961, CL-0002; Resolution on Preliminary Objections dated May 26 1961 and the Case concerning the border dispute between Burkina Faso and the Republic of Mali), ICJ Rep 1986, Resolution of December 22 1986, p. 554, CL-0008.

expression "*any obligation*" contained in the ECT must be interpreted in the sense of any obligation assumed by the State with the investor, either legally or conventionally. Afterwards, the Claimant's Memorial stipulates that the commitments and obligations assumed by the Kingdom of Spain with the companies operating the Plants "*can be traced*" to: a) RD 661/2007, b) the Government press release on July 2 2010 setting out the "agreement" dated July 2010 between the Minister and the thermosolar industry whereunder an agreement was made on the limitation of the regulated tariff and the delay in the date as from which the Plants could start supplying energy to the network in exchange for the Government recognising the application to the Plants of the regime of RD 661/2007 and the stabilisation of the tariff; c) the draft of RD 1614/2010 and the letters from the Plants whereby the latter waiver their right to supply energy to the network until May 1 2011 in the case of Gemasolar and until January 1st 2012 in the case of the Plants Arcosol and Termesol, requesting from the Government that, in exchange, it is confirmed that the tariff which would be applied to them would be that stated in the draft of the RD from 2010 during the operating life of the installations and the Resolutions issued by the Government after the approval of RD 1614/2010 confirming that RD 661/2007 would be applicable to Plants throughout their operating life.

1022. With the alleged "commitments" and "obligations" assumed by the Kingdom of Spain in these acts being set out in the Claimant's Memorial, the Claimant believes that the measures adopted by the Kingdom of Spain entail a breach of the protection clause of the last section of Article 10 (1) of the ECT.

1023. As we will argue below, the Claimant's arguments cannot be accepted by the Arbitral Tribunal as:

A) The interpretation of the protection clause or umbrella clause set out in the Claimant's Memorial is contrary to the literal wording of Article 10 (1) of the ECT and the umbrella clause concept dominant in international case law and doctrine.

B) The Kingdom of Spain has not been legally bound "vis á vis" with the Claimant under RD 661/2007, by dint of a "press release", nor in the 2010 Resolutions nor in RD 1614/2010.

C) Under no circumstances do the measures questioned in this arbitration entail a breach of the obligations that the Kingdom of Spain may have assumed under the legislation

[576] Excerpt from United Nations Conference on Trade and Development, Bilateral Investment Treaties in the Mid-1990s (United Nations Publications, 1998), p.56; CL-0014.

[577] Dolzer & C. Schreuer, Principles of International Investment Law (2nd ed, Oxford University Press, 2012), p. 177, p. 495. CL-0082; G. Salias, "Do Umbrella Clauses Apply to Unilateral Undertakings?" in C. Binder, U. Kriebaum et al (ed), International Investment Law for the 21st Century (Oxford University Press, 2009), p. 495, CL-0067A.

[578] *Eureko B.V. v The Republic of Poland, Partial Award on Jurisdiction and Merits*, 19 August 2005, para. 246, CL-0040; *Plama Consortium Limited v The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 186, CL-0058; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, CL-0051; *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, CL-0054; *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, *Decision on Objections to Jurisdiction*, 11 May 2005, paras. 312-314, CL-0038.

applicable to the Plants as this legislation, presided over by Article 30.4 of the ESL, requires investors to be given a "reasonable rate of return" and it does not entitle the latter to a "regulatory standstill".

(5.1) The interpretation of the umbrella clause carried out in the Claimant's Memorial is contrary to the literal wording of Article 10 (1) of the ECT and the umbrella clause concept dominant in international case law and doctrine.

1024. The Claimant's Memorial argues that the Spanish Government assumed obligations with the Claimant in the sense of Article 10.1 of the ECT. It bases this on the premise that "*as a matter of international Law, States can get binding legal Obligations with investors through the adoption of general legislation*".[579]

1025. However, the Claimant makes an erroneous interpretation of the content and purpose of Article 10 (1), last section, taking the application of the "umbrella clause" beyond any reasonable interpretation.

1026. Both, the arbitration Case law and doctrine, stress the importance that the literal wording of the umbrella clauses has for their proper interpretation to which end we must start off by setting out the wording of Article 10 (1) ECT, last section:

> *"Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party".*

1027. The wording of the Article obliges to consider included within the scope of the umbrella clause only those "*any obligations*" that the Contracting Party "*has signed*".

1028. Hence, the considerations of the Claimant's Memorial to the effect that "*the power of States to make binding legal Obligations through its unilateral acts has been affirmed by the International Court of Justice (ICJ) on several occasions*" fall outside the present dispute. Self-evidently, the possibility of a State being legally bound by unilateral acts towards other States, referred to by the three Resolutions of the International Court of Justice quoted by the Claimant, is a matter which is unrelated with the assumption actually defined by Article 10 (1), last section of the ECT. In fact, the Resolution by the International Court of Justice concerning the conflict between New Zealand and France with regard to the nuclear tests the latter was carrying out near New Zealand waters, has nothing to do with the present case, nor does the Resolution regarding the territorial sovereignty existing between Cambodia and Thailand concerning the Temple of Preah Vihear, nor the Resolution regarding the border dispute between Burkina Faso and Mali.[580] None of these conflicts have resolved disputes between investors and States nor did any of them invoke and interpret the scope of the umbrella clause. Hence, the Claimant's Memorial is untruthful when it asserts, based on these Resolutions, that "*as a matter of international Law, the States may take on legally binding obligations with investors through the adoption of the general legislation*."[581]

[579] Paragraph 414 of the Claimant's Memorial.
[580] Exhibits provided with the Claimant's Memorial as CL-0002, CL-0004 and CL-0008.
[581] Paragraph 414 of the Claimant's Memorial.

1029. On the other hand, the Claimant asserts that the expression *"any*", owing to its broad nature, would allow the inclusion in the concept of obligation guaranteed by the umbrella clause not only the contractual obligations, but also what it calls the "*regulatory and legislative commitments*". What's more, the Claimant extrapolates said theory to mean that the rules of Royal Decree-Law, general provisions *erga omnes,* by dint of the umbrella clause become commitments specifically agreed with the Claimant.

1030. Said approach denotes an unawareness of the true scope of the umbrella clause as it ignores the fact that Article 10 (1), last section of the ECT, clearly uses the term "*entered into*", that is "signed", which necessarily means the assumption of specific obligations by the State with regard to a specific investor or investment. To say it in another way, the wording of the clause inexorably refers to those specific, bilateral obligations which have been assumed by the State with regard to an investor by means of a specific, conclusive and individualised commitment for each investor or investment, which is usually not possible to conceive outside of the formalisation of a contract or equivalent bilateral instrument as there is no other way in which the State can "enter into" a commitment with an investor.

1031. Hence, in the case *Noble Ventures, Inc v. Romania*[582], the Tribunal declared that:

> *"[…] considering the wording of Article II (2)(c) which speaks of "any obligation [a party] may have entered into with regard to investments", it is difficult not to regard this as a clear reference to investment contracts. In fact, one may ask what other obligations can the parties have had in mind as having been "entered into" by a host State with regard to an investment. The employment of the notion "entered into" indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Article II (2)(c) would be very much an empty base unless understood as referring to contracts.[…]".*

1032. The obligations of the State must thus be specific and have been assumed by the State with regard to a specific investor in a *vis á vis* relationship as declared by the Tribunal in *SGS v Philippines*[583]:

> *"[T]he host State must have assumed a legal obligation, and it must have been assumed vis-à-vis the specific investment-not as a matter of the application of some legal obligation of a general character. This is very far from elevating to the international level all the 'municipal legislative or administrative or other unilateral measures of a Contracting Party."*

1033. And in the same way, the Ad hoc Committee for the cancellation of the Award in the case *CMS v. Argentina*, at the time of annulling said Award with regard to the exaggerated, unjustified application of the umbrella clause, had the opportunity to make its opinion about the main characteristics of this institution. To be precise, said Committee stressed that the umbrella clause assumed a specific relationship between the State and the investor and that the

[582] *Noble Ventures, Inc v. Romania*, Case ICSID No. ARB/01/11, Award dated October 12 2005, paragraph 51. RL-0055

[583] *Société Général de Surveillance S.A. v. Philippines*, ICSID No. ARB/02/6, Decision on objections to jurisdiction, of January 29 2004, paragraph 166. RL-0056

"umbrella clause" does not alter the nature and effects of the obligation to which said clause referes to, all on the following terms[584]:

> *"(a) In speaking of "any obligations it may have entered into with regard to investments", it seems clear that Article II(2)(c) is concerned with consensual obligations arising independently of the BIT itself (i.e. under the law of the host State or possibly under international law). Further they must be specific obligations concerning the investment.*
>
> *They do not cover general requirements imposed by the law of the host State.*
>
> *(b) Consensual obligations are not entered into erga omnes but with regard to particular persons. Similarly the performance of such obligations or requirements occurs with regard to, and as between, obligor and obligee.*
>
> *(c) The effect of the umbrella clause is not to transform the obligation which is relied on into something eESL; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.*
>
> *(d) The obligation of the State covered by Article II(2)(c) will often be a bilateral obligation, or will be intrinsically linked to obligations of the investment company. Yet a shareholder, though apparently entitled to enforce the company's rights in its own interest, will not be bound by the company's obligations, e.g. as to dispute settlement."*

1034. Indeed, the litigiousness which arises about the interpretation and scope of the umbrella clauses was raised in almost all of the cases with regard to contracts formalised between State-investor and not with regard to the legal framework of Host State, which actually reflects the belief of the exclusion of legislative acts from the scope of umbrella clauses. The Arbitral Tribunals are so categorical on this point that, for example, in the case *AES Summit Generation Limited and AES-Tisza Erömü Kft against Hungary*, the Tribunal, in view of the fact that Hungary appears in annex IA of the ECT on the list of countries that do not allow an investor to be able to make claims under the last section of Article 10(1) of the ECT, argues its lack of Jurisdiction on this matter under the following terms:

> *"this Tribunal cannot rule on the scope of contract obligations and consequently cannot determine if the Claimants' contract rights under the 2001 Settlement Agreement – and the 2001 PPA – were eviscerated because it has no jurisdiction to do so."*[585]

1035. The United Nations itself - which the Claimant quotes as a reference- in its Conference on *"Bilateral Investment treaties 1995-2006, trends in investment rulemaking*", updating its conclusions from 1998 in the light of the arbitration Awards laid down to date, declared:

[584] *CMS Gas Transmission Company v. Argentine Republic*, ICSID No. ARB/01/8, Decision by the Ad hoc Committee on Annulment, of September 25 2007. Paragraph 95. RL-0057

[585] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22; Award 23 September 2010. RL-0047, 9.3.4.

"There is some uncertainty as to the precise nature and effect of umbrella clauses. On the one hand, it has been asserted that such provisions protect an investor's contractual rights against "any interference which might be caused by either a simple breach of contract or by administrative or legislative acts. On the other hand, the precise scope of this obligation is unclear, in particular whether it also covers purely commercial contracts and what degree of specificity the host county's commitment must have in order to become an obligation under international law.

This issue has generated some recent case law, above all two recent arbitral cases brought by the Swiss-based transnational corporation Société Générale de Surveillance (SGS) against Pakistan and the Philippines. In each case, the central question was whether, through the umbrella clause in the applicable BIT, the investor's contractual claims against the host country (for breaches of contracts entered into for the provision of pre-shipment customs inspection services) could be resolved under the arbitration provisions of the BIT, rather than under the dispute resolution provisions of the contract in dispute."[586] (Emphasis added)

1036. The Reader's Guide to the ECT of the Secretariat of the ECT, in turn, defines the provision of Article 10(1), last section, under the significant title "*Individual investment contracts*" and defines its scope stressing its grounds which is nothing more than the international principle of *pacta sunt servanda*[587]:

"According to Article 10 (1), last sentence, each CP shall observe any obligations it has entered into with an investor or an investment of any other CP. This provision covers any contract that a host country has concluded with a subsidiary of the foreign investor in the host country, or a contract between the host country and the parent company of the subsidiary.

Respect of the international principle of "pacta sunt servanda" is of particular relevance in the energy sector where most major investments are made on the basis of an individual contract between the investor and the state. Article 10 (1) has the important effect that a breach of an individual investment contract by the host country becomes a violation of the ECT. As a result, the foreign investor and its home country may invoke the dispute settlement mechanism of the Treaty". (Emphasis added)

1037. Against this, the Claimant's approach intends to include under the umbrella clause the regulations erga omnes of the State, irrespective of whether there is a specific consensual relationship between the State and the investor. This assumes an unawareness of the actual essence of the umbrella clause, which authors like Wälde call a "*clause pacta sunt servanda*", thereby highlighting its "contractual" nature. In fact, the umbrella clause or *pacta sunt servanda,* was created to guarantee respect for contracts formalised by foreign investors with a State in such a way that the State cannot avoid its contractual obligations resorting to its sovereign authority. In other words, the object of protection is in any case a contract, whether it is an administrative contract, a concession or a license between the Host State and the foreign investor.

1038. Wälde thus indicates that:

[586] Bilateral Investment treaties 1995–2006, trends in investment rulemarking. RL-0058
[587] The Energy Charter Treaty: A Reader's Guide, June 2002, page 26. CL-0029

> *"The umbrella clause and investment treaties target an abuse of the state when situated in its dual role as both contract party and regulator."*[588]

1039. Indeed, Wälde categorically rejects that under the field of application of the umbrella clause there can be hidden an obligation for States to legislate in one or another way. Wälde believes that this would assume that States waive their legislative authority, a waiver which is so relevant that it cannot be assumed, but rather it must be established in a specific and unequivocal manner. And he specifically states that it was not the intention of the signatory states to the ECT to assume said waiver. In this regard, when commenting on the case *SGS v. Pakistan* Walde stated that:

> *"While a duty to comply with governmental contracts concluded with foreign investors is quite clear, such an implied commitment to enact implementing rules is not [...] Such a complex scheme is not envisaged by umbrella/sanctity of contract clauses, however, neither in the Switzerland-Pakistan BIT, in the ECT nor in the other hundreds of BITs with an umbrella clause."*[589].

1040. What's more, even in cases of contracts signed by the States (a different assumption from the one which concerns us) it cannot be understood that the umbrella clause prevents the State from regulating on matters that affect the contract. In other words, the regulatory authority of the State is not limited. In this regard, Wälde understands that the umbrella clause cannot be held equivalent to a kind of stabilisation or "standstill" clause of the regulations in force at the time of formalising the contract, stating that:

> *"My solution to the question whether the umbrella clause is the equivalent of the stabilization clause but on the level of treaty law (compare Benhamida, supra, footnote 8) is that the umbrella/sanctity of contract clause may not "freeze" applicable law, as some stabilization clause provisions purport to do, but that it prevents the State from invoking its sovereign and regulatory powers in an abusive way to escape from contractual commitments assumed earlier. This is one of the functions of the contractual stabilization clause, but it does not cover the "freezing" automatically. There may be changes in the regulatory context of a project which are of a general nature, non discriminatory and justified by legitimate public policy adjustment of the legal context to changing circumstances and international standards. Such changes should, as a rule, not be caught by the "sanctity of contract" clause, as they do not represent an abusive reliance on sovereign powers to undermine contractual commitments."*[590]

1041. Essentially, within the scope of the umbrella clause there is a reference to breaches of individual investment contracts; in other words, it solely covers contractual obligations specifically assumed by the State, we repeat, within the framework of a contract. And it would not entail, not even in the event that there is a contract, a standstill of the regulations in force at the time of signing the latter, that is to say, it would not deprive the State of its legislative authority.

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[588] The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases. Thomas W. Wälde. HEINONLINE 6 J. World Investment & Trade 183 2005, page 226. RL-0059

[589] The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases. Thomas W. Wälde. HEINONLINE 6 J. World Investment & Trade 183 2005, page 221. RL-0059

[590] The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases. Thomas W. Wälde. HEINONLINE 6 J. World Investment & Trade 183 2005, page 200. RL- 0059

1042. These arguments are not undermined by the Awards quoted by the Claimant but rather they are reinforced. Hence, the Partial Award of Jurisdiction and Merits in the *Eureko B.V. against the Republic of Poland Case* on August 19 2005 analysed the alleged breach by Poland of a purchase agreement signed with EU investorreko B.V. The Award carries out a detailed analysis of the origin and evolution of the interpretation of the umbrella clause in the Awards which had been pronounced in this context. In this regard, it reports its origin in the "pacta sunt servanda" principle and its meaning. It comments on the interpretation provided in the Pakistan's Award, which asserts that not all breaches of its obligations by a State are equivalent to a breach of the BIT or of its obligations under international Law and, by contrast to the latter, it follows the interpretation of the Philippines'Award, that states that the breach of contractual obligations by the State is equivalent to a breach of its international obligations. However, under no circumstances does the Award interpret that "*any obligation*" refers to obligations other than those arising from a contract. Quite the contrary, to reject the interpretation of the Pakistan Award, parts of the interpretation of the Philipinnes' Award that mantains the umbrella clause only protects obligations arising from specific State-investor bilateral relations and adds in its paragraph 258:

> *"The Tribunal adds to the considerations advanced in the Philippines Award its conclusion that to give effect to the plain meaning of an umbrella clause by no means renders the other substantive protections of a BIT superfluous. As Professor Scheuer points out in his cited Article, "The BIT's substantive provisions deal with non-discrimination, fair and equitable treatment, national treatment, MFN treatment, free transfer of payments and protection from expropriation. These issues are not normally covered in contracts."*[591]

1043. In turn, the Tribunal in the case *Plama Consortium Limited v The Republic of Bulgaria*, also quoted by the Claimant's Memorial, does not really take a position with regard to the scope of the umbrella clause because it believes that in said case there was contract between the parties and that *"contractual obligations are covered by the last sentence of Article 10 (1) ECT."*

1044. Nor do the Awards of the cases *LG&E v. Argentina, Enron v. Argentina* and *Sempra Energy International v. Argentina* serve to confirm the thesis of the Claimant. In all these cases the obligations not complied by the State, although they were determined by law, were channelled through the licenses granted to investors, meaning that their obligations actually arose directly from the license or concession as a *vis á vis* relationship between the State and the claimant investor.

1045. This is why the Claimant's thesis – considering the possibility of extending the umbrella clause to general provisions *erga omnes* - cannot be accepted. Said reasoning is erroneous because what the Arbitral Tribunal did in the cases of Argentina was to analyse to what extent the contractual obligations assumed by the State had been breached, to which end it analysed the regulatory changes. However, this does not mean that the protection clause includes the legislative acts and general provisions, because the obligations for the State in those cases arise out of the formalised contract and not from subsequent legislative acts. In fact, the regulatory

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Partial Award of Jurisdiction and Merits in the case Eureko B.V. against the Republic of Poland on August 19 2005. CL-0040

changes were only analysed with regard to their influence in terms of the contract signed between both.

1046. As indicated by Axel Weissenfels:

> *"it is worth to note that, although the umbrella clause in LG&E v. Argentina was held in very general terms, the Tribunal limited its scope of application to "specific obligations", excluding "legal obligations of a general nature". The authority arising from these cases is that, no matter how generally an umbrella clause is termed, it is only triggered if the obligations breached are specific ones, i.e., if they concern particularly the investment in question."*[592]

1047. The Claimant has not quoted a single case in which the umbrella clause has been applied without the existence of a contract, a concession or a license which generates *vis á vis* obligations between the State and the claimant investor.

1048. In fact, we cannot avoid pointing out that professors Dolzer and Schreuer, quoted by the Claimant itself in paragraph 415 of its Memorial, end up qualifying their view on the umbrella clause by stating that:

> *"Some tribunals have read limitations into the clauses on the basis of the specific wording of umbrella clauses […]. Other tribunals have found that the words 'entered into' contained in an umbrella clause could only be read as restricting the clause to contractual undertakings. In Noble Ventures v Romania the Tribunal said:*
>
> *'The employment of the notion 'entered into' indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Article II (2) (c) would be very much an empty base unless understood as referring to contracts"*[593].

1049. And said same professors clearly define the clause we are studying under the following terms:

> *"An umbrella clause is a provision in an investment protection treaty that guarantees the observance of obligations assumed vis-à-vis the investor"*[594].

1050. In view of all of the above we have to conclude that the Laws or general provisions set out in their development do not generate *per se* any legal obligations of the State which fall within the scope of the umbrella clause. This is a logical consequence of the actual wording ("entered into") and the purpose of Article 10(1), final section. This wording assumes, first and foremost, a *vis á vis* relationship between the State and the investor and, secondly, that on the occasion of said *vis á vis* relationship the State agreeds to take on a specific obligation with said investor.

1051. Hence, in order to be able to invoke the application of the "protection clause" it is necessary for the party invoking it to prove its essential assumption: a specific bilateral relationship between

[592] Umbrella Clauses. Seminar on International Investment Protection. Prof. Dr. August Reinisch. Winter Semester 2006/2007.Axel Weissenfels, page 36. RL-0060

[593] R. Dolzer y C. Schreuer, Principles of International Investment Law (2.ª ed, Oxford University Press, 2012), page 178. CL-0082.

[594] R. Dolzer y C. Schreuer, Principles of International Investment Law (2.ª ed, Oxford University Press, 2012), page 166. CL-0082.

the State and the Investor during the course of which the State has assumed with regard to said Investor a specific obligation which it must legally respect.

1052. This specific bilateral relationship does not exist in this case in which the Claimant has decided to invest in a sector which is liberalised but regulated. Hence, there was no contract, nor concession nor license whereby a consensual bilateral relationship was assumed between the Claimant and the Kingdom of Spain.

(5.2) Neither Royal Decree-Law 661/2007, Royal Decree-Law 1614/2010, the Government press release on July 2 2010 nor the Resolutions from 2010 entail any assumption by the Kingdom of Spain of *vis á vis* obligations with the Claimant.

a) Royal Decrees 661/2007 and 1614/2010.

1053. That which has been set out above makes it clear that regulatory acts such as Royal Decree-Law 661/2007 of May 25 which regulates electrical energy production activity under a special regime and Royal Decree-Law 1614/2010 of December 7 which regulates and modifies certain aspects pertaining to electrical energy production activity using solar thermoelectric and wind technologies, cannot be included within the scope of application of the umbrella clause. These regulations are enacted by the Government during the exercising of its regulatory authority in the regulated electricity sector and are applicable not only to the Claimant but also to all electrical energy producers included within its scope of application.

b) Press released on July 2 2010.

1054. Neither is the Government press release on July 2 2010 liable to create any obligations. It is a general communication which does not assume nor can it assume - either by dint of its nature or its purpose, neither under Spanish regulations - any obligation the Claimant may invoke in its favour and which the Spanish State has breached. Furthermore, the other alleged "party" to the agreement invoked, Protermosolar (and not the Claimant), never invoked the existence of said "agreement".[595]

c) Resolutions dated December 2010

1055. As regards the Resolutions from 2010 by the Directorate-General of Energy Policy and Mining (henceforth, "the 2010 Resolutions"), which were issued in response to the letters dated December 1 2010 sent by Gemasolar, Arcosol and Termesol - and which, according to the Claimant are "*favourable administrative acts*" whereby the Kingdom of Spain was undertaking to maintain a certain regime – it has been explanained in detail in paragraphs 620 to 644 of this Memorial that said Resolutions do not provide any Government commitment to not modify the regime of RD 661/2007 nor do they declare any right in favour of the Claimant.

1056. Indeed, the 2010 Resolutions merely: 1) accept the waiver by the companies operating the Plants (and not by the Claimant) understanding that said waiver is a right of the party

[595] In this regard see parag.609 of this Memorial.

concerned in accordance with Article 90 of Law 30/1992[596] of November 26 regarding the Legal regime on Public Administrations and Common Administrative Procedure (henceforth, Law 30/1992), a waiver which, what's more, is not forbidden by the rest of domestic Spanish Law, nor does it harm third parties, 2) accept the statement made by the companies operating the Plants (and not by the Claimant) with regard to the classification of the installation carried out and 3) notify the companies operating the Plants (and not the Claimant) of that information requested about the applicable regime. This latter request is granted pursuant to Article 35.g) Law 30/1992[597], a Spanish Law regulation which recognises that the parties concerned are entitled to obtain information and guidance about the legal and technical requirements that the provisions in force impose on the projects, actions or applications it is intended to carry out.

1057. In this regard, Spanish doctrine[598] and case law[599] have understood that the replies to consultations of those administrated do not strictly constitute administrative acts as the latter are solely those expressions of will which create legal situations for the purposes of their annulation by Tribunals. Hence, the mere communication of the applicable regulatory regime is in no way legally binding for the Spanish State.

1058. Basically, the Kingdom of Spain has not assumed either under Royal Decrees 661/2007 and 1614/2010, its press release or its 2010 Resolutions any "commitments" or "obligations of any type with regard to the Claimant, which may be covered by the umbrella clause of Article 10(1) of the ECT.

(5.3) In no way did the Kingdom of Spain, through the measures it adopted, breach the umbrella clause.

1059. Even if we hypothetically assumed and as an interpretative exercise, the Claimant's theory that the Kingdom of Spain had assumed by dint of said acts, any kind of commitment to the Claimant, this commitment would merely apply the legal regime in force as a whole and not limited to two Articles of two Regulations. This legal regime, as has been argued in detail during the course of this Memorial, is presided over by the "principle of reasonable level of

[596] Article 90 of Law 30/1992 of November 26 regarding the Legal regime on Public Administrations and Common Administrative Procedure. R-0143.
[597] Article 35.g) of Law 30/1992. R-0143.
[598] Administrative Law. I General PArticle Chap. IV. The administrative act: 1. Concept and classes, Ramón Parada, Professor of the National University for e-Learning, pages 84 and 85. R-0144.
[599] In this regard, the decision dated April 30 1984 of the Supreme Court stated:
"*That…the Resolution by the Provincial Labour Delegation of Cádiz on December 18 1979, declaring that the derogation of the Order dated September 23 1939 with that of July 9 1959 only affects the registration of women and minors with the Placement Office but not the minimum percentage of apprentices there must be in proportion to the permanent staff of each company… it does not lie within the legal nature of the administrative act – the basic concept of the system and legislation of the public Administration – to constitute a kind of legal act issued by an administrative body expressing the will which creates a legal situation - SS. Dated December 8th and 17th 1974 and May 20th 1977- these notes exclude from said concept any other, declaration or manifestation which, even if it derives from administrative bodies, is not per se the creator or modifier of legal situations, in other words, it lacks imperative or decision-making effects,* hence, opinions, reports and expressions of opinion can*not be regarded as challengeable acts because they are mere procedural acts, they derive from advisory bodies, nor can replies to the consultations of the administered parties be so regarded -S. 7 mayo 1979-."* R-0145.

return" set out in Article 30(4) of the ESL that the Claimant deliberately ignores in its Memorial. This legal regime has been interpreted by multiple Judgements of the Supreme Court of the Kingdom of Spain, known by the Claimant when it made its investment. It is asserted therein that:

> *"The remuneration regime we are analysing does not guarantee, by contrast, for the owners of installations under a special regime the inviolability of a given level of profits or income with regard to those obtained in past financial years, nor any indefinite permanence of the formulas usable to set the premiums."* [600]

1060. The maximum interpreter of Spanish Law, the Supreme Court, has categorically denied and repeated that a regulatory provision may not establish the inviolability of a certain level of specific benefits nor the indefinite permanence of the formulas useable for setting them in accordance with the description of Case law provided in previous sections.

1061. Quite simply, in Spanish Law it does not exist the obligation that, under the umbrella clause, the Claimant intends to highlight to the international scope. The sole obligation that Spanish Law has engendered towards renewable Energies producers is that of obtaining, at all times, a "reasonable level of return" on their investment. This was the understanding of the supreme interpreter of said Law.

1062. The new measures of the Kingdom of Spain allow the Claimant to recover its investment costs, its operating and maintenance costs and, what's more, they ensure it a return of around 7.398%[601].

1063. The Claimant was fully aware that energy is a regulated sector in Spain and is thus subject to regulatory changes, business risk assumed by the Claimant, freely, voluntarily and, consciously. And we say consciously because the very nature of the regulations on energy (as a regulated sector) determines that it is a fluctuating matter, subject to Government energy policy and EU orientations and guidelines.

1064. In this regard, the Tribunal in the *Perenco v. the Republic of Ecuador Case* stated that:

> *"Where a State has duly considered a legislative/regulatory policy, as was the case in 1994 when Ecuador resolved that it was in the nation's interest to move from service to participation contracts, governmental decisions taken thereafter must, during the lifetime of such contractual arrangements maintain fidelity to that policy framework. This is not to say that the policy framework is frozen and cannot be changed because*

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Among many others, the Judgement of the Third Chamber of the Supreme Court on October 25 2006, RCA 12/2005, reference "El Derecho" of the EDJ 2006/282164. Legal Basis Three. R-0071.

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According to Final Provision Three of Law 24/2013 of December 26t, the specific figure for those installations already up and running is around 7.398 per cent of return of the project as a whole for a standard installation, as set out in Section IV.D.4.2 of the present Memorial C-0102_ESP.

this is not so unless the State has expressly stabilised its law vis-à-vis its contractual counterparty". [602]

1065. Also in the case *Plama*, invoked by both parties, the Tribunal reached the conclusion that:

> *" the Tribunal believes that the ECT does not protect investors against any and all changes in the host country's laws.(...) It does not appear that Bulgaria made any promises or other representations to freeze its legislation on environmental law to the Claimant or at all."*[603]

1066. The protection clause of Article 10(1) ECT was thus fully respected by the Kingdom of Spain.

(4) Conclusion

1067. The Claimant's complaints regarding the breach of the FET standard set out in Article 10(1) ECT must be dismissed.

1068. The expectations invoked by the Claimant about the immutability of the remunerations' system cannot be classified as legitimate. The Claimant was aware that:

- The Spanish System of remuneration for renewable energies is based on the "reasonable rate of return" premium.
- The legal principle of a "reasonable rate of return" accepts modifications both to the manner in which the renewable supporting subsidies are set as well as to their amount.
- The principle of a "reasonable rate of return" does not include situations in which the infringement of these principles remains over time.
- The "reasonable return" solely pertains to the investment made in the Plants.
- The Claimant was aware that the application of the subsidised regime for the production of energy with gas could be modified.

1069. Besides the maintenance of the principle of reasonable rates of return, investors do not benefit from any other guarantee. Under no circumstances has there been any regulatory norm, agreement or commitment granted by any civil servant establishing an exception to the principle of a reasonable rate of return and its dynamic nature.

1070. The Kingdom of Spain complied with international standards regarding the setting up of a stable, transparent framework for Renewable Energies' regulation in Spain. The other principles of the FET standard set out in the ECT have been respected, in particular, those pertaining to foreseeability, the stability of the regulatory framework, coherence and transparency.

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[602] *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID No. ARB/08/6, Decision on the Remaining matters on jurisdiction and responsibility, September 12 2014 parag. 562. RL-0038

[603] *Plama Consortium Limited against Republic of Bulgaria* ICSID No. ARB/03/24. Award dated August 27 2008. CL-0058

1071. The legal reform carried out by Spain meets the criteria set by different Arbitral Tribunals to assess that the action by a State is not arbitrary or discriminatory nor does it breach the FET standard. Hence, the measures adopted by Spain, are reasonable in terms of their grounds and the mechanism used, respecting, in any case, the principle of the economic equilibrium of the investment and ensuring the receipt of reasonable rates of return throughout the working life of the installations.

1072. The Kingdom of Spain has not entered into any obligations or commitments with the Claimant under the alleged *"umbrella clause"* in such a way as to undertake to maintain unchanged, for its alleged investment, the economic regime included in RD 661/2007.

1073. For all these reasons the Claimant's request should be dismissed and it should be declared that Spain did not breach the FET standard set out in Article 10(1) ECT.

V. THE CLAIMANT DOES NOT HAVE THE RIGHT TO COMPENSATION

A. Introduction

1074. ParagraphS 431 and subsequent ones of the claimant's Memorial provide a short clarification of the alleged obligation that Spain would have to "restitute the legal and regulatory regime"[604] and, alternatively, they submit a claim for damages.

1075. First and foremost, we must stress that the previous request is a contradiction in itself: the regulatory, legal regime, since 1997 until today, has always granted the same, a reasonable rate of return. Hence, there is no point claiming that which has not been taken away, nor is there any point talking about damages.

1076. Secondly, as the previous paragraphs have shown that Spain has not violated any ECT provision, the Respondent has no obligation to compensate the Claimant.

1077. Consequently, this section V is presented as an ancillary, in the event that, firstly, the Tribunal agrees it has jurisdiction in this dispute and, additionally, in second place, the Tribunal understood there is a breach by the Kingdom of Spain of any precept of the ECT.

1078. It should also be warned that the opaque nature of the Brattle report and failure to contribute any information (which will be required in the relevant procedural step), places constraints on the Respondent's right to defence.

1079. Furthermore, we must wholly reserve the right to make ulterior objections to the calculation of compensation requested, amongst them: the incorrectness of the different parameters considered; the *contributory fault* of the Claimant; the Flow-Through of hypothetical damage; the incorrect determination of the valuation dates taken into account for the FET standard; the inadmissible immunity from the entrepreneurial risk; the inappropiate *tax gross-up* requested;

[604] Paragraph 431 of the Claimant's Memorial.

the wrong demand for interest; or the necessary discounts for *marketability*, due to a lack of control, or others.

1080. Notwithstanding the foregoing, in this section, the following arguments are developed (again, all of them are ancillary and with a reservation to ulterior objections to quantum):

a) The supposed alleged damages are totally and absolutely speculative.
b) The DCF method is inappropriate in the light of the circumstances in place, in accordance with the doctrine.
c) The standard established for the Thermosolar Plants of the Claimant (Gemasolar, Valle 1 and Valle 2) in the Parameters Order covers the investment costs undertaken.
d) Other serious flaws in the Brattle Report.

B. <u>The alleged damages are totally and absolutelly speculative.</u>

1081. First and foremost, the alleged damages estimated in the Brattle Report cannot be compensated as they are totally and absolutely speculative.

1082. The Claimant's Memorial indicates that compensation must be provided for "the lost fair market value of its investments, comprised of lost historical and future cash flows"[605], distinguishing between the flows supposedly generated until June 20 2014 (a date chosen at random by the Claimant as the valuation date), incorrectly called "historic" and those which would supposedly be generated from this date onwards.

1083. Now, said approach, setting against each the distinction between "historic" and future flows disregards the fundamental concept of regulatory useful life and avoids the joint consideration of past and futurible cash flows to guarantee the reasonable rate of return of the investments made. Consequently, said approach must be totally rejected.

1084. By Law the Thermosolar Plants are ensured reasonable rates of return, protected from uncertainties and the ups and downs of the market. For this very reason it is certainly paradoxical that in the context of an investment which by law guarantees a reasonable rate of return, a privilege that few entrepreneurs enjoy, and the Claimant claims for a breach of the FET standard.

1085. In view of said guarantee, the Claimant wishes to sustain a claim based on a simplistic comparison of scenarios ("real" and counterfactual), taking for granted that the "real" scenario will be maintained during the next few decades, ignoring the fact that the main guiding principle of the system consists of the reasonable rate of return guaranteed. This is why the forecast of the parameters is hypothetical and unrealistic.

1086. As the Supreme Court of the Kingdom of Spain, in similar cases, we believe that the alleged damages have not even been proven in the slightest. The time horizon, in addition to the fact that nothing guarantees that the retribution will remain petrified in its current way, always

[605] Paragraph 445 of the Claimant's Memorial.

ensuring a reasonable rate of return, means that the damage calculation carried out is speculative.

1087. Arguments which will undoubtedly be nothing new to the Claimant (nor, in all likelihood, to its experts), in view of the fact that it was made quite clear in almost one hundred judgements in which the Supreme Court has been aware of modifications about the remuneration regime for Renewable Energies. This includes the Judgement of the 24th of September of 2012 which, in its Sixth Legal Basis, declares as follows:

> *"Finally, with regard to the expert report provided with the document of demand with the purpose of quantifying the impact that the return of the projects implies applying Royal Decree 1565/2010, of the 19th of November, we will limit ourselves to repeat that the conclusions in it cannot be accepted given they are based in thirty years extrapolations into the future of magnitudes whose establishment lacks the necessary rigour and security. In front of a 30 years limiting "time horizon" of the right to receive the regulated tariff, the loss of "equity value" of photovoltaic plants stated in those reports is not proven. We refer, as in previous occasions, to what the judgement of the 19th of June of 2012 (appeal 62/2011) and ulterior ones stated already"*[606].

1088. Speculative, hypothetical damages are thus being invoked. In short, the Claimant wholly fails to comply with the burden of proof required.

C. <u>The DCF method is inappropriate in view the circumstances in places in accordance with the doctrine</u>

1089. As the damage is merely speculative, the Claimant had to adopt a speculative method for its calculations.

1090. Hence, the Claimant has used the DCF method to calculate the market value, assuming the cash flows of the Thermosolar Plants for 37 years (until 2051). As set out in its Claimant's Memorial:

> *"As has already been explained, the appropriate starting point for assessing compensation when resti-tution is unavailable is the fair market value of the investment in question. Although there are alter-native methods for measuring the fair market value of an investment, in the present instance, a DCF method is the appropriate method"*[607].

1091. The complexity and subjectivity of the calculations carried out by Brattle are shown in paragraph 472 and subsequent paragraphs which endeavour to provide a summary and then explain the steps taken. Said complexity and subjectivity, *per se*, invalidates the method selected.

[606] Judgement of the Supreme Court of the Third Chamber, of the 24th of September 2012, Sixth Legal Basis. R-0146.
[607] Paragraph 450 of the Claimant's Memorial.

1092. Self-evidently, without being unaware of the widespread use of the DCF method, in the present case there are a series of circumstances which would clearly advise against its usage. In this regard, arbitration case law is quite clear in rejecting the use of DCF when it proves too speculative.

1093. In this section, we will show how doctrine and arbitration case law totally reject, under certain circumstances, speculative methods like DCF and, by contrast, they are inclined to lend more credibility to more reliable methods such as those based on assets.

1094. In other words, doctrine and arbitration Case law are inclined to check whether the investor receives the reimbursement of its investments plus a suitable return on the costs thereof.

1095. In this regard, *Ripinsky* warns of the effect that the use of DCF would cause on many occasions, overvaluing financial impacts based on futuribles:

> *"[…] the future is uncertain and looking into the future requires one to make numerous assumptions and subjective choices regarding future market conditions, sales, costs, additional capital requirements, currency fluctuations, rates of inflation, levels of risk, etc. The end-result is thus inherently somewhat speculative. This explains why litigating parties' experts frequently produce DCF valuations with diverging results. Noting this tendency, Stauffer has warned against a 'Cinderella effect', that is, overvaluation of assets by claimants in their DCF valuations"*[608] *(emphasis added)*

1096. Now, in the present case there are certain circumstances which point towards both the inadmissibility and impossibility of using the DCF method:

(a) The lack of sufficient financial record (less than five years) sustaining a minimally solid future forecast on cash flows.

(b) The fact that this is a business which is capital intensive, with an important asset base. Virtually all its costs are investment costs on tangible infrastructures which were made recently (Plants finished in 2011-2012). There are no relevant intangibles to be valued.

(c) The characteristics of the thermosolar industry itself: evolving, lacking the necessary maturity. And the groundbreaking technology worldwide of one of the Plants in particular, Gemasolar.

(d) The high dependence on cash flows from exogenous elements which are volatile and unpredictable such as the pool price, inter alia.

(e) The financial weakness of the non-recourse *Project Finance* structures agreed upon which excessively leveraged the Thermosolar Plants, compromising and placing constraints on their feasibility.

(f) The long timeframe of the predictions, 37 years (until 2051).

[608] *Damages in International Investment Law*, Sergey Ripinsky with Kevin Williams, British Institute of International and Comparative Law (BIICL), 2008, pages 200 y 201. RL-0061.

(g) The contradiction between said time horizon and the working life declared in the official accounts of the Plants (between 20 and 25 years) and the monthly reports provided by the Claimant itself.

(h) The clear time disproportion between the *track record* (background, less than five years) and the projections (37 years).

(i) The disproportion between the alleged investments (and the pretended risk assumed) and the amount claimed.

1097. Bearing in mind the previous elements above, let's take a look at different doctrinal pronouncements in this regard. Hence, we can observe that DCF was rejected on numerous occasions for cases like the present one in which there is a series of characteristics:

> *"The DCF method has been rejected by tribunals on several grounds including:*
>
> *(i) lack of sufficiently long performance record;*
> (ii) *failure to establish future profitability of the investment;*
> (iii) *lack of sufficient finances to complete and operate the investment; and*
> (iv) *large disparity in the amount actually invested and the FMV claimed.*" (emphasis added)

1098. Consequently, in view of the inadmissibility of DCF, the Arbitral Tribunals have frequently used, to evaluate the existence of damages, methods based on the costs of assets, analysing whether they have been recovered and reasonable rates of return are obtained on them:

> *"The method of calculating FMV by reference to actual investments has proved quite popular in arbitral practice. […] they have turned to the historic costs of investment as the relevant approach to valuation when the evidence necessary to apply an income base method has been considered insufficient"*[609]*. (emphasis added)*

1099. In turn, *Marboe* focuses on the advantages of asset-based methods which are less speculative and easier to use:

> *"The advantage of this approach is that, in comparison with the income capitalization approach, it appears to be much easier and less speculative. It looks into the past and not into the future and is seemingly much simpler to apply than the highly complex forecasting and discounting processes"*[610]*. (emphasis added)*

1100. Once again, *Marboe* refers to the normal returns and the book value as an obligatory reference, particularly when the investment is very recent. It also makes reference to reasonable rates of return:

> *"Experienced economists point to the fact that the significance of the ABV usually works with companies with normal rates of return. Extraordinarily*

[609] *Damages in International Investment Law*, Sergey Ripinsky with Kevin Williams, British Institute of International and Comparative Law (BIICL), page 227. RL-0061.

[610] *Calculation of Compensation and Damages in International Investment Law*, Irmgard Marboe, Oxford, Oxford International Arbitration Series, 2009, page 267. RL-0062.

> *high or low rated are rather rare and cannot be explained or be appropriately reflected by this method. Stauffer notes that extraordinarily high and 'abnormally poor performance must be explained, since, by definition most firms or ventures realize "average" rates of return'. This is also confirmed by Lou Wells who supports the use of the book value method for recently established businesses*
>
> *When the investment is very recent, or still in process of being made, there is an obvious and often easier alternative to using NPV of future cash flow to determine FMV. If the project was expected to generate 'normal' rates of return for the business, then the amount of investment itself provides a reasonable starting point for determining FMV. In most cases, the FMV of recently acquired assets is unlikely to be substantially different from the cost of those assets. Cost of investment will approximate what a buyer might pay; moreover, the investor who receives his investment back can invest the sum in another project, earn normal returns, and be equally well off. […]"*[611] *(emphasis added)*

1101. Indeed, the above is particularly appropriate when the acquisition date of the assets is close to the date of valuation. Therefore, *Ripinsky* adds the following:

> *"On the date a particular asset is bought, the price paid for it normally represents the market value of this asset. Accordingly, on that date, the price reflected in the buyer's books represents the asset's book value and market value at the same time."*[612]

1102. Carrying on the same idea, *Sabahi* talks about the recovery of costs plus a return on them as an appropriate compensation method:

> *"In Metalclad v Mexico, for example, […] considering that the investment was made recently and lacked a history of profitability, held that the investor could only recover its actual investment […] sunk costs in this case may have approximated the fair market value, because the investment was made recently.*
>
> *Another example is the case of Wena v Egypt […]. The tribunal […] did not consider DCF appropriate because the ventures were new and the claimant has not proved satisfactorily that they would have become profitable. Instead, the tribunal awarded the value of the investment actually made […]."*[613] *(emphasis added)*

1103. Ultimately, being the above-mentioned factual elements present, we construe that all of them must be taken into account by the Honourable Tribunal, in order to discard any valuation based in a DCF in the present case.

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[611] *Calculation of Compensation and Damages in International Investment Law*, Irmgard Marboe, Oxford, Oxford International Arbitration Series, 2009 , pages 275 y 276. RL-0062.

[612] *Damages in International Investment Law*, Sergey Ripinsky with Kevin Williams, British Institute of International and Comparative Law (BIICL), 2008, page 221. RL-0061.

[613] *Compensation and Restitution in Investor-State Arbitration – Principles and Practice,* Borzu Sabahi, Oxford, International Economic Law, 201, pages 132-133. RL-0063

D. <u>The standard set out for Claimant's Thermosolar Plants (Gemasolar, Valle 1 and Valle 2) in the Parameters Order covers the investment cost undertaken</u>

1104. In addition to all that set out above, it is necessary to highlight in the present case that the standard set out for the Plants of the Claimant in the Parameter Orders more than covers the investment cost undertaken. Indeed, the detailed analysis carried out in chapter 4 of the Expert report by Accuracy on the Masdar Plants concludes that:

> *"436. The standard cost established in the regulations in force (Order of Parameters IET/1045/2014) for Thermosolar Plants of the Claimant within the respective IT's (Gemasolar: IT-00614; Valle 1: IT-00609; and Valle 2: IT-00609) is higher than the cost declared in its official accounts.*
>
> *437. Precisely, for Valle 1 and Valle 2 the cost is similar to he one established in the Order, whereas for Gemasolar the Order considers a higher cost of €29.6 million, 11.7% more than the actual cost declared in its official accounts.*
>
> *438. As a result, the subsidy will grant the Claimant's specific Thermosolar Plants a higher effective return than the one established in the regulation".*

1105. This means that the rate of return enjoyed in particular by the Claimant's plants will be far higher than that stipulated in the regulation as a reference.

E. <u>Other serious flaws in the Brattle Report</u>

1106. According to that stated in the Accuracy report accompanying the present document, the Brattle Report suffers from serious flaws which invalidate its conclusions.

1107. The Brattle Report is opaque, not revealing nor providing the information used. Consequently, it cannot be checked or verified. As stated in the Accuracy expert report about the Claimant and its claim[614]:

> *"551. Although we consider that the methodology is not appropriate, we have analysed the information provided by Brattle for the preparation of its models. We must note that, in general terms, Brattle has not been thorough in the description of the assumption, and even less in their quantification. It does not inform on its detailed models and does not even include tables summarising the main hypotheses (production, revenues, operational expenses, etc.). It does not communicate the annual FCF series, neither for its But For nor for its Actual model. […]*
>
> *555. In order to carry out a validation of the claim calculated by Brattle, Accuracy would need to obtain the detailed financial models on which basis the But For and Actual scenarios have been calculated. […]*

[614] Paragraph 551 and subsequent paragraphs of the Economic Report on the Claimant and its claim issued by Accuracy, September 15th 2015.

556. In addition, the model to be provided by Brattle must be sufficiently broken down and its assumptions sufficiently detailed to enable Accuracy to review the sources and preparation […]"

1108. In this sense, the fact is that the information provided is incomplete, which puts this Respondent party in an absolute and unfair and defenceless situation.

VI. PETITUM AND RESERVATION OF RIGHTS

1109. In view of the arguments presented in the present Memorial, the Kingdom of Spain respectfully requests the Arbitral Tribunal to:

a) Declare that it has no jurisdiction over the Claimant's claims, or in its case it inadmissibility, according to what section III of this brief states, referring to Jurisdictional Objections;

b) In the alternative, in case the Arbitral Tribunal decides it has jurisdiction over this dispute, to dismiss all the Claimant's pretensions regarding to merits as the Kingdom of Spain has not breached the ECT in any way, according to what section IV of the brief states, referring to the merits;

c) In the alternative, to dismiss all compensation pretensions from the Claimant as they do not have right to a compensation, as stated in section V of the present brief; and

d) Order the Claimant to pay for all the costs and expenses that arise from the present arbitration, including the administrative expenses incurred by ICSID, the fees of the arbitrators and the fees of the legal representation of the Kingdom of Spain, their experts and advisers, as well as any other cost or expense incurred, all that including a reasonable interest rate from the date on which said costs were incurred until the date of its effective payment.

1110. The Kingdom of Spain reserves the right to supplement, amend or complement these observations and to present any additional argument as needed, in accordance to the ICSID Convention, the ICSID Arbitration Rules, the Procedural Orders and the directives of the Arbitral Tribunal in order to respond to all allegations made by the Claimant with regard to this matter.

Madrid, 16th of September 2015

Respectfully submitted,

Fernando Irurzun Montoro Diego Santacruz Descartin Fco. Javier Torres Gella