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**IN THE CASE OF AN ARBITRATION UNDER THE RULES OF THE ARBITRATION
INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (SCC)**

AND

**UNDER THE ENERGY CHARTER TREATY
(SCC V 2015/150 ARBITRATION)**

BETWEEN:

GREENTECH ENERGY SYSTEMS A/S ET AL

Claimants

and

THE KINGDOM OF SPAIN

Respondent

**COUNTER-MEMORIAL ON THE MERITS AND MEMORIAL ON
JURISDICTIONAL OBJECTIONS**

ARBITRATORS:

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**Submitted in representation
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the payment of rates, are determined, while that the rates that must be paid by electricity producers are not developed in regulations”⁴¹¹

725. Secondly, the fall in the price of electricity on the wholesale market. Specifically, as the Government indicated:

“The second unexpected factor that has affected the estimate of the tariff deficit in a significant and unforeseen manner is related to wholesale market prices and their indirect effect on the costs of the system, through the equivalent special regime premiums.

Indeed, given the fact that renewable technologies have a guaranteed minimum remuneration and that toll income must cover the part of this remuneration that is not covered by the market, the regulated costs increase when market prices fall, and vice-versa”⁴¹².

726. Consequently, the introduction of the examined measures responded to the need to ensure the economic sustainability of the SES. Notwithstanding the fact that the measure consisting on the limitation of subsidised hours was motivated by an additional factor: to correct situations of over-remuneration, as shall be discussed when we examine this particular measure.

(i) The limitation of the working hours entitled to receive a subsidy

• Description of the Measure

727. RD-Act 14/2010 introduced, from the point of view of the temporary extension of its effects, two limitations: (i) a non-transitory limitation; and (ii) a transitory limitation

- The non-transitory limitation on the equivalent operating hours of the photovoltaic facilities: the RD-Act sets a maximum limit of hours (both for the facilities under RD 661/2007 and under RD 1578/2008) during which the photovoltaic facilities can sell the electricity generated with a subsidised Tariff. After this maximum number of hours, the facilities can continue to sell at Market rates.

Therefore, an annual maximum quota of hours during which energy can be produced at the Tariff (subsidy) rate is established, distinguishing according to the climatic solar area where the facility is located, in accordance with the classification of climatic zones according to average solar radiation in Spain established by Royal Decree 314/2006⁴¹³, of 17 March, which approves the Technical Building Code. The distinction is, therefore, by production zones and type of technology:

⁴¹¹ Report on regulatory impact of Draft Royal Decree-Act 14/2010 establishing urgent measures for the correction of the tariff deficit in the electricity sector, pages 5-6. R-0111

⁴¹² Ibid.

⁴¹³ Royal Decree 314/2006, of 17 March, which approves the Technical Building Code. R-0077.

Tecnología	Horas equivalentes de referencia/año				
	Zona I	Zona II	Zona III	Zona IV	Zona V
Instalación fija	1.232	1.362	1.492	1.632	1.753
Instalación con seguimiento a 1 eje	1.602	1.770	1.940	2.122	2.279
Instalación con seguimiento a 2 ejes	1.664	1.838	2.015	2.204	2.367

- The transitory limitation on hours with a right to the Tariff: the foregoing must be specified for facilities subject to RD 661/2007, as the Second Transitional Provision of RD-Act 14/2010 provides that until 1 January 2014 the facilities covered by RD 661/2007 have a limit of hours entitled to a different Tariff. From that date, they have the general limit described above.

Geographic areas are not differentiated by this time limit, although the technology of each facility is taken into account:

Tecnología	Horas equivalentes de referencia/año
Instalación fija	1.250
Instalación con seguimiento a 1 eje	1.644
Instalación con seguimiento a 2 ejes	1.707

In other words, during their useful life, all photovoltaic facilities have a “cap” or maximum ceiling (the one in the first table) of production hours with a subsidy (at the Tariff). Above this “cap” they will always be able to continue selling their energy in the “Pool” or market, receiving the corresponding price. However, between 2011 and 2013, the facilities covered by RD 661/2007 (not those covered by RD 1578/2008) have a “cap” or specific ceiling (the one in the second table). After 2013, all photovoltaic plants are subject to the general “cap” (i.e. the one in the first table).

728. Nonetheless, we must highlight the fact that these measures have been left without effect by RD-Act 9/2013, which has absorbed all their effects.

- **The measure responded to the need to guarantee the economic sustainability of the SES and eliminate situations of over-remuneration.**

729. As discussed above, the examined measure’s main purpose was to ensure the economic sustainability of the SES. However, this measure was intended to correct situations of over-remuneration.

730. In this sense, the Government, before passing RD-Act 14/2010, stated with regard to this measure that:

“Secondly and according to the same principle, in order to avoid return in excess of that envisaged, a limitation to the equivalent number of hours subject to a premium is

established, in a similar way to the limitation placed by Royal Decree 1614/2010, for wind and solar thermoelectric facilities.

The remunerative values of Royal Decree 661/2007 were calculated for the purpose of obtaining reasonable rates of return and on the assumption of the average performance hours of the facilities that use these three technologies.

These performance hours are set out in the 2005-2010 Renewable Energies Plan, for all technologies.

Subsequently, in the actual operation of the system, it has been demonstrated that the performance hours of the facilities, in some cases, exceed those that were initially planned, for a range of reasons, improvements in technology, excess facilities, etc. In any case, this means that, for these facilities, the remuneration obtained is higher than reasonable."⁴¹⁴

731. The Government clearly states that RD 661/2007 was not enacted for the purpose of granting an implied yield, the return arising from the application of the tariffs under said regulation. The Government is showing that the tariffs under RD 661/2007 are inextricably linked to what is stated in the PER 2005-2010. That is, these tariffs do not arise spontaneously. These tariffs are the result of the methodology followed in the PER 2005-2010 and are intended to provide the return target set in the aforementioned planning instrument.

732. Thus, when correcting the situation of over-remuneration it acted with the intention of guaranteeing the right to receive a reasonable rate of return. Thus, the Preamble of RD-Act 14/2010 noted⁴¹⁵:

“In the design of these measures care has been taken to ensure the guarantee of the electrical energy supply in conditions of universality, quality, security and continuity, and to guarantee the protection of the consumers' right to electricity supply in equitable conditions, as well as to ensure compliance with the energy efficiency and development of renewable energy sources objectives. Concurrently, special attention and care have been taken not to affect the economic-financial equilibrium of the companies in the sector, not just for large companies, maintaining the principles of liberalisation on which Act 54/1997, of 27 November, on the Electricity Sector is based, but also for generation facilities as a whole, ensuring that, especially in the case of the Special Regime generation companies, they have a sufficient and reasonable remuneration guaranteed.” (emphasis added)

“Thirdly, and as it has been stated in section two, it also seems reasonable that the Special Regime producers also make a contribution to mitigate the system's extra costs, a contribution that must be in proportion with the characteristics of each type of technology, with its level of participation in the generation of those extra costs and

⁴¹⁴ Report on regulatory impact of Draft Royal Decree-Act 14/2010 establishing urgent measures for the correction of the tariff deficit in the electricity sector, pages 13 to 15. R-0111

⁴¹⁵ RD-Act 14/2010, of 23 December, establishing urgent measures for the correction of the tariff deficit in the electricity sector published in the Official State Gazette of 24 December 2010. Preamble. R-0058.

with the margin existing in the remuneration whose reasonable rate of return is in any case guaranteed. In this way, regulatory measures with the same aim have been approved by the Government aimed at wind, thermosolar and cogeneration electricity producers.” (emphasis added).

- **The maximum hours of operation set down in RD-Act 14/2010 were already forecasted since PER 2005-2010**

733. The limitations introduced by Additional Provision One and Transitory Provision Two of RD-Act 14/2010 were enacted because of the methodology used by the PER 2005-2010. The limitations on equivalent operating hours introduced by RD-Act 14/2010 cannot, indeed, be considered arbitrary because, as is set out in detail in the aforementioned rule's Preamble, they have their origin in the PER 2005-2010.

734. The operating hours established by RD-Act 14/2010 are exactly the equivalent operating hours that, as a standard, were used in the standard facilities contained in PER 2005-2010 to determine the tariff, that with the objective of granting a reasonable rate of return were subsequently included in RD 661/2007. In consequence, the perception of these tariffs for hours of operation considerably greater than those taken into account for setting the tariff would determine a rate of return clearly greater than that considered reasonable and, in any case, greater than that intended by PER 2005-2010 and RD 661/2007.

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

736. Royal Decree-Act 14/2010 considers that the facilities will perceive the regulated tariff until using up the reference hours each year. They may subsequently continue to function, earning the market price for their electricity. In this way, the over-remuneration perceived by the facility is returned to consumers.

737. In this regard the Supreme Court of the Kingdom of Spain, when examining the limitation of operating hours under Spanish Law stated:

"The provisions of the Renewable Energies Plan 2005-2010, which established the remunerative regime of Royal Decree 661/2007 for facilities using solar photovoltaic technology, revolved around certain operating hours (1250 equivalent hours per year for a fixed facility of less than 100 kW connected to the grid and 1644 equivalent hours for a smaller facility of 100 kW with one-axis tracking) that are similar to those included in the second transitional provision of RD-Act 14/2010. The "reasonable rate of return" of those facilities covered by the economic regime established by Royal Decree 661/2007 could not, therefore, uncouple itself from the targets set out in the Renewable Energy Plan 2005-2010 or fail to know what the provisions of the latter

certain costs which, unlike conventional technologies, they cannot recover on the market. The TVPEE is precisely one of those costs.⁴⁸⁰

(ii) Revision of remunerations, tariffs and premiums for activities in the electricity sector linked to the Consumer Price Index at constant tax rates, excluding unprocessed foods and energy products.

816. This measure was implemented by RD-Act 2/2013, of 1 February 2013, on urgent measures in the electricity sector and in the financial sector (hereinafter, "**RD-Act 2/2013**")⁴⁸¹. In the Ruling of the Plenary Session of the Constitutional Court 28/2015, of 19 February 2015, the constitutionality of this RD was declared.⁴⁸² The Supreme Court has endorsed the legality of the measure, because these indices, as the Spanish Supreme Court noted, do not "*have to be the same for different activities or have to remain unchanged over time.*"⁴⁸³

817. Royal Decree-Act 2/2013 agrees to replace with effect from 1 January 2013, the Consumer Price Index governing the adjustment of remunerations, fees and premiums for power sector activities, including the production of renewable energy, by the Consumer Price Index at constant taxes excluding unprocessed food and energy products (hereinafter "**CPI-CT**").

818. This measure, justified both scientifically and legally, has produced effects that do not harm the Claimant, as it has been beneficial to those facilities. CPI at constant taxes has evolved over the CPI in certain periods of 2013, 2014 and 2015. This evolution is confirmed by the following table:⁴⁸⁴

⁴⁸⁰ Order IET/1045/2014, dated 16 June, approving those compensation parameters for standard energy facilities applicable to certain electric energy production facilities from energy renewable energy sources, cogeneration and waste, Explanatory Memorandum III:

"On the other hand, the operating costs, which are variable depending on the standard facilities' production, include but are not limited to the following: insurance costs, administrative expenses and other general expenses, market representation expenses, fees for accessing the transmission and distribution grids that must be paid by the producers of electric energy, operation and maintenance (both preventive as well as corrective) costs, tax on the value of the production of electric energy established by Act 15/2012, of 27 December, on tax measures for energy sustainability as well as the other taxes regulated by this Act. R-0086.

⁴⁸¹ RD-Act 2/2013, of 1 February, on urgent measures in the electricity sector and the financial sector. R-0063.

⁴⁸² Ruling of the of Plenary Session of the Constitutional Court 28/2015, of 19 February 2015, in Constitutional Question number 6412-2013. Legal basis 3: "*The situation that the measures here contested should address was the diversion of electricity system costs caused by various factors (the excess costs of special regime premiums, the allocation of costs for non-mainland electricity systems and the deficit increase due to the declining in electricity demand) displayed explicitly in the preamble or in the parliamentary debate on recognition. Factors whose conjunction had led to a higher than initially planned deficit by the government. Thus, it can be considered that, [...], the Government has met the need to explain and reason the existence of a situation of extraordinary and urgent need, [...] it is clear that the proposed measures as pursuing an adjustment in the electricity sector costs, keep the necessary connection between the situation of extraordinary and urgent need and the measures taken to address it.*" R-0132.

⁴⁸³ Ruling of the Supreme Court, of 26 March 2015. Fifth Legal Ground. R-0134.

⁴⁸⁴ BDO Report. Para. 443



819. The methodological change in this measure is only to change the overall CPI by a form of core CPI at a constant tax. In this sense, the use of underlying price indices at a constant consumption tax is largely based on the global economic doctrine⁴⁸⁵ and avoids general index distortions attributable to the volatility of certain elements or modifications of indirect taxes.⁴⁸⁶

⁴⁸⁵ For example, these types of indexes are included in the analysis methodology of price indices in the *Consumer Price Index manual. Theory and practice*, compiled 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, the United Nations and the World Bank. 2006. R-0158.

Similarly, the main report on the world economic situation, the *World Economic Outlook* of the International Monetary Fund uses underlying price indices in its analysis Methodology. *World Economic Outlook*, International Monetary Fund, April 2014. R-0177.

The same core inflation method of analysis is used by the Federal Reserve of the United States. *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 at www.federalreserve.gov, 10 April 2015 (date of last access).

⁴⁸⁶ In terms of the report on the subject of the Organisation for Economic Cooperation 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 policy-makers 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." (emphasis added). R-0100.

Indeed, one of the most common methods for calculating the underlying price index is used by RD-Act 2/2013, that is, the overall CPI excluding unprocessed food and energy products, as well as indirect taxes or variations thereof. As stated in the report cited above: "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. Hence, excluding them provides a better picture of existing underlying inflation

820. That is, the update methodological change made by RD-Act 2/2013 responds, in general, to the usual standards for calculating the consumer price indices in the international economy and aims to avoid distortions in the consumer price index, unrelated to the fundamentals of the economy. This will be discussed in detail in the analysis of ECT protection standards. It also involves a change endorsed by the rules and criteria of the European Union.⁴⁸⁷

821. It is also a change announced by the proposals contained in several Reports of the National Energy Commission⁴⁸⁸ and the National Markets and Competition Commission.⁴⁸⁹

822. The predictability of this reform by a prudent and diligent operator, being a measure in an economic context which required urgent decisions, has also been recognised by the Supreme Court repeatedly, saying:

"A "prudent and diligent economic operator", therefore, could not be surprised by the adoption, in 2013, of a measure of this kind, much less since that was neither unpredictable, but on the contrary that had been suggested by the energy regulator, nor - in the words of the aforementioned ruling of the Court of Justice- "the economic operators may have a legitimate expectation that an existing situation which may be modified in the exercise of the discretion of national authorities is maintained." In a generalised crisis scenario, as was that of Spain in late 2012 and early 2013, similar

pressures."(emphasis added). *Measuring and assessing underlying inflation*, OECD Economic Outlook, Preliminary Edition, 2005, pag. 188 and 189. R-0100.

⁴⁸⁷ Under this reform, the proposal from the Commission was from 2009 and this is the reason why the National Institute of Statistics, the Spanish authority responsible for statistics, began to publish the HICP-IC as early as September of that year.

Once the reform was formally approved on 26 September 2012, the INE proceeded to incorporate this magnitude into the CPI scope and published it on 11 October 2012 in a press release on its website, stating, inter alia the following: *"This indicator aims to deduct from the price variation the section that may be due to changes in taxes on consumption. To do this, the CPI evolution is assessed under the assumption that these taxes have not changed since the reference time. [...] The CPI-CT will usually only vary differently from the CPI when there are changes in taxes considered in its calculation: Value Added Tax (VAT), taxes on fuel, taxes on tobacco, vehicle registration tax, and taxes on insurance premiums."* Regulation (EC) No 2494/95 of 23 October 1995 concerning the indices of consumer prices (RL-0018, page 1), developed as the sub-indices by Regulation (EC) No. 2214/96 of 20 November 1996 concerning the indices of consumer prices: transmission and dissemination of indices of consumer prices sub-indices (RL-0022, page 8). The latter was modified by the proposal approved on 26 September 2012, producing Regulation (EU) No 119/2013 of the Commission on 11 February 2013, by which Regulation (EC) No 2214/96 is modified, regarding the creation of HICP-IC. (RL-0023 page 1).

⁴⁸⁸ Report on the Spanish Energy Sector Part I. Measures to guarantee the financial-economic sustainability of the electricity sector, National Energy Commission, 7 March 2012, page 16: *"In line with what was observed by the Council of European Energy Regulators (CEER)", it was noted that "it is necessary to review the current update mechanisms with efficiency factors X and Y fixed, and link them to target efficiency improvements. Temporarily, as long as the study of these parameters is not made according to efficiency analysis, a downward revision of updates is proposed, taking into account the current economic situation."* R-0105.

⁴⁸⁹ National Competition Commission Report 103/13 on the Electricity Sector Bill, National Competition Commission, page 11. R-0106.

*changes in economic value index updates were carried out in this and other sectors of economic life.*⁴⁹⁰

823. Indeed, the Spanish Supreme Court has ruled on the matter stating that the reform made by RD-Act 2/2013 is limited in scope, since the differences between the two update methodologies are not especially significant.

I. Current remuneration model for certain energy production facilities from renewable energy sources.

(1) Objectives of the current system.

824. Firstly, the electric system analysis revealed that the remuneration that was paid via electricity bills, should be revised in order to comply with the standards of the EU and domestic law, to ensure the guarantee of a reasonable rate of return.

825. The complex economic situation in which the Kingdom of Spain found itself owing to the existence of a deep crisis required the electricity system to comply with the aforementioned basic principles.

826. In this context, and as we have explained, the different preliminary analyses, regulatory developments themselves, technical knowledge and technological developments, revealed the existence of remunerations which, either by default or by excess, did not maintain the criterion of *reasonable rate of return* established for the remuneration of the so-called special regime and that of *adequate remuneration* for the rest of the regulated activities, especially transport and distribution activities. To do so, a remuneration system was established that tried to guarantee the reasonable rate of return of the RE producers in the framework of a sustainable SES.

827. The model resulting from this review is contained in RD-Act 9/2013⁴⁹¹ and Act 24/2013.⁴⁹² Regulations with the force of Law that have been developed by RD 413/2014⁴⁹³ and Order IET/1045/2014⁴⁹⁴. This model strengthens the support system for renewable technologies. The measures adopted from 2012 to 2014, measures that have affected all SES sectors, have guaranteed the economic sustainability of the SES. Achieving this objective implies the principal protection of the investments made in the Spanish renewable sector. In this sense:

"It is not possible to counter the support through subsidies for renewable energy generation and the defence of the system's financial sustainability, when the latter is a

⁴⁹⁰ Ruling of the Third Chamber of the Supreme Court of 26 March 2015, RCA 133/2013, reference CENDOJ: 28079130032015100087. Ninth Point of Act (R-0134) and Ruling from the Supreme Court of the Third Chamber, dated 16 March 2015, RCA 118/2013, reference CENDOJ: 280779130032015100072 (R-0133).

⁴⁹¹ RD-Act 9/2013 of 12 July, establishing urgent measures to ensure the financial stability of the electricity system. First Additional Provision. R-0064

⁴⁹² Act 24/2013, of 26 December, on the Electricity Sector R-0047.

⁴⁹³ RD 413/2014. R-0080.

⁴⁹⁴ Order IET/1045/2014. R-0086