

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

AZIENDA ELETTRICA TICINESE

– Claimant –

and

FEDERAL REPUBLIC OF GERMANY

– Respondent –

ICSID Case No. ARB/23/47

Before:

Sir Christopher Greenwood GBE CMG KC (President)

John Beechey CBE

Professor Campbell McLachlan KC

**Rejoinder on the Merits and
Reply on Preliminary Objections**

18 May 2026

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GLOSSARY

2020 Act	Act to Reduce and End Coal-Fired Power Generation, 8 August 2020
2023 PPA	Amendment to PPA dated 19 September 2023
2018 UN IPCC Special Report	2018 UN IPCC Special Report on Global Warming of 1.5°C
2013 Preliminary Permit	Decision by the District Government of Arnsberg on the construction and operation of the Lünen Plant, 20 November 2013
2008 Preliminary Permit	Decision by the District Government of Arnsberg on the construction and operation of the Lünen Plant, 6 May 2008
2011 AET Law	Amended AET Law of 2011, Exhibit R-0055
AET	Azienda Elettrica Ticinese
AET Law	The Law on Azienda Elettrica Ticinese, 10 May 2016
AR5	Fifth UN IPCC Assessment Report
AR6	Sixth UN IPCC Assessment Report
Aurora ER I	First Expert Report of Mr. Hanns Koenig
Aurora ER II	Second Expert Report of Mr. Hanns Koenig
CCS	Carbon-capture storage
Claimant	Azienda Elettrica Ticinese
Climate Change Opinion	ICJ's Advisory Opinion of 23 July 2025 on Obligations of States in respect of Climate Change
Coal Commission	Commission for Growth, Structural Change, and Employment
Coal-Firing Stop	Order that prohibits the firing of hard-coal in hard-coal fired installations
Compass Lexecon ER I	First Expert Report of Mr. Julian Delamer and Mr. Alan Rozenberg
Compass Lexecon ER II	Second Expert Report of Mr. Julian Delamer and Mr. Alan Rozenberg
Consortium Agreement	Trianel Consortium Agreement dated 8 May 2008 to pursue the aim of building the Lünen Plant (C-0081)
Counter-Memorial	Respondent's Counter-Memorial dated 26 March 2025
CO₂	Carbon dioxide
ECT	Energy Charter Treaty, Lisbon, 17 December 1994, UNTS 2080, 95
ECtHR	European Court of Human Rights
EnBW	Energie Baden-Württemberg
	

ETS	European Emissions Trading System
EU	European Union
FET	Fair and Equitable Treatment
FICL	Federal Immission Control Law (<i>Bundesimmissionsschutzgesetz</i>)
FMV	Fair market value
FPS	The Full Protection and Security standard
Germany	The Federal Republic of Germany
GHG	Greenhouse gas emissions
[REDACTED]	[REDACTED]
[REDACTED]	A gas-fired power plant [REDACTED]
Hard-Coal Levy	Claimant's obligation under Swiss law to pay a climate-action levy of 6 EUR/MWh for its share of electricity produced by the Lünen Plant
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2020)
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts of 2001
Kyoto Protocol	Kyoto Protocol to the United Nations Framework Convention on Climate Change, UNTS Chapter XXVII 7. a.
LEAG	Lausitz Energie Kraftwerke AG und Lausitz Energie Bergbau AG
Loan Agreement	Loan Agreement between Trianel Kohlekraftwerk Lünen GmbH & Co. KG and Trianel Kohlekraftwerk Lünen Verwaltungs GmbH and [REDACTED] , 26 July 2008 (amended from time to time)
Lünen Plant	The Coal-Fired Power Plant in Lünen, Germany
Memorial	Claimant's Memorial dated 26 July 2024
Moorburg Plant	The hard-coal power plant in Moorburg ultimately owned by Vattenfall AB
NAFTA	North American Free Trade Agreement
OPEX	Operating expenses
Paris Agreement	Paris Agreement, 12 December 2015, UNTS Chapter XXVII 7.d.
Partnership Agreement	Agreement between the shareholders of Trianel, 8 May 2008
Phase-Out	The phase-out of hard-coal and lignite fired power generation
PPA	Power Purchase Agreement between Azienda Elettrica Ticinese and Trianel Kohlekraftwerk Lünen GmbH & Co. KG, 8 March 2008 (amended in 2015)
Prognos ER I	First Expert Report of Mr. Marco Wunsch and Mr. Hans Dambeck

Prognos ER II	Second Expert Report of Mr. Marco Wunsch and Mr. Hans Dambeck
Project Mozart	Trianel's efforts to sell the Lünen Plant as part of a package deal [REDACTED]
Referendum	Public referendum held by the Ticino Government on 5 June 2011 obliging AET to exit the Lünen Plant
Rejoinder	This Rejoinder on the Merits and Reply on Preliminary Objections
Reply	Claimant's Reply on Merits and Counter-Memorial on Preliminary Objections dated 16 January 2026
Respondent	The Federal Republic of Germany
RWE	Rheinisch-Westfälisches Elektrizitätswerk AG
[REDACTED]	[REDACTED]
STEAG	STEAG Energy Services GmbH
Ticino Parliament	The Grand Council of the Canton of Ticino, Switzerland
Trianel	Trianel Kohlekraftwerk Lünen GmbH & Co. KG
UN IPCC	United Nations Intergovernmental Panel on Climate Change
UNFCCC	United Nations Framework Convention on Climate Change, UNTS Chapter XXVII 7
[REDACTED]	[REDACTED]
VCLT	Vienna Convention on the Law of Treaties (1969)
Westfalen E Block	Block E of the Westfalen hard-coal power plant of RWE

I. INTRODUCTION

A. THE ECT IS NOT A DECISION AGAINST CLIMATE ACTION

1. Claimant began its case in this arbitration by trying to carve-out the issue of climate change.¹ In the Counter-Memorial, Respondent insisted that climate change is at the heart of the present arbitration. The Act to Reduce and End Coal-Fired Power Generation of 8 August 2020 (the “**2020 Act**”) combats climate change. The Counter-Memorial showed that the 2020 Act was adopted because of the existential need for climate action to save species, mitigate poverty and prevent geopolitical conflicts.² Further, the 2020 Act was enacted to comply with the Paris Agreement of 12 December 2015,³ and Germany’s obligations under, *inter alia*, international law, EU law, and German constitutional law on climate change.⁴ Hence, the 2020 Act falls under the police-powers doctrine and is compliant with Article 10 ECT.

2. After the Counter-Memorial, the ICJ rendered its Advisory Opinion of 23 July 2025 on Obligations of States in respect of Climate Change (the “**Climate Change Opinion**”). The ICJ’s Climate Change Opinion underlines the existential need for climate action and concludes that sovereign States, including Respondent, have certain obligations under international law. The Opinion reinforces Respondent’s case.⁵

3. Claimant’s Reply on Merits and Counter-Memorial on Jurisdiction (the “**Reply**”) disputes neither the existential need for climate action, the binding nature of the Paris Agreement, nor the unchallenged status of Germany’s climate-action obligations under EU and German law. Nor did Claimant dispute that the police-powers doctrine is a rule of customary international law or that climate action is also required under human rights. Therefore, these aspects are undisputed.

4. Claimant’s case in the Reply on climate action is narrow, albeit incorrect.

5. *First*, Claimant’s main allegation is that the ECT would constitute a conscious decision against further climate action. This is incorrect. Above all, Article 24(1) ECT does not exclude the police-powers doctrine. Essential-security clauses such as Article 24 ECT and the

¹ Cf. Request for Arbitration, ¶ 3: “The dispute is [...] no[t] about contesting the need to reduce CO2 emissions”.

² Counter-Memorial, ¶¶ 136-143, 156-162, Annex.

³ Counter-Memorial, ¶¶ 144-150.

⁴ Counter-Memorial, ¶¶ 151-155, 163-179.

⁵ See in detail below, ¶¶ 208-222.

police-powers doctrine are two separate topics.⁶ On fair and equitable treatment (“FET”) under Article 10 ECT, Claimant’s case that the numerous references in the ECT to environmental matters would *e contrario* imply that further climate-action norms violate FET, is incorrect. Instead, FET must be interpreted in line with these references. Claimant’s case would result in the untenable result of the ECT not being embedded in international law, but the ECT standing against other norms of international law.⁷

6. *Second*, on the need for climate action as such, Claimant’s main assertion appears to be that climate action should be achieved through means other than phasing out hard-coal power plants: “*none of these documents establish a necessity to shut down New Plants*”.⁸ For the avoidance of doubt, hard-coal power plants, including those built in the 2000s such as the Lünen Plant, are amongst the world’s most significant CO₂ emitters. This is scientific consensus. Hence, phasing out hard-coal power plants is a reasonable step to fulfil the obligation to mitigate climate change.⁹

7. *Third*, Claimant alleges that the 2020 Act would have discriminated against the Lünen Plant. Claimant’s arguments in the Reply mainly repeat the Memorial. They remain incorrect. The 2020 Act treats Claimant like any domestic or third-State investor. This already undermines Claimant’s discrimination case. Even if the Tribunal holds otherwise, the 2020 Act’s shutdown order is based strictly on age. The 2020 Act’s auction formula applied to all hard-coal power plants identically. Plants of a comparable vintage participated in the auctions. Hence, Claimant’s true case on the comparison with *other hard-coal plants* is that the Lünen Plant should have been treated better than these plants. However, the obligation not to discriminate is not an obligation to treat a foreign investor better than everyone else.¹⁰

8. Claimant’s discrimination case regarding the *lignite sector* remains flawed because hard-coal and lignite are two different industries. German hard-coal power plants only burn hard-coal sourced on the world market (hard-coal mining in Germany had been phased out already after many billions of subsidies). By contrast, the lignite phase-out under the 2020 Act concerned the lignite mining sector. In Germany, lignite mining is intertwined with the power plants. The mining

⁶ See in detail below, ¶¶ 230-249.

⁷ See in detail below, ¶¶ 350-358.

⁸ Reply, ¶ 173.

⁹ See in detail below, ¶¶ 360-377.

¹⁰ See in detail below, ¶¶ 260-269.

sector employed more than 60,000 employees and needs to take care of the rehabilitation of the lignite pits. Therefore, treating hard-coal power plants and the lignite sector differently was appropriate and well within Germany's margin of appreciation.¹¹

9. *Fourth*, Claimant and its experts allege that alleged principles on fair market value ("FMV") would entitle Claimant to claim lost profits that depend on an alleged market expectation in the Paris Agreement being ignored by regulators. After the Reply, it is undisputed that input data in line with the Paris Agreement, *e.g.* on CO₂ certificate prices, would reduce any damages claim to zero because the Lünen Plant's phase-out will be market-driven. Contrary to Claimant, damages, if any, must be calculated *under* international law, not *contrary to* international law. Especially, in the present case, the sole financial beneficiary of a hypothetical damages award, *i.e.* Switzerland, is itself bound by the international law on climate action.¹²

B. BEYOND THE ISSUE OF CLIMATE CHANGE, THE DEFICIENCIES IN CLAIMANT'S CASE INCREASED

10. In the Counter-Memorial, Respondent set out that while the 2020 Act's object and purpose to mitigate climate change suffices, on its own, to undermine Claimant's case, there are numerous further factual and legal reasons that warrant to dismiss the claim. In the Reply, Claimant was unable to rebut any of them. Moreover, the additional facts established through document-production (which AET sought to exclude altogether¹³), increase the deficiencies in Claimant's claim. To summarize some of the most important deficiencies in Claimant's case beyond the issue of climate change:

11. Claimant's decision to invest in the Lünen Plant was controlled by the Swiss State. It is undisputed that AET submitted its decision to invest to the Ticino Parliament for approval. It is also undisputed that AET received a special right under the Consortium Agreement to leave the project in case the parliamentary approval would be rejected. Claimant alleges that it requested the Parliament's approval only for reasons of political opportunity. While Claimant's allegation is incorrect, it is also irrelevant. Already the undisputed facts suffice to meet the test for State control over the decision to invest under the *Broches* test's second limb and Article 8 ILC Articles.

¹¹ See in detail below, ¶¶ 270-289.

¹² See in detail below, sect. V.A.1.

¹³ PO 2, ¶ 5.

The present dispute is a covert State-State dispute outside the scope of Article 25 ICSID Convention.¹⁴

12. Claimant was forced under the amended AET Law of 2011 to leave the power plant “as soon as possible, provided they do not generate financial losses” (“**2011 AET Law**”) and by 2035 at the latest (even with losses). In document production, Claimant resisted heavily and unsuccessfully against any disclosure of its efforts to comply with this obligation. The disclosed documents confirm that despite its obligation to act “as soon as possible”, Claimant undertook hardly any efforts to divest in 2011-2017. Thus, Claimant violated Swiss law and/or deemed its shares in the Lünen Plant worthless.¹⁵ Due to this new information, Respondent invokes the violation of Swiss law as a self-standing preliminary objection¹⁶ and Claimant’s inability to secure any offer for its shares in 2011-2017 on liability and quantum.¹⁷

13. Claimant does not and cannot bring its case based on any legitimate expectations. In the Reply, Claimant confirmed: “As regards the allegedly lacking legitimate expectations, Claimant gladly repeats that it does not depend on the existence of subjective expectations [...]”.¹⁸ Instead, Claimant seeks a first-of-its-kind award holding a State liable for abstract regulatory changes absent any legitimate expectations.¹⁹ Claimant only brings this – incorrect – FET theory because Claimant invested without having received any formal commitments about the Lünen Plant’s lifetime. It is undisputed that no such commitment was given in a law, regulation, permit, contract or even conversation. Claimant does not even invoke any meeting between anyone involved in the Lünen Plant and the government. Instead, Claimant only invokes public political speeches. However, Claimant does not assert, let alone prove to have even reviewed these speeches at the time of the alleged Investment. Further, Claimant did not establish that any document addressed the timeframe between 2032 and 2052 for which Claimant now claims lost profits.²⁰

14. Claimant did not receive any legal due diligence, let alone on the German legislature’s power to phase out hard-coal energy before the alleged Investment. Respondent was able to

¹⁴ See in detail below, sect. III.A.

¹⁵ See in detail below, ¶¶ 48-72.

¹⁶ See in detail below, sect. III.B.

¹⁷ See in detail below, ¶¶ 307-308, 435, 561-567.

¹⁸ Reply, ¶ 576.

¹⁹ See in detail below, ¶¶ 333-349.

²⁰ See in detail below, ¶¶ 378-415.

confirm this remarkable fact through document-production.²¹ The complete absence of an assessment of the legal framework must weigh heavily against a claim for an alleged change of that very framework.

15. Claimant shifted its case on the operating permits in the Reply and now overstates the 2013 Preliminary Permit. As highlighted in the Counter-Memorial, the 2008 Preliminary Permit was revoked as unlawful in court in 2011. In the Reply, Claimant now focuses on the 2013 Preliminary Permit alleging: “*the 2013 Advance Decision is nothing other than the 2008 Advance Decision recast – with the initially missing environmental compatibility assessment.*”²² Claimant also alleges that because the Permit became final and binding only in 2023, Respondent would be bound by an *obiter dictum* in this Permit on public interest. Claimant also submitted an expert report on the alleged obligations under the 2013 Preliminary Permit. Contrary to Claimant’s supplementary case, the 2013 Preliminary Permit does not suffice for any claim. As a matter of *fact*, the 2013 Preliminary Permit cannot have been a basis for any investment because it post-dates the alleged Investment by five years. As a matter of *German law*, the 2013 Preliminary Permit did not establish any relevant obligations for the German legislature. In this regard, Respondent submits the accompanying expert report of the former Vice President of the Constitutional Court of the Federal Republic of Germany, Professor Ferdinand Kirchhof.²³

16. [REDACTED]

Above all, the disclosed PPA from 2023 states that Claimant will exclusively bear an outstanding loan if the Lünen Plant closes on [REDACTED] or later. However, Claimant’s case in this arbitration is that the Lünen Plant would close in [REDACTED]. Hence, Claimant’s liability does not even apply. [REDACTED]

[REDACTED]²⁴

17. Claimant also did not dispute in the Reply that the banks financing the Lünen Plant have already received more than EUR [REDACTED] in interest and will receive a total of more than

²¹ See in detail below, ¶¶ 41-47.

²² Reply, ¶ 121.

²³ See in detail below, ¶¶ 321-327, 426-434.

²⁴ See in detail below, ¶¶ 92-148.

EUR [REDACTED] in interest before the Lünen Plant closes. But-for the Lünen Plant’s heavy debt and the chosen project-financing structure, the alleged Investment would have already been amortized. Claimant failed to establish any reason why the (German) State should indemnify for Claimant’s self-chosen leverage.²⁵

18. Claimant did not revoke its prior concession that the alleged fair market value of its shares in the Lünen Plant was at best EUR [REDACTED] at the time of the alleged Investment. Therefore, Claimant’s claim has nothing to do with Article 13(1) ECT, but with the customary international law on damages. Article 13(1) ECT is not a damages claim because an expropriation *per se* is not a treaty breach. Claimant’s damages claim, however, does not comply with the customary international law standard either. Claimant fails to respect its obligations to establish causation and prevent over-compensation in numerous respects.²⁶

19. By contrast, Claimant sought to revoke its concession from the Memorial that converting the Lünen Plant to a gas power plant would result in, at least, a EUR [REDACTED] net benefit for Claimant alone. In passing, Claimant and its expert mention that they revised their calculation and that the EUR [REDACTED] would be gone. This speaks volumes on Claimant’s confidence in its mitigation position from the Memorial. Claimant’s experts, however, did not disclose the calculations behind this revision. It must be rejected on this ground.²⁷

20. Indeed, the undisclosed nature of the calculations from Claimant’s experts from Frontier was already a main issue raised in the Counter-Memorial and document-production. Claimant and its experts refuse to put these on record. At the same time, they even increase references to these undisclosed calculations. Claimant then takes the position that an investor in treaty arbitration should be allowed to base claims on undisclosed calculations. Claimant brings a damages claim with an active request of denying Respondent its due-process rights to address these calculations. Claimant’s approach is untenable.²⁸

21. Claimant does not dispute that the 2020 Act increases electricity prices also abroad. Nor did Claimant advance any substantiated case to dispute the fact that such increase in electricity prices, in turn, increases the turnover for Claimant’s remaining electricity production portfolio. Claimant only provided the new information that app. 30 % of the produced electricity

²⁵ See in detail below, ¶¶ 480-489.

²⁶ See in detail below, sect. V.A.

²⁷ See in detail below, ¶¶ 581-595.

²⁸ See in detail below, ¶¶ 568-576.

is sold under long-term PPAs. *E contrario*, the other app. 70 % are not. They benefit from higher prices. Faced with this issue of fact, Claimant alleges that the law would require to ignore all financial effects on the investor's assets other than the investment itself. Claimant represents international law incorrectly. Damages are about the investor's losses, not only the investment's losses. A damages award under international law must not place the investor in a better position than the investor would have been in but-for the disputed measure.²⁹

22. These reasons only constitute examples of the reasons beyond the issue of climate change that warrant to dismiss Claimant's claims. For the full reasons set out in this Rejoinder, Claimant's claims must be dismissed with costs.

C. OVERVIEW OVER STRUCTURE, WITNESSES AND EXPERTS

23. In accordance with the timetable set out in Procedural Order No. 6, the Federal Republic of Germany ("**Respondent**" / "**Germany**") submits this Rejoinder on the Merits and Reply on Preliminary Objections ("**Rejoinder**") together with Exhibits R-194 through R-235 as well as RL-122 through RL-155. Respondent also re-submits corrected or extended translations of Claimant's Exhibits C-30, C-33, C-66, C-74, C-78, C-80, C-86, C-127, C-135, C-136, C-138, C-177 and SD-75.

24. The present Rejoinder follows closely the structure of the Counter-Memorial, beginning with issues of fact (see below, at II.), preliminary objections (at III.), liability (IV.), and quantum (V.). Also, the structure of the legal issues within these sections corresponds to the Counter-Memorial. The only modification of the established structure is that in the section on facts, Respondent focuses on the new facts established through document-production. Respondent's sur-rebuttal on all other facts, already addressed in the Counter-Memorial, will occur in the context of the specific issues where these facts become relevant.

25. An important editorial note to this Rejoinder is that the Rejoinder avoids duplication of arguments already set out in the Counter-Memorial to limit the material the Tribunal must review before the Hearing. The Rejoinder will refer to the Counter-Memorial where issues have already been addressed sufficiently and the Reply either repeats the Memorial or does not address the core argument from the Counter-Memorial. The Rejoinder instead focuses on the new allegations in the Reply and the few facts established through document-production. This

²⁹ See in detail below, ¶¶ 601-625.

approach should not be construed as any waiver of any argument from the Counter-Memorial. The latter stands. The Rejoinder should be read together with the Counter-Memorial.

26. Together with this Rejoinder, Respondent submits the following expert reports and witness statements:

27. Respondent submits the Second Expert Reports from **Julian Delamer** and **Alan Rozenberg** from Compass Lexecon on damages and input data; **Hanns Koenig** from Aurora on power market modelling; and **Marco Wunsch** and **Hans Dambeck** from Prognos on technical conversion options of the Lünen Plant and technical assumptions of Claimant and its economic experts respectively. These expert reports are submitted in sur-rebuttal to the Second Expert Reports of Claimant’s experts from Frontier and Secretariat.

28. Furthermore, Respondent submits the Second Expert Report from **Professor Hans-Joachim Schellnhuber** on the relevant scientific foundations of climate change and the necessity for its mitigation. He replies to Claimant’s allegations on his First Report made in sect. B.IV.3 of the Reply. In addition, he updates his First Report to include those publications that only became available after his First Report. Accordingly, the Tribunal has the benefit of the most up-to-date research on the existential issue of climate change.

29. In addition, Respondent submits the Expert Report from **Professor Peter Kunz** of the University of Bern. Professor Kunz analyses aspects of Swiss law, *i.e.* the control of the Canton of Ticino over AET’s decision to invest (in which capacity Professor Kunz also replies to Claimant’s expert Professor Peter) and AET’s compliance with the 2011 AET Law based on the documents obtained in document-production.

30. Respondent also submits the expert report of **Professor Ferdinand Kirchhof**, the former Vice President of the Constitutional Court of the Federal Republic of Germany. Professor Kirchhof analyses that under the applicable constitutional law, the legislature had full authority to phase out hard-coal energy despite existing operating permits (in this capacity, Professor Kirchhof also replies to Claimant’s expert Dr. Krahnefeld).

31. Respondent also submits the expert report of **Professor Götz Wiese** on the obligations to pay the trade tax under German law. In this capacity, Professor Wiese also replies to Claimant’s first substantiated comments on trade tax issues made in sect. E.VII.4 of the Reply.

32. Respondent also submits Supplementary Witness Statements of the following witnesses whose First Witness Statements had been submitted with the Counter-Memorial:

33. [REDACTED] (whose First Witness Statement addressed the legislative process of the 2020 Act during which he was in charge of the Ministry's unit handling the drafts) comments on certain allegations of fact made by Claimant regarding the legislative process and the comparison of the hard-coal and lignite sectors as well as by Claimant's experts from Frontier in sect. 8 of their Second Report.

34. [REDACTED] (whose First Witness Statement addressed the subsidies for the hard-coal mining industry) comments on Claimant's allegation in the Reply that "*the lignite mining industry has received state aid long before the [2020 Act]*."³⁰

35. [REDACTED] (who commented on the Lünen Plant's operating permits from his perspective of District Government of Arnsberg's department supervising the Lünen Plant) was provided with the Expert Report of Claimant's expert Dr. Krahnefeld on the administrative and court proceedings of the Lünen Plant. For the sake of good order, he confirms in his Second Witness Statement that he reviewed Dr. Krahnefeld's report and has no amendments to make to the testimony from his First Witness Statement.

36. All emphases in verbatim quotes have been added unless stated otherwise. Abbreviations are defined in the glossary above or taken from the GAR Universal Citation in International Arbitration Guide (RL-118).

37. With regard to the citation of exhibits, Respondent noted that the citations of C-Exhibits in the Reply were incorrect. The actual Exhibit files submitted by Claimant have each a number higher than those cited in the Reply. For example, when the Reply cited Exhibit C-133, the actual file is Exhibit C-134. All references in this Rejoinder are to the actual C-Exhibit files.

38. As a final introductory comment, Respondent regrets the many polemic phrases in Claimant's Reply. Respondent distances itself from this approach. In the interest of assisting the Tribunal in deciding the Parties' disagreements, Respondent will address the substance of Claimant's arguments. However, Respondent will not quote the polemic phrases. Respondent not quoting these polemic phrases and not confirming its disagreement to each of these phrases for

³⁰ Reply, ¶ 221.

the record should not be construed as any agreement with Claimant's characterizations. Instead, Respondent intends to keep the pleadings fact-based in what may become the leading case on issues of climate action under investment treaties.

II. FACTS ESTABLISHED THROUGH DOCUMENT-PRODUCTION

39. In the Counter-Memorial, Respondent showed that Claimant's documentation was insufficient on key facts of the dispute, *i.e.* Claimant's lack of due diligences on German law (see below, at A.), Claimant's efforts since 1 August 2011 to comply with its duty under the 2011 AET Law to divest its shares in the Lünen Plant (at B.), the 2023 PPA between Claimant and Trianel (at C.), and the reasons why Claimant gave concessions in this 2023 PPA (at D.).

40. Through document-production, Respondent was able to obtain further documentation on these issues. With the exception of the 2023 PPA, all documents were obtained over Claimant's objection. This happened after Claimant took the unusual position at the outset of the arbitration that there should not be any document-production at all, as rejected in PO 2.³¹ This section summarizes the additional facts established through document-production.

A. AET DID NOT CONDUCT ANY DUE DILIGENCES ON GERMAN LAW

41. In Procedural Order No. 5, Annex B, Respondent made Requests No. 6-8 for Claimant's assessments of Germany's regulatory framework, particularly the regulator's power to phase out hard-coal energy. Claimant objected to these requests. The Tribunal gave the following orders for document-production in Respondent's Redfern Schedule:

- Request No. 6: *“The Tribunal therefore directs the Claimant to produce any internal documents from the period specified in the Respondent's reply column [1 June 2005 through 30 May 2008] in which the Claimant assessed, or was presented with an assessment of, the powers of the regulator to phase out hard-coal plants.”*
- Request No. 7: *“The Tribunal therefore directs the Claimant to produce any documents in the possession, custody or control of the Claimant setting out the due diligence and results thereof, conducted prior to the initial decision to invest, regarding the risks under German law concerning the proposed investment insofar as those risks concerned the possibility of hard-coal plants being phased out.”*
- Request No. 8: *“The Tribunal refers to its decision on Request No. 7 and directs that any documents in the possession, custody or control of the Claimant assessing the results of the due diligence covered by that decision should be produced.”*

³¹ See CMC I; Claimant's letter of 15 May 2024.

42. In response to all three orders, Claimant produced one (1) document.

43. This one document is not a legal due diligence. It is a 25-page document from 2007 issued by Trianel for its shareholders. It is largely identical with Trianel's 76-page feasibility study already submitted to the record with Claimant's Memorial as Exhibit C-68. These documents mainly record Trianel's own economic projections.

44. Only three paragraphs in the produced document concern legal matters. They do not go beyond Trianel's own (not: counsel's) brief statement that the Lünen Plant should receive an operating permit. The regulator's power to phase out hard-coal power plants is not mentioned. Indeed, the entire topic of regulatory restrictions on the operation is not addressed. Further, even on the operating permit itself, the risk that later materialized into 15 years of litigation for the Lünen Plant regarding the validity of the operating permit is not mentioned. The three paragraphs are the following:

“ Regulatory risks⁷

The project developer is entitled to a permit both under the provisions of the Federal Immission Control Act and under the energy sector legislation applicable to high-voltage overhead lines, provided that the factual requirements for such a permit are met.

At present, there are no known circumstances in any of the key approval and authorization procedures that would preclude a positive decision by the competent authorities on the applications submitted.

The preliminary decision is expected to be issued in early 2008. The water law permits are expected to be granted in the second quarter of 2008, and the planning approval decision for the high-voltage overhead line is expected to be issued in late 2008 or early 2009. The risk assessment shows that there are more uncertainties in the planning approval procedure for the high-voltage overhead line than in the procedure for the preliminary decision under immission control law. This is not specific to the project of TPK/Netzleitung Lünen GmbH. In this respect, the project of Netzleitung Lünen GmbH does not present any particular risks beyond those normally expected in such projects.”³²

45. These three paragraphs from Trianel (not: outside counsel) are the entire allegedly-legal assessment which Claimant produced. For the avoidance of doubt, Claimant's Privilege Log contains no entries for Requests No. 6 through 8 either.

³² R-0201-ENG/GER, Trianel, Draft Resolution - Summary, 3 December 2017, adobe pp. 21-22.

46. Therefore, it is established that Claimant neither conducted nor was provided with any assessment of the powers of the regulator to phase out hard-coal plants (PO 5, Annex B, Decision on Request No. 6). It is also established that Claimant neither conducted nor was provided with any due diligence regarding the risks under German law concerning the proposed investment insofar as those risks concerned the possibility of hard-coal plants being phased out (PO 5, Annex B, Decision on Request No. 7).

47. Respondent also notes that amongst its numerous objections against the document requests, Claimant also claimed legal privilege.³³ However, outside counsel's assessments do not exist. This shows that Claimant's assertions should be approached with caution.

B. AET'S OBLIGATION UNDER SWISS LAW TO EXIT THE LÜNEN PLANT

48. In the Counter-Memorial, Respondent drew the Tribunal's attention to the 2011 amendment on the AET Law (the Swiss law which is the constituent document of Claimant, a State-owned company under public law). The 2011 amendment was enacted as a result of a referendum in Ticino. Since 1 August 2011, Claimant's shares in the Lünen Plant "*shall be disposed of as soon as possible, provided they do not generate financial losses. In any event, such participations must be disposed of by the end of the year 2035 at the latest.*"³⁴

49. Given the fundamental nature of Claimant's 2011 obligation to divest, Respondent concluded in the Counter-Memorial that Claimant had "*concealed*" this obligation.³⁵ Document-production has reinforced that this is the appropriate conclusion.

1. 2011-2017, AET either made insufficient efforts or deemed its shares worthless

50. In PO 5, Annex B, the Tribunal directed Claimant, over Claimant's objections, to produce the following documents:

- Decision on Request No. 20: "*Accordingly, the request is granted insofar as it concerns offers for the shares in the plant and the Claimant is directed to produce*

³³ PO 5, Annex B, Requests 7 and 8, Claimant's Objections (same wording): "Claimant objects to this request for the reasons of [...] Privilege (P)."

³⁴ **R-0055-ENG/ITA**, Amendment of the Law establishing the AET of 25 June 1958 in Official Bulletin of Laws Vol. 137 32/2011, 12 July 2011, Transitional Rule, adobe p. 11.

³⁵ Counter-Memorial, ¶ 620.

any documents in its possession, custody or control relating to such offers or to certify that no such offers were made.”

- Respondent’s Request No. 21 (granted by Tribunal in full subject to legal privilege and Article 9(2) IBA Rules): *“The internal documentation on the steps AET has taken (incl. any valuations received by external consultants and/or experts) to divest its shares in the Lünen Plant in accordance with its obligations under Swiss law.”*

51. For the timeframe until the end of 2017, Claimant produced five (5) documents. Of these, two pre-date the entry into force of the 2011 AET Law on 1 August 2025. The remaining ones are a very brief internal memorandum from 2014 (1.5 text pages) and an email exchange from 2017.

52. On substance, the scarce documentation Claimant produced disproves Claimant’s assertions that the 2020 Act would have prevented AET from finding a buyer.³⁶ These documents pre-date the 2020 Act by many years. They even pre-date the work of the – unchallenged – Coal Commission (which began its work only in summer 2018).

53. None of the produced documents from 2011-2017 is a purchase offer. Therefore, it is established that until the end of 2017, Claimant did not receive any purchase offers for its shares in the Lünen Plant. That Claimant was obligated to divest these shares *“as soon as possible, provided they [the shares] do not generate financial losses”* (2011 AET Law, Transitional Provision) and could not secure any offer already calls into question the economic viability of Claimant’s alleged Investment.

54. The five documents are the following:

55. R-0200, Internal communication from AET, 18 February 2011: The first document is an email from AET’s head of legal services dated February 2011 (several months before the 2011 AET Law entered into force). The email does not address any steps to divest but whether AET can terminate the shareholders agreements.

56. C-140, AET statement, 1 February 2011: The second document is a statement by AET to Ticino’s Special Energy Commission. After Claimant had objected to producing the document in document-production, Claimant cited this document in the Reply. However, the document is

³⁶ Cf. Reply, ¶ 105: “With the Coal Ban Law, Germany has made it as difficult as possible to comply with that obligation [under the 2011 AET Law].”

dated 1 February 2011. Therefore, the document cannot contain any evidence on the steps AET *has taken* to comply with the 2011 AET Law. The date of the document, 1 February 2011, was months before the Referendum took place (which was in June 2011) and the 2011 AET Law entered into force (which was on 1 August 2011). Instead, the document records AET's opposition at the time it was faced with the still-pending Referendum to exit the Lünen Plant already by 2015.

57. C-141, AET Internal Memorandum, January 2014: The third document is an internal memo from 29 January 2014, *i.e.* drawn-up after AET had been obligated for more than two years to divest as soon as possible. After it had to produce the document in document-production over its objection, Claimant also submitted the document as Exhibit C-141.

58. The document has three pages of which 1.5 pages are text. The document does not show who the author is. Claimant does not offer any fact witness who could provide further contemporaneous context.

59. On substance, the 2014 memorandum (Exhibit C-141) confirms the following:

60. *First*, until the end of 2013, *i.e.* for more than two years after the 2011 AET Law entered into force, AET made no attempts to sell its individual shares in the Lünen Plant. Instead, according to the 2014 memorandum, AET only tried to participate in the sale of the entire Lünen Plant. Approximately [REDACTED] of Trianel's shareholders were also interested in a full or partial divestment of their shares. The 2014 memorandum asserts:

“It is intended to avoid acting and offering shares of the plant in the market in an uncoordinated manner, creating competition among the various bidding shareholders and thus avoiding a loss of value.”³⁷

61. The 2014 memorandum is silent why avoiding competition is compatible with the 2011 AET Law which obligated Claimant to divest these shares “*as soon as possible, provided they [the shares] do not generate financial losses*”. Even a sale at a reduced share price can still be without losses, especially given the low equity paid by AET.

62. *Second*, the 2014 memorandum continues that the Lünen Plant engaged the M&A firm [REDACTED], which undertook a survey but could not identify any suitable buyers at all:

“The outcome [of the survey] was not encouraging in that some interest emerged, but the potential price the buyers would be willing to pay is

³⁷ C-0141, AET, Promemory – AET stake in TKL, status of sale negotiations, 29 January 2014, p. 1.

wholly unsatisfactory in that it would lead to a failure to recover the capital invested and thus a loss in the overall transaction.”³⁸

63. The 2014 memorandum also records explicitly that the Lünen Plant’s litigation issues were an *“uncertainty factor that could impact the value of the investment.”*³⁹ The 2014 memorandum continues that in December 2012, Trianel decided to suspend the sales process in light of the ongoing litigation.⁴⁰

64. *Third*, the 2014 memorandum does not contain any statement that AET itself made any efforts to sell its shares during the year after December 2012. Apparently, for a year, no efforts to divest took place at all.

65. *Fourth*, AET’s internal 2014 memorandum records that its author (who is unknown, as is his/her legal training, if any) may have had a misunderstanding of the applicable contracts. The document states: *“only companies directly or indirectly linked to public capital are allowed to participate in the shareholding.”* This is incorrect. Trianel’s by-laws may have to be changed if the *majority* of shares are transferred to purely private companies. However, they do not prohibit the sale of a *minority* interest provided the other co-shareholders consent.⁴¹

66. *Fifth*, the January 2014 memorandum concludes as follows:⁴²

The final concession was obtained last December.

For this reason, AET is again taking steps to resume the coordinated sale process, although the impact of the appeal filed to the plant’s outline permit will have to be considered.

The short-term market is not showing more positive signs than it did a year ago, but it is also true that AET is observing in the market an increasing interest in long-term holdings in coal-fired power plants by its counterparts or business partners. This may bode well, but should not lead to hasty conclusions.

67. Regarding the timeframe after this memorandum of January 2014, Claimant did not produce any documents from February-December 2014, 2015, 2016 or the beginning of 2017. That is, for the timeframe of the three years (January 2014 through spring 2017) after this memorandum, no documentation whatsoever was produced. In the Reply, Claimant only asserted vaguely: *“Once the operation of the plant had been authorised in December 2013, also the working group resumed its coordinated sales process. In line with its obligation to divest*

³⁸ C-0141, AET, Promemory – AET stake in TKL, status of sale negotiations, 29 January 2014, p. 2.

³⁹ C-0141, AET, Promemory – AET stake in TKL, status of sale negotiations, 29 January 2014, p. 2.

⁴⁰ C-0141, AET, Promemory – AET stake in TKL, status of sale negotiations, 29 January 2014, p. 2.

⁴¹ C-0080-DE/C-0080-ENcorrected, Trianel Partnership Agreement, 8 May 2008, sect. 16; C-0081-DE/EN, Trianel Consortium Agreement, 8 May 2008, sect. 4(1).

⁴² *Id.*

*participation in the Lünen plant, AET would also continue to independently monitor the market.”*⁴³ After this statement in para. 114 of the Reply, Claimant jumps to the year 2018 in para. 115. That is, also in the Reply, Claimant is silent on whether any meaningful efforts have taken place in the years between.

68. Therefore, it is established that no internal documentation (including emails and correspondence) exists at AET regarding any efforts to sell its shares in the Lünen Plant between January 2014 and spring 2017. Even for the entire timeframe between 1 August 2011 and spring 2017, *i.e.* a timeframe of almost six (6) years, only one document (Exhibit C-141) with 1.5 text pages and an unknown author exists.

69. R-0195 & R-0196, Email correspondence, April/July 2017: The other two documents are dated April and July 2017. Claimant produced email correspondence between Claimant and a representative of [REDACTED], an energy commodities company based in Lugano, Switzerland.⁴⁴ The exchange did not reach beyond the arrangement of a personal meeting on 10 May 2017 and the exchange of a confidentiality agreement.⁴⁵ Claimant did not produce any minutes of any personal meetings. For the avoidance of doubt, Claimant’s privilege log shows no such entries either.

Interim conclusion

70. In summary, the scarce documentation on the timeframe between 1 August 2011 and the end of 2017, *i.e.* a timeframe of more than six years, confirms the following:

- There is no more documentation than a memorandum of 1.5 text pages (Exhibit C-141) with an unknown author from 2014 and one email exchange from 2017.
- AET did not receive any purchase offers for more than six years.
- AET did not conduct more than one meeting with parties interested in AET’s shares during more than six years.
- Between 1 August 2011 and December 2013, AET did not undertake any efforts to sell its individual shares in the Lünen Plant.

⁴³ Reply, ¶ 114.

⁴⁴ **R-0195-ENG/ITA**, Email correspondence between AET and [REDACTED] 12 April 2017-27 July 2017; **R-0196-ENG/ITA**, Additional email correspondence between AET and ENET Energy, 20-31 July 2017.

⁴⁵ **R-0195-ENG/ITA**, Email correspondence between AET and [REDACTED] adobe pp. 2-3.

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- There is no evidence on record that AET even attempted to sell its shares between January 2014 (the date of the 1.5 text-page memorandum) and the spring 2017, *i.e.* a timeframe of more than three years.

71. Hence, either AET violated Swiss law or AET's shares in the Lünen Plant (which AET had to sell as soon as possible without a loss) could not be sold within a timeframe of more than six years without any losses.

72. The most devastating aspect is that these conclusions apply to a timeframe many years before the 2020 Act (and even before the unchallenged Coal Commission begin its work in summer 2018). Therefore, Claimant assertions that the 2020 Act would have prevented AET from finding a buyer⁴⁶ is disproven by the chronology of events.

2. In 2018, the Lünen Plant received offers significantly below its expectations

73. From 2018 onwards, the produced documents show that Claimant, again, only tried to participate in a sale of the entire Lünen Plant.

74. In 2018, Trianel commenced 'Project Mozart'. This describes Trianel's efforts to sell the Lünen Plant as part of a package deal [REDACTED]. For context, most of the Lünen Plant's shareholders are also shareholders in [REDACTED]. AET is not a shareholder in [REDACTED].

75. In paras. 115-119 of the Reply, Claimant asserts that the summary of Project Mozart would be that [REDACTED] was interested in acquiring the Lünen Plant. Claimant then implies that [REDACTED] refrained from the deal because of the Coal Commission's establishment.

76. For context, the Coal Commission began its work in June 2018, issued its Interim Report in October 2018, and its Final Report in January 2019.⁴⁷ As a preliminary matter, it remains unclear how the Coal Commission's own actions can be relevant in Claimant's case. Claimant never challenged the Coal Commission's actions under the ECT, let alone established how the

⁴⁶ Cf. Reply, ¶ 105: "With the Coal Ban Law, Germany has made it as difficult as possible to comply with that obligation [under the 2011 AET Law]."

⁴⁷ See in detail Counter-Memorial, ¶¶ 181-193.

independent Coal Commission's actions would be attributable to Respondent. Instead, Claimant even attempts to rely on the Coal Commission in its liability case.⁴⁸

77. Moreover, the documentary evidence confirms that already before the Coal Commission's establishment, [REDACTED] offered a price for the Lünen Plant far below the targets of Trianel's shareholders. Other potential buyers offered less or submitted no offer at all. [REDACTED] then withdrew because of [REDACTED], not the 2020 Act. In detail:

78. In January 2018 (months before the Coal Commission was even established), the Project Mozart steering committee conducted negotiations with the [REDACTED] utility companies [REDACTED], [REDACTED] and [REDACTED] as well as the [REDACTED] companies [REDACTED] and [REDACTED] about a sale of Trianel's shares.

79. The documents produced by Claimant do not contain any formal offers from three of these five potential buyers:

- [REDACTED] rejected Trianel's enquiries about a potential interest in the Lünen Plant.⁴⁹
- [REDACTED] made only an indicative offer, the details of which Claimant redacted.⁵⁰
- [REDACTED] had a value indication planned, but the documents produced to Respondent did not contain any result.⁵¹
- [REDACTED] submitted initial offers that were too low for Trianel's shareholders to enter into negotiations.⁵²

80. In February 2018 (several months before the Coal Commission was even established), [REDACTED] offered EUR [REDACTED] for the Lünen Plant considering a lifetime until 2033.⁵³

81. In March 2018, Trianel made [REDACTED] a counteroffer for EUR [REDACTED]. Still months before the Coal Commission was even established, Trianel's offer to [REDACTED] considered a lifetime

⁴⁸ Cf. below, ¶¶ 436-444, 553-560.

⁴⁹ **SD-0075-corrected**, Meeting of the Mozart Steering Committee 24 July 2018 (English), adobe p. 3.

⁵⁰ **R-0203-ENG/GER**, Session of shareholder committees TKL and [REDACTED], 3 September 2018, adobe p. 9.

⁵¹ **R-0204-ENG/GER**, 4th session of Project Mozart's steering committee, 29 August 2018, adobe p. 12; **R-0203-ENG/GER**, Session of shareholder committees TKL and [REDACTED], 3 September 2018, adobe p. 11.

⁵² **SD-0075-corrected**, Meeting of the Mozart Steering Committee 24 July 2018, adobe p. 1; **R-0203-ENG/GER**, Session of shareholder committees TKL and [REDACTED], 3 September 2018, adobe p. 10.. [REDACTED] offered initially only EUR [REDACTED] for the entire Lünen Plant. [REDACTED] then increased the offer to EUR [REDACTED] assuming a lifetime until 2040.

⁵³ **C-0142-DE/EN**, TKL, Documentation of Negotiations with [REDACTED], 7 June 2018, adobe p. 1.

of only until 2040 rather than until 2053 as proposed by Claimant’s experts in the present arbitration’s but-for scenario.⁵⁴ AET’s internal correspondence also evidences AET’s dissatisfaction with the fact that its co-shareholders in Trianel expected a lower minimum value than AET:

“4. The pain threshold range of the various shareholders is very wide, almost 100% between min and max. (There are some shareholders who want to sell “at any cost”).”⁵⁵

82. On 5 July 2018, *i.e.* one month after the establishment of the coal commission, ██████ increased its valuation to EUR ██████ assuming a lifetime until 2040.⁵⁶ This remained ██████ final offer.⁵⁷

83. In August 2018, ██████ informed Trianel that it had been analysing data and information on the Lünen Plant for weeks and that it did not see any justification for a value-increasing surcharge.⁵⁸

84. On 29 August 2018, the steering committee for Project Mozart held another session. In this session, many of Trianel’s shareholders expressed that ██████ offer was too low for them. They required a higher price.⁵⁹

85. The documentation also shows that key aspects of the transaction essential to ██████, ██████, could have only been implemented through a qualified majority of 75% of Trianel’s shareholders.⁶⁰ However, achieving this majority was effectively out of question due to ██████ offer which was below what many shareholders

⁵⁴ C-0142-DE/EN, TKL, Documentation of Negotiations with ██████, 7 June 2018, adobe p. 1; Secretariat ER I, ¶ 4.14.

⁵⁵ R-0197-ENG/ITA, Internal correspondence from AET regarding 2nd session of Project Mozart’s steering committee, 28 June 2018.

⁵⁶ R-0203-ENG/GER, Session of shareholder committees TKL and ██████, 3 September 2018, adobe p. 5; R-0220, Internal correspondence of AET regarding the session of shareholder committees TKL and ██████, 7 September 2018.

⁵⁷ R-0205-ENG/GER, 5th session of Project Mozart’s steering committee, 2 October 2018, adobe p. 4.

⁵⁸ R-0221-ENG/GER, 8th session of Project Mozart’s working group “negotiations”, 24 August 2018, adobe p. 15; R-0204-ENG/GER, 4th session of Project Mozart’s steering committee, 29 August 2018, adobe p. 9.

⁵⁹ R-0204-ENG/GER, 4th session of Project Mozart’s steering committee, 29 August 2018, adobe pp. 14, 27.

⁶⁰ R-0204-ENG/GER, 4th session of Project Mozart’s steering committee, 29 August 2018, adobe pp. 6-7, 28-29; See also R-0202-ENG/GER, ██████ Meeting 28 August 2018, 22, adobe p. 5.

wanted.⁶¹ While [REDACTED] remained interested in a transaction, it insisted that Trianel had to secure a qualified majority:

“[REDACTED] has made it clear to us that we must organise the 75% majority required under corporate law ourselves (“it is your problem how you will overcome this hurdle internally”).”⁶²

86. In addition, [REDACTED] considered the pending appeal of the 2013 Preliminary Permit (which, to recall for context, was still pending when the 2020 Act entered into force) before Germany’s Federal Administrative Court a significant legal risk. [REDACTED] demanded a probability discount to account for the risk of the 2013 Preliminary Permit being revoked by the court making the operation of the Lünen Plant unlawful.⁶³

87. All of these issues documented until August 2018 pre-date the Coal Commission’s Interim Report (issued only on 25 October 2018).

88. On 21 October 2018 (still four days before the Coal Commission’s Interim Report), Trianel informed its shareholders that [REDACTED] would withdraw from the negotiations for Project Mozart in their entirety. The only specific reason Trianel’s email mentions is the following: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

89. In conclusion, the documentary evidence does not support Claimant’s implications that [REDACTED] would have decided against an acquisition because of the Coal Commission. Already before the Coal Commission’s establishment, the offers were significantly below Trianel’s expectations. Claimant did not establish that the reasons went beyond ordinary commercial reasons and would include the anticipation of the 2020 Act.

⁶¹ R-0202-ENG/GER, [REDACTED] Meeting, 28 August 2018, adobe p. 4; R-0204-ENG/GER, 4th session of Project Mozart’s steering committee, 29 August 2018, adobe p. 14.

⁶² R-0204-ENG/GER, 4th session of Project Mozart’s steering committee, 29 August 2018, adobe p. 8.

⁶³ R-0204-ENG/GER, 4th session of Project Mozart’s steering committee, 29 August 2018, adobe p. 9.

⁶⁴ C-0145-DE/ EN: E-Mail from Mr. Becker to the members of the Steering Committee, *Subject: Mozart transaction project*, 21 October 2018 (redacted), p. 1.

⁶⁵ [REDACTED]

90. From 2019, AET produced one further document, an email exchange between AET and [REDACTED]. It concludes that as next steps, AET would seek its co-shareholders' consent for disclosure of further documents. The produced documents do not include any follow-up.⁶⁶

Interim conclusion

91. To conclude on the overarching issue of Claimant's obligation to exit the Lünen Plant, given Claimant's obligations for document-production under PO 5, Annex B, and the limited amount of documents produced by Claimant, it is established that:

- In 2011/2012, Claimant only participated in all shareholders' efforts to sell the entire Lünen Plant. These efforts were stopped in 2012 as the Lünen Plant was considered not to attract any buyer.
- On the time frame between 1 August 2011 (entry into force of 2011 AET Law) and spring 2017, there is no meaningful documentation that Claimant undertook any efforts to offer its individual shares in the Lünen Plant to potential purchasers. The only document from this timeframe is a 1.5 text-page memo (whose author is unknown) from January 2014 which mainly states that Claimant has not done so until end of 2013.
- In April/July 2017, Claimant had one email exchange and one meeting with one contact about its shares. There is no document of any meeting or meaningful negotiations. There is also no documentation of other potential buyers having been approached.
- In 2018, Trianel undertook an effort to sell the entire Lünen Plant. The price hoped for by Trianel was much higher than what [REDACTED] and other approached companies were willing to offer. In the end, Trianel received no offer. [REDACTED] withdrew for reasons unrelated to the Lünen Plant's phase-out [REDACTED]
- In 2019, Claimant sent one email to a potential buyer. There is no document of any meeting or meaningful negotiations. There is also no documentation of other potential buyers having been approached.

⁶⁶ R-0199, Email correspondence between AET and [REDACTED], 8 July 2019.

C. [REDACTED]

92. [REDACTED]

[REDACTED]

[REDACTED]

93. As a preliminary matter, it is undisputed that Claimant's position as a limited partner (*Kommanditist*) in Trianel as such does not lead to such liability. Under German law, limited partners are not liable for the partnership's full debt.⁶⁹

94. [REDACTED]

[REDACTED] Respondent agrees that through this PPA and its predecessors, Claimant reimburses Trianel for the loan instalments paid to the banks. However, this reimbursement occurs in exchange for the delivery of electricity. After a Coal-Firing Stop, Trianel's Lünen Plant will no longer produce electricity.

95. [REDACTED]

[REDACTED] In particular, Respondent flagged that it had reason to believe that Claimant and Trianel concluded an amendment to their PPA in 2023, which was missing in the record.⁷¹

96. Respondent received this PPA in document-production. Respondent submits the amendment to Claimant's and Trianel's PPA dated 19 September 2023 as Exhibit R-0194 (the

⁶⁷ [REDACTED]

⁶⁸ Secretariat ER II, ¶ 6.4.

⁶⁹ Counter-Memorial, ¶ 254: "It is undisputed that Claimant is only a limited partner in Trianel. As a limited partner, Claimant is not liable for Trianel's debts. Nor has Claimant asserted to have given any collateral towards the banks. The only mechanism by which Claimant pays for the debt is by reimbursing Trianel through a higher electricity price under the PPA."

⁷⁰ Memorial, ¶¶ 575-576; Reply, ¶¶ 259-286.

⁷¹ Counter-Memorial, ¶¶ 250-252.

“2023 PPA”). [REDACTED]
[REDACTED]

97. The 2023 PPA introduced a special sect. 18(1) to the PPA. Under this provision, Claimant is obligated to reimburse Trianel also for its share in the loan outstanding at the time of a Coal-Firing Stop:

“1. If, in implementation of the Act to Reduce and End Coal-Fired Power Generation (KVBG), the Supplier is permanently prohibited from operating the power plant before the end of the Power Purchase Agreement with effect from [REDACTED] or at a later date or is restricted to reserve operation and if, as a result, the Purchaser's obligations to pay the remuneration ends, the Purchaser is obliged to make a final payment in accordance with paragraph 2 below.[...]”⁷²

98. It would be implausible that the banks would have insisted on this clause if the original PPA before 2023 had already included such obligation for Claimant to bear the outstanding loan.
[REDACTED]
[REDACTED]

99. The most important aspect about sect. 18(1) 2023 PPA is that it applies to a Coal-Firing Stop “*effective* [REDACTED] *or any later date.*” To make it even clearer, the preamble of the 2023 PPA states explicitly that Claimant will have to pay a final instalment “*exclusively*” in case the Lünen Plant closes in [REDACTED] or later. The full passage in the preamble is:

“The obligation to make such a final payment under this amendment agreement applies exclusively in the event that plant operations are terminated on or after [REDACTED].”⁷³

100. [REDACTED]
[REDACTED] Under the unequivocal wording of the 2023 PPA shown in the preceding paragraph, Claimant is not liable for a Coal-Firing Stop before [REDACTED].

101. On top of the unequivocal wording of the 2023 PPA, the negotiation history shows that the wording had been chosen consciously. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] On 14 April 2023, the shareholders committee of Trianel (including the representative

⁷² R-0194-ENG/GER, 2023 PPA, 19 September 2023, section 18a 1-3.

⁷³ R-0194-ENG/GER, 2023 PPA, 19 September 2023, Preamble.

from Claimant) met again. The documentation of Trianel's shareholder meeting of April 2023 (five months before the 2023 PPA) records that Claimant's and the other shareholders' obligations for the outstanding loan under the 2023 PPA was limited consciously to a situation where a Coal-Firing Ban takes effect in [REDACTED] or later:

102. The protocol of a further shareholder meeting in May 2023 (four months before the 2023 PPA) also confirms:

103. Therefore, the 2023 PPA produced in document-production is evidence that Claimant would not be liable for a Coal-Firing Stop before [REDACTED]. Claimant's explicit legal case is that the Lünen Plant would close by [REDACTED]: *"determining the shutdown date for the Lünen plant is straightforward. [...] by [REDACTED], the hard coal capacity needs to drop to 5,516 MW. Hence, by that time, the Lünen plant needs to be shut down."*⁷⁶ Under the 2023 PPA, Claimant will not be liable for such Coal-Firing Stop by [REDACTED], i.e. before [REDACTED].

104. [REDACTED]

⁷⁴ **R-0213-ENG/GER**, Protocol of Trianel’s 65th Shareholder Committee Meeting, incl. attachment, 14 April 2023, pp. 2-3.

105. In the Counter-Memorial, Respondent concluded that there was no evidence on record that Claimant had conducted the negotiations leading to the 2023 PPA with the necessary prudence and vigour.⁷⁷ Respondent also emphasized that the banks in whose benefit Claimant agreed to the 2023 PPA had already collected more than EUR [REDACTED] in interest payments from the Lünen Plant.⁷⁸ The latter fact remained undisputed in the Reply.

106. In the Reply, Claimant states: “*During document production, Claimant produced 179 documents relating to the bank negotiations. It expects Respondent to withdraw its objections.*”⁷⁹ Claimant then asserts in the following paragraph: “*The amendment itself was a direct consequence of the Coal Ban Law.*”⁸⁰ Having reviewed the documents that Claimant had been ordered to produce over its objections, Respondent disagrees with Claimant’s assertions.

107. The documents addressed in chronological order below demonstrate that:

- Claimant knew of [REDACTED] (see below, at 1.);
- [REDACTED] (at 2.); and
- Claimant conceded to agree to sect. 18(1) 2023 PPA under the assumption that this concession would remain inapposite (at 3.).

1. AET was advised of [REDACTED]

108. On 27 March 2020, Trianel received the legal memorandum on the effects of the 2020 Act from its outside counsel. In the Reply, Claimant asserts: “[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Claimant’s assertions in the Reply on this memorandum are misleading.

109. [REDACTED]
[REDACTED]
[REDACTED]

⁷⁷ Counter-Memorial, ¶¶ 262-266.

⁷⁸ Counter-Memorial, ¶¶ 128-132.

⁷⁹ Reply, ¶ 262.

⁸⁰ Reply, ¶ 263.

⁸¹ Reply, ¶ 275.

[REDACTED]

[illegible]

[REDACTED]

[REDACTED]

82 [REDACTED]

83 [REDACTED]

84

85 [REDACTED]

112.

113.

2.

114.

115.

116.

86

87

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117.

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

business judgment during these negotiations and concludes: “*The amendment to the loan agreements was a balanced compromise.*”⁹⁶

124. As a preliminary matter, even if *arguendo* Claimant’s conclusion were correct, Claimant must establish more than a balanced compromise. [REDACTED]
[REDACTED]
[REDACTED] Therefore, Claimant must prove, *inter alia*, that the 2023 restructuring was the inevitable consequence of the 2020 Act.

125. The documentation that Claimant had to produce in document-production confirms that Claimant’s agreement was not inevitable. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] To address this documentation in chronological order:

126. On 26 January 2023, Trianel sent the letter to the banks that Claimant relies on in the Reply as alleged evidence that the banks’ termination would have been a “*pretext*.”⁹⁷ Respondent has already disputed this assertion above. A letter from Trianel cannot be evidence on the motives of the banks. The more important content of the letter is the following proposal of [REDACTED]
[REDACTED]:

[REDACTED]

127. [REDACTED]
[REDACTED]

⁹⁶ Reply, p. 87 (heading c.). See also ¶ 274: “Respondent tries to put itself post hoc into the shoes of TKL/AET but confuses the existence of abstract legal risks with the business consequences if those risks realise. It is the latter which companies have to take into account when exercising their business judgement before making a decision.”

⁹⁷ Reply, ¶ 272.

⁹⁸ C-0173-DE/EN, TKL, *Letter to the Steering Committee TKL-Bank Consortium*, 26 January 2023, p. 2.

128. [REDACTED]

This also contradicts the assumptions of Claimant's valuation experts that the Lünen Plant would need to operate until [REDACTED].⁹⁹

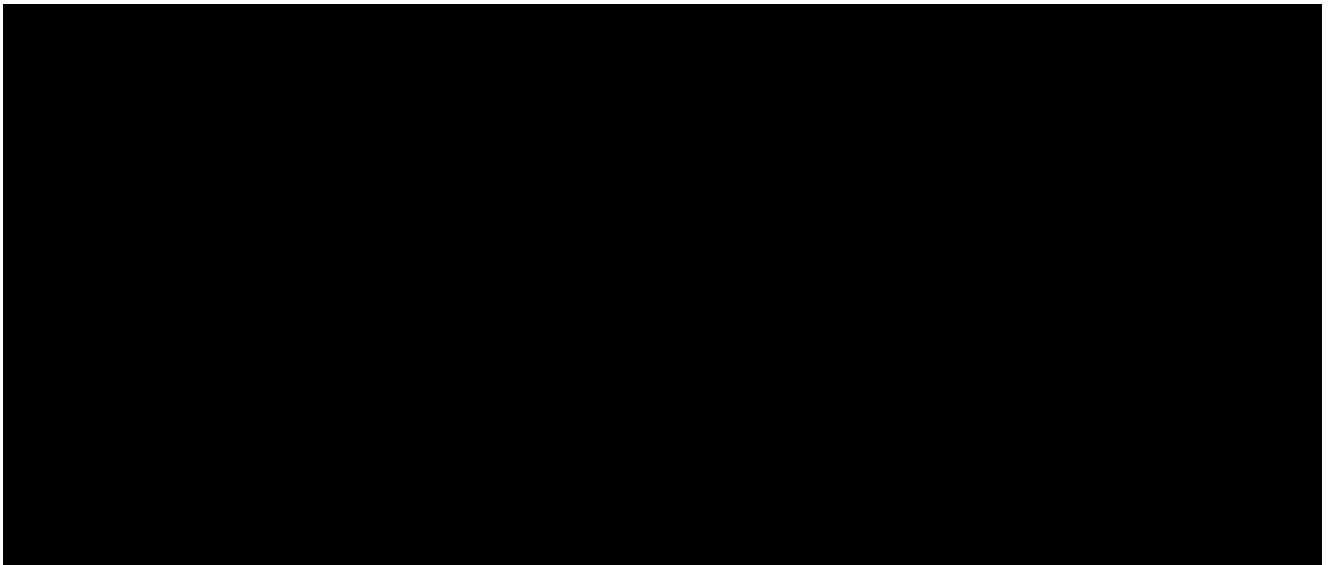
129. On 31 January 2023, Trianel sent an email to Claimant and the other shareholders for coordinating further proposals. Trianel stated:

“[REDACTED]

130. The following is a screenshot of Trianel's financial model which itself has not been produced by Claimant but was attached to correspondence.¹⁰¹ [REDACTED]

[REDACTED]

[REDACTED]):



131. On 1 February 2023, the shareholder committee of Trianel (incl. a representative from Claimant) met. The committee discussed an internal note on the negotiation strategy. It also

⁹⁹ See Secretariat ER I, ¶ 5.32: “We model the debt repayments based on this schedule and assume that TKL would not take out any additional debt, such that all of TKL's debt has been fully repaid by [REDACTED].”

¹⁰⁰ R-0211-ENG/GER, Internal correspondence from Mr. Marc Engbert, 27 January 2023 - 1 February 2023, adobe p. 2.

¹⁰¹ R-0211-ENG/GER, Internal correspondence from Mr. Marc Engbert, 27 January 2023 - 1 February 2023, adobe p. 1.

confirms that the shareholders assumed that by [REDACTED] the loan could be repaid in any event. In addition, the note also confirms the assumption that also Claimant's equity can be repaid:

“The remaining balance would be sufficient to cover the remaining loan amount ([*amount redacted by Claimant*] €) and repay equity ([*amount redacted by Claimant*] €).”¹⁰²

132. On 8 February 2023, Trianel and its shareholders received another legal opinion from the outside counsel [REDACTED]. The outside counsel assessed whether the banks could still terminate the loan based on the [REDACTED] even though the banks had been sitting on this termination right for two years. [REDACTED]

[REDACTED]
[REDACTED] This is inaccurate. The advice of the outside counsel was that [REDACTED]
[REDACTED]

[REDACTED]

133. That is, Claimant and the other shareholders received the legal advice that [REDACTED]
[REDACTED]

134. On 10 February 2023, Trianel sent its shareholders the information letter submitted after document-production as Exhibit C-172. [REDACTED]
[REDACTED]
[REDACTED]

135. In addition, the letter contains another pivotal information not addressed in the Reply. Trianel proposed to the shareholders to avoid any termination through another alternative, [REDACTED]
[REDACTED]
[REDACTED]

¹⁰² **R-0212-ENG/GER**, Protocol of Trianel's 58th Shareholders' Committee Meeting, 1 February 2023, p. 2.

¹⁰³ Reply, ¶ 277.

¹⁰⁴ [REDACTED]
[REDACTED]

¹⁰⁵ **C-0172-DE/EN**, TKL, *Information letter to shareholders on potential partial termination of the loan agreement*, 10 February 2023 (redacted), pp. 6-7.

[REDACTED]

136. Trianel continued that the shareholders' risk in this scenario would be [REDACTED]

[REDACTED]

137. That is, Claimant and its co-shareholders had the alternative of [REDACTED] through covering losses above the [REDACTED] amount. Trianel assessed the risk that such payment for losses above the [REDACTED] amount would become necessary at [REDACTED]

138. On 22 February 2023, Trianel held an informative meeting with its shareholders. After document-production, Claimant submitted the meeting's Power Point deck as Exhibit C-174 and cited it as evidence for the assertion that the banks would use the [REDACTED] issues only as "pretexts",¹⁰⁸ which Respondent disputes as set out above. To reiterate, documents from Trianel cannot be evidence about the banks' motives. The more important evidence is that Claimant and the other shareholders were aware that the banks (who had already collected more than EUR [REDACTED] in interest) [REDACTED]

[REDACTED]

[REDACTED]

139. Moreover, the presentation records again the understanding that the Lünen Plant would be able to repay the loan by [REDACTED]:

"Commercial assessment

¹⁰⁶ C-0172-DE/EN, TKL, *Information letter to shareholders on potential partial termination of the loan agreement*, 10 February 2023 (redacted), p. 3.

¹⁰⁷ C-0172-DE/EN, TKL, *Information letter to shareholders on potential partial termination of the loan agreement*, 10 February 2023 (redacted), p. 7.

¹⁰⁸ Reply, ¶ 272.

¹⁰⁹ C-0174-DE/ EN, TKL, *Information event on bank negotiations*, 22 February 2023 adobe p. 4.

140. After this quote, a screenshot from the financial model follows (which Claimant did not produce in document-production), showing that the expectations were that [REDACTED]

141. On 14 April 2023, the shareholders committee of Trianel (including the representative from Claimant) met again. This meeting note records the pivotal evidence that Claimant's and the other shareholders' obligations for the outstanding loan under the 2023 PPA was limited consciously to a Coal-Firing Ban in [REDACTED]. The evidence was already cited above at sect. C as evidence that the 2023 PPA does not impose liability for a Coal-Firing Stop in [REDACTED].¹¹² [REDACTED]

142. On 16 May 2023, Claimant held the extraordinary shareholder meeting leading to the negotiations for the 2023 PPA. In the Reply, Claimant asserts: “TKL [Trianel] [...] gave a legal assessment of the banks [sic] arguments; concluded that the suggested solution – [REDACTED] [REDACTED] – would mitigate damages by approx. EUR [REDACTED].”¹¹³ However, the documentary evidence does not establish that the “legal assessment”, to take Claimant’s formulation from the Reply, was done by lawyers.

143. The Power Point deck produced and submitted by Claimant (Exhibit C-175) has a redacted calculation of the comparisons between [REDACTED] and 2023 PPA amendment.¹¹⁴ Therefore, it is not possible to comprehend the relevant considerations. Furthermore, on the alleged costs of [REDACTED], Trianel apparently did not undertake any legal assessment by external counsel of the shareholders' standing under the PPA in such scenario.¹¹⁵

¹¹¹ C-0174-DE/ EN, TKL, *Information event on bank negotiations*, 22 February 2023, adobe p. 11.

p. 2-3: [REDACTED]

¹¹⁴ **C-0175-DE/EN**, TKL, *Extraordinary Shareholders' Meeting*, 16 May 2023 (redacted), adobe p. 10.

42

The only clear termination right of the banks arose through unrelated events, *i.e.* [REDACTED]

[REDACTED].
Claimant's case that the banks used this as "*pretext*"¹¹⁹ remains unproven. [REDACTED]

[REDACTED] Claimant also had alternatives such as stepping-in for [REDACTED]
[REDACTED] at a risk of [REDACTED] Instead, Claimant chose the 2023 PPA under the continuous assumption
that the Lünen Plant would be able to repay the loan by [REDACTED] in any event.

¹¹⁹ Reply, ¶ 272.

III. PRELIMINARY OBJECTIONS

A. STATE CONTROL OVER THE DECISION TO INVEST

149. Respondent maintains its preliminary objection under Article 25(1) ICSID Convention. Under the applicable legal standard (see below, at 1.), the evidence stands that AET's decision to invest was controlled by the Swiss State (at 2.).

1. Legal standard: Article 25(1) ICSID Convention and Article 8 ILC Articles

a. Core parameters not in dispute between the Parties

150. After the Reply, the legal standard governing the present preliminary objection is mostly agreed between the Parties. Respondent's objection is based on Article 25(1) ICSID Convention. The latter does not confer jurisdiction over State-State disputes. The provision is limited to claims brought by private investors. In the Reply, Claimant did not dispute this rule.

151. Claimant, in turn, spends several pages of the Reply emphasizing that the mere shareholding of a State in a claimant company does not render a dispute a State-State dispute and that State-owned companies can, in general, be investors for the purposes of the ICSID Convention.¹²⁰ Respondent has already confirmed in the Counter-Memorial that its objection goes beyond the Canton of Ticino's mere shareholding in AET.¹²¹

152. Instead, Respondent bases its objection on the first limb of the test formulated by Mr. Broches in his lecture at The Hague Academy of International Law. He stated: "*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 [...]*."¹²² In the Reply, Claimant took no issue with this test. Claimant described the test as a "*universally accepted functional test*."¹²³

¹²⁰ Cf. Reply, ¶¶ 337-346.

¹²¹ Counter-Memorial, sect. III.

¹²² **RL-0009**, Aaron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Recueil des Cours – Collected Courses of the Hague Academy of International Law, 1972, II, 25 May 1905, pp. 354-355, quoted at Counter-Memorial, ¶ 346.

¹²³ Reply, ¶ 345, quoted Aaron Broches.

153. Crucially, there is no disagreement that Article 8 of the ILC Articles on State Responsibility informs the meaning of ‘agent’ under the *Broches* test. In the Counter-Memorial, Respondent set out in detail that this first limb of the *Broches* test resembles Article 8 ILC Articles (and that the second limb, on which Respondent does not rely, resembles Article 5 ILC Articles). In the Reply, Claimant confirmed that it does not express any disagreement in this regard.¹²⁴

154. Regarding the test for control under Article 8 ILC Articles, Claimant spends a considerable amount of the Reply emphasizing that the test requires more than general control, *i.e.* control over a specific act. Claimant concludes: “*A State-owned entity thus acts as an agent for the government [...] when a company acts under the instructions or directions of the State in relation to a specific act.*”¹²⁵ (emphasis in original). Later in the Reply, Claimant reiterates: “*The ‘effective control’ test [...] requires proof that a State organ exercised control in relation to the precise act under review.*”¹²⁶ (emphasis in original)

155. Respondent agrees. The specific act under review must be controlled by a State to be attributable to the latter under Article 8 ILC Articles.

156. In the present case, the specific act under review for purposes of Article 25(1) ICSID Convention is the decision to invest. Therefore, Respondent concluded its legal standard in the Counter-Memorial with the following section: “*Under Article 8 ILC Articles, control over the Investment decision is decisive.*”¹²⁷ Again, there is no disagreement. In the Reply, Claimant agreed: “*Respondent’s task was to prove that AET acted as an agent for Swiss State [sic] or at*

¹²⁴ Reply, ¶¶ 348, 350: “[...] not uncontroversial. However, as will be shown below, the Tribunal need not decide this academically interesting question. [...] The following discussion will thus limit itself to the first limb of the *Broches* Test, relating to Article 8 of the ILC Articles.”

For the avoidance of doubt, should Claimant attempt to and be permitted to amend its position, Article 8 ILC Articles is the appropriate legal standard to inform the meaning of “agent” under the *Broches* test for the following reasons: *first*, this is required by the imperative of equality and fairness. In the end, attribution is an issue of the appropriate party to a dispute. On the respondent side, this issue arises after jurisdiction because the claimant can choose its opponent. For a claimant, it arises already on jurisdiction. The functional issue however, remains the same as on the respondent side. *Second*, it would be unfair to expose a respondent State to claims by State-controlled investors because this may deprive the respondent State of counterclaims. *Third*, Article 8 ILC Articles deals with “conduct”, not only breaches. *Fourth*, the ILC considered the issue of attribution an issue of “general character”, see **RL-0145**, Draft Articles on State Responsibility with Commentaries, 2001, General commentary, ¶ 3: “a number of further issues of a general arise. These include: (a) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful; (b) Determining in what circumstances conduct is to be attributed to the State as a subject of international law.”

¹²⁵ Reply, ¶ 362.

¹²⁶ Reply, ¶ 368.

¹²⁷ Counter-Memorial, heading III.A.3 (p. 104).

least under its effective control, specifically over Claimant's investment decision."¹²⁸ Hence, the core of the legal standard is not in dispute.

b. Comments on legal authorities

157. The only factor of the legal standard which appears to be in dispute between the Parties is that Claimant apparently disputes the relevance of shareholder decisions on the decision to invest (here: by the Ticino Parliament). Claimant's Reply is not entirely clear in this regard and Claimant may intend to develop its legal arguments only in the Rejoinder on Preliminary Objections. However, certain passages in the Reply indicate that Claimant intends to make a case that decisions by shareholders in the exercise of the corporate-governance rights would not be relevant under Article 8 ILC Articles.¹²⁹ However, such assertion would be incorrect.

158. Above all, Claimant makes the following assertion with regard to the decision of the ICSID tribunal in *Cyprus Popular Bank v. Greece*: "*The tribunal further emphasised that the existence of authorisation processes by controlling shareholders, regardless if public or private, has no bearing on the assessment of jurisdiction *ratione personae* under the Broches Test.*"¹³⁰ Claimant overstates this decision significantly. In this case, Greece's objection was that Cyprus approved the cooling-off letter, not the decision to invest. The decision reads:

"When the Notice of Dispute was submitted, the Republic of Cyprus was the controlling shareholder of Laiki. Although the Notice of Dispute was passed by Laiki's corporate bodies, the decision was additionally submitted to approval from [REDACTED]."¹³¹

159. On substance, alleged control over the cooling-off letter is irrelevant. The test is about control over the decision to invest. On this core criterion, the case is inapposite. Cyprus could not

¹²⁸ Reply, ¶ 372.

¹²⁹ Cf. Reply, ¶¶ 362, 369: "A State-owned entity thus acts as an agent for the government when it operates on behalf of the State in the fact-specific context, regardless of potential policy considerations or supervisory mechanisms. [...] In light of the above, the relevant factor in determining whether a State-owned enterprise can exceptionally lose standing before an ICSID tribunal is completely disconnected from its structure or policies. Instead, tribunals must conduct a functional exercise and examine the nature of the specific act in question."

¹³⁰ Reply, ¶ 359.

¹³¹ **CLA-0152**, *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability, 8 January 2019, ¶ 386.

control the original decision to invest because Cyprus acquired its 84 % interest in the claimant bank only after the relevant investment.¹³²

160. Moreover, Claimant alleges the following with regard to the ICSID decision in *Beijing Urban Construction Group v. Yemen*: “The tribunal deemed it irrelevant that BUCG was ‘subject to the overall direction of a Board that was the ‘representative of the state interests and the operation decision making organ’. Also the circumstances that the Chinese State was to authorise operation and management as well as supervise and inspect the airport project would be insufficient to meet the ‘State agent’ threshold set out by the *Broches Test*.”¹³³ However, Yemen’s case does not appear to have gone beyond the fact that State representatives sat in the claimant’s board and that in China, such representatives would act in the interest of the State.¹³⁴ This is distinct from the present objection. The latter is about the claimant’s nature and the undisputed fact that the decision to invest was made by parliament.

161. Finally, Claimant relies at length on *CSOB v. Slovakia* alleging: “[t]he sole relevant question would be whether or not the relevant acts themselves are governmental or private in nature.”¹³⁵ However, Claimant does not distinguish properly between the test under Article 8 ILC Articles (on which Respondent relies) and the *Broches* test’s second limb, i.e. Article 5 ILC Articles (on which Respondent does not rely). Under Article 5 ILC Articles, the nature of an act is decisive. Under Article 8 ILC Articles, effective control is decisive, irrespective of the nature of the act. In *CSOB*, Slovakia appears to have focused on Article 5 ILC Articles. The decision states: “Respondent argues that in concluding the Consolidation Agreement, CSOB was performing State functions and could therefore not claim to be a private investor.”¹³⁶ Submissions on ‘State functions’ appear synonymous with governmental authority in the sense of Article 5 ILC Articles. By contrast, the *CSOB* decision does not record any evidence of control in the sense of Article 8 ILC Articles, let alone through a decision of parliament.

Conclusion on the legal standard

¹³² *Id.*, ¶¶ 41, 380: “By 2012 more than 50% of Laiki’s business was carried out in Greece. [...] on 30 June 2012 the Republic of Cyprus acted to subscribe 84% of Laiki’s share capital, and to effectively take control of the bank.”

¹³³ Reply, ¶ 358.

¹³⁴ Cf. **CLA-153**, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, ¶¶ 37-41.

¹³⁵ Reply, ¶ 355.

¹³⁶ **CLA-151**, *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶ 22.

162. In conclusion, it is not in dispute that the decisive test is about effective control over the decision to invest. Further, contrary to the implications in the Reply, there is no authority that a decision of a State's parliament about the decision to invest could be *a priori* excluded from the decisive assessment under the *Broches* test's first limb and Article 8 ILC Articles.

2. Application

a. Already the undisputed facts suffice to meet the ILC Articles' test

163. Two simple facts suffice to meet the test under Article 8 ILC Articles whether AET's decision to invest was controlled by the Canton of Ticino as a Federal State of Switzerland. Both of these facts were set out in detail in the Counter-Memorial and stayed undisputed in the Reply:

164. *First*, AET did request the approval of the Grand Council, *i.e.* Ticino's Parliament for its Investment. To recall, already on 9 July 2008, during the very year of AET's alleged Investment, AET submitted the investment decision to Ticino's parliament.¹³⁷ On 23 March 2010, Ticino's parliament authorized the specific decision to invest in Trianel through a legislative decree.¹³⁸

165. *Second*, sect. 4(1) of the Lünen Plant's Consortium Agreement of 2008 includes a special provision enabling AET to sell its shares in Trianel without the otherwise-necessary approval of the majority of the shareholders:

“In deviation from § 16 of the Partnership Agreement of TPK, the approval for the sale and transfer of the company shares of AET Azienda Elettrica Ticinese mentioned in § 3 (2) no. 1 of the Partnership Agreement to one or more third parties may only be refused by the shareholders' meeting for good cause. Good cause exists in particular if the sale would jeopardise the project financing of the power plant, or if the purchaser is not majority-owned by the municipality. However, sentence 1 above only applies if the sale takes place after passing the construction decision and AET has not received the necessary consent of the competent bodies to hold the shares.”¹³⁹

¹³⁷ **C-0063-IT/EN**, Department of Finance and Economic Affairs of the Canton of Ticino, *Message No. 6091 to the Grand Council of the Republic and Canton of Ticino on the Participation of AET in a company for the construction of a thermal power plant in Germany*, 9 July 2008.

¹³⁸ **R-0158-ENG/ITA**, Legislative Decree Concerning the participation of the Azienda Elettrica Ticinese in a company to build a thermal power plant in Germany of 23 March 2010 in Official Bulletin of Laws and Executive Acts Volume 136 17/2020, p. 130.

¹³⁹ **C-0081-DE/EN**, TKL 2008 Consortium Agreement, 8 May 2008, sect. 4.

166. As Claimant confirmed in the Memorial, the requirement in the last sentence of sect. 4(1) quoted above (“*AET has not received the necessary consent of the competent bodies to hold the shares*”) was included specifically for the request for parliamentary approval. Claimant confirmed in the Memorial:

“The Consortium Agreement of 8 May 2008 granted AET a temporary disposal right. According to Section 4 of the Consortium Agreement¹³⁶, AET could sell and transfer its shares until 31 December 2010 if AET’s owner, the Canton of Ticino, were to refuse its approval. This temporary special termination right was established because, as a public company, AET was legally required to obtain approval from the Parliament of the Canton of Ticino for “significant” investments. Since such an approval process can be time-consuming and the construction project should not be indefinitely delayed, the temporary disposal right for AET was decided as an interim solution.”¹⁴⁰

167. A comparable provision was included for no other shareholder in the Consortium Agreement.

168. Documents obtained in document-production confirmed that AET has planned with the option to use this exit right under the Consortium Agreement should the parliamentary approval not be obtained. AET assured this in two letters towards the Canton of Ticino.¹⁴¹

169. In light of the pending parliamentary approval and sect. 4(1) Consortium Agreement, it is clear that AET would have had to divest had the Ticino Parliament refused the approval. Correspondingly, Claimant never asserted in the Reply that it would have continued to stay a shareholder in the Lünen Plant had the Ticino Parliament not approved.

170. *Third*, Respondent recalls the further facts set out in detail in the Counter-Memorial:

- Profits of AET are distributed to the Canton of Ticino.
- Debts of AET are guaranteed by the Canton of Ticino.
- Also, AET’s exit from the Lünen Plant has been determined by the Canton of Ticino, *i.e.* through the Referendum and AET Law amendment of 2011.¹⁴²

Conclusion

¹⁴⁰ Memorial, ¶ 148.

¹⁴¹ **R-0222-ITA/ENG**, Letter from AET to Ticino, 7 July 2009; **R-0223-ITA/ENG**, Letter from AET to Ticino, 27 January 2010, adobe p. 2.

¹⁴² Counter-Memorial, sect. II.B.

171. Therefore, the ultimate decision whether AET stayed a shareholder in the Lünen Plant or would exercise the special transfer right under sect. 4(1) Consortium Agreement was the exclusive decision of Ticino Parliament. This already meets the test for control over the investment decision under Article 8 ILC Articles.

b. In addition, the AET Law required the approval

172. In the Reply, Claimant spends pages on the additional contextual circumstances of AET's decision to request the Ticino Parliament's approval for the investment. In this regard, Respondent refers to its Counter-Memorial in the interest of efficiency. Claimant's main reply to the decisive fact that it did seek the Ticino Parliament's approval is that allegedly "*Claimant sought the approval voluntarily.*"¹⁴³ Claimant also relies on the report of its expert Professor Peter who asserts: "*decision was requested by AET's BoD from the Ticino Parliament for reasons of political opportunity (because of the possible sensitive nature of the investment in a carbon-based plant).*"¹⁴⁴

173. The assertions of Claimant and its expert are incorrect. In this regard, Respondent refers in full to the accompanying Expert Report of Professor Stefan Kunz. Professor Kunz is one of the leading experts on the corporate law of publicly owned companies in Switzerland. To avoid repetition, Respondent only highlights the key conclusions of Professor Kunz:

174. *First*, Professor Kunz highlights the particular legal nature of AET. AET was not structured as a stock corporation under private law (which is possible under Swiss law also for publicly owned companies). Instead, AET was structured as an entity under public law. AET's constituent document are not articles of association. AET's constituent document is a statutory act, the AET Law. Above all, the Canton of Ticino is fully liable for all debts of AET. In exchange, the Canton receives all profits. This structure for AET was chosen, *inter alia*, because under Swiss law, the obligation to guarantee electricity is an obligation of the State.

175. *Second*, Professor Kunz explains in detail that the decisive Article 5(4) of the AET Law, requiring the Canton's approval for substantial investments, applies. Professor Kunz identifies, *inter alia*, the following disagreements with Professor Peter's interpretation of Article 5(4) of the AET Law:

¹⁴³ Reply, p. 126 (heading bb.).

¹⁴⁴ Peter ER I, ¶ 107.

-
- Professor Peter opines that Article 5(4) AET Law would require no more than comparing annual investments with the annual balance sheet. This is incorrect. The investment must be seen as a whole.
 - Already AET’s equity contribution of more than EUR [REDACTED] necessitates obtaining the Parliament’s approval.
 - Professor Peter either overlooks or intentionally disregards the considerable obligations for AET to compensate the Lünen Plant for the loan installments and interest payments to the banks *via* the PPA. These payments amount to multiples of the equity contributions and may trigger the Canton’s liability.
 - Professor Peter either overlooks or intentionally disregards that Article 5(4) AET Law has not only a *quantitative*, but also a *qualitative* perspective.
 - In the present case, qualitative factors necessitating an approval are, *inter alia*, that the Lünen Plant was AET’s first hard-coal power plant; that AET had a track-record of obtaining parliamentary approvals for other ‘firsts’ (*e.g.* the first nuclear and gas power plant); and that climate change was already an important topic of public debate already in 2008.¹⁴⁵

176. *Third*, in addition to Professor Kunz’s expert opinion, Claimant relies on AET’s own contemporaneous statements. This evidence on facts also validates Professor Kunz’s expert opinion and refutes Professor Peter’s expert opinion that AET decided to submit its alleged Investment in the Lünen Plant to the Ticino Parliament for reasons of “*political opportunity*”, as he puts it.¹⁴⁶

177. The reasons for the parliamentary approval post-dating the equity contributions are not “*political opportunity*”, but the particular corporate governance of Trianel. AET had agreed voluntarily in its shareholder agreements for the Lünen Plant to providing the equity contribution together with the other shareholders. Therefore, AET had no option other than to receive the parliamentary approval after the equity contribution. If AET had delayed the contribution until after the approval, AET could have been excluded from the Lünen Plant. The 2006 Consortium

¹⁴⁵ Kunz ER, ¶¶ 128-144.

¹⁴⁶ Peter ER, ¶ 100.

Agreement stipulated that shareholders who did not approve of the capital increase were required to sell their shares.¹⁴⁷

178. Indeed, in its messages to the Ticino Parliament from 2006, AET's management confirmed that it had negotiated the exit clause in the Consortium Agreement (addressed above, at. a.) to ensure that AET would not be excluded from the Lünen project, while still being able to adhere to the “*normal procedures*” for acquiring the “*appropriate authorisations*”:

“AET was granted differential treatment regarding this particularly stringent provision, on the following terms. [...] Insofar as AET does not obtain the appropriate authorisations, it is entitled to cede its shares to third parties.

[...]

On the one hand, this solution ensures the necessary operational speed of the project, and on the other hand, it guarantees AET's decision-making boards to follow the normal procedures and, in the event of a negative decision, to recover the investments made at a correct market value.”¹⁴⁸

179. AET took part in the capital increases in 2007 and 2008.¹⁴⁹

180. AET's submission for approval to the Ticino Parliament from 2008 confirms AET's understanding that the timeline was due to the special contractual situation. AET together with the Ticino Department for Finance and Economic Affairs confirmed that it had to agree to increase Trianel's capital before it could obtain parliamentary approval. Notably, AET's submission speaks of the “*need to have the participation approved by the Grand Council*”:

“AET had to make a decision about this project at short notice, but was able to negotiate a no-cost exit clause within a given timeframe. AET has therefore already taken on the commitments in principle outlined in this message, but can divest itself of them by 31 December 2009. This is expected to allow a reasonable period for a final ruling from the Grand Council on this subject, as recently reaffirmed by the Federal Court in the Metanord case.

[...]

¹⁴⁷ **C-0074-ENcorrected**, TKL 2006 Consortium Agreement, 9 August 2006, sections 6(1)-(2) in conjunction with section 7(3).

¹⁴⁸ **C-0066-ENcorrected**, AET, Message No. 6/06 to the Board of Directors, *AET's participation in “Trianel Power – Projektentwicklungsgesellschaft Kohlekraftwerk mbH & Co. KG”, for the construction of a coal-fired power plant in Germany*, 23 March 2006, p. 9.

¹⁴⁹ Peter ER, ¶ 80, 82; **HP-0008**; **HP-0010**.

At the end of the planning phase, the shareholders meeting is required to make the building decision (Baubeschluss) within a very short time frame (4 months), so as not to delay implementation.

This automatically requires an increase in the company's capital. Once the capital increase has been approved, shareholders who do not participate may be obliged to sell their shares. The selling price is based on the "Buchwert," i.e. the accounting value at the time of the sale (which could be significantly lower than the initial investment value).

With reference to this provision, which is particularly stringent because of AET's need to have the participation approved by the Grand Council, AET was granted differential treatment in the following terms. The partners, including AET, must decide within the allowed timeframe whether to participate in the implementation phase and thus in the necessary agreed capital increase. AET is entitled to transfer its shares to third parties if it does not obtain the appropriate authorisations."¹⁵⁰

181. In document production, Claimant had to produce a document authored by Claimant's then-CEO Mr. Reto Brunett from July 2009. Therein, Mr. Brunett confirms that the Investment decision will ultimately be up to the Ticino Parliament:

"AET's task is to ensure that Ticino's energy needs are met at favorable prices, now and in the future. That is why we opted for this energy carrier and decided to enter the production sector directly," emphasizes AET Director Reto F Brunett. "Whether Ticino should invest in this specific energy carrier is, however, a political decision that is therefore up to Parliament."¹⁵¹

182. In its 2010 report recommending the approval of the alleged Investment, the Ticino Department for Finance and Economic Affairs reiterated that AET had to authorize the capital increase before it could obtain the necessary parliamentary approval:

"After the construction licence was granted, the special purpose entity voted for a capital increase so that plant construction could start. Under the terms of the contract, once the capital increase has been approved, shareholders who do not participate may be obliged to sell their shares. The selling price is based on the accounting value at the time of the sale (which could be significantly lower than the initial investment value). AET thus had to participate in the capital increase, before the Grand Council had approved the capital increase. For this reason, AET was granted differential treatment on the following terms. If Parliament does

¹⁵⁰ **C-0063-IT/EN**, Department of Finance and Economic Affairs of the Canton of Ticino, *Message No. 6091 to the Grand Council of the Republic and Canton of Ticino on the Participation of AET in a company for the construction of a thermal power plant in Germany*, 9 July 2008, pp. 3, 20.

¹⁵¹ **R-0198-ENG/ITA**, Internal memo by AET's former director Mr. Reto Brunett, 7 April 2009, p. 1.

not approve the participation, AET will have the option to sell its shares to third parties.”¹⁵²

183. Therefore, AET’s decision to proceed with the alleged Investment without prior approval of the Ticino Parliament is not evidence against AET having been obligated to request such approval. The explanation is that AET could otherwise have been excluded from the project altogether. The existence of AET’s special exit clauses ensured that AET could comply with Article 5(4) AET Law.

Conclusion on first preliminary objection

184. In conclusion, already the undisputed facts suffice to establish that the decision to invest was controlled by the Ticino Parliament. AET did obtain the Ticino Parliament’s approval. But-for this approval, AET would have exercised a special exit clause under sect. 4(1) of the Consortium Agreement. Even if it were decisive whether AET had to request the Ticino Parliament’s approval, the persuasive expert evidence of Professor Kunz and the evidentiary record confirm that this was the case. Hence, under Swiss law, AET did not and could not take any decision to invest in the Lünen Plant without the Canton’s approval. Hence, the decision to invest was controlled by the Canton. Therefore, the dispute is not an investor-State dispute under Article 25(1) ICSID Convention.

B. VIOLATION OF OBLIGATION UNDER SWISS LAW TO DIVEST

185. The documents that Claimant had to produce in document-production over its objections prompt Respondent to raise a second preliminary objection. Since 1 August 2011, AET had been obligated to divest its shares in the Lünen Plant as soon as possible without losses (Transitional Provision of 2011 AET Law). However, as set out in detail above,¹⁵³ judging from the documentation that AET produced in document-production on the time between 1 August 2011 and the end of 2017 – which was only one memo of 1.5 text pages and one email exchange – AET undertook hardly any efforts to comply with this obligation under Swiss law for many years.

¹⁵² C-0084-IT/EN, Department of Finance and Economic Affairs of the Canton of Ticino, *Special Energy Commission: Majority Report on AETs Message No. 6091 concerning its Participation in TKL*, 23 February 2010, pp. 11-12.

¹⁵³ See above, sect. II.B.

186. As set out in the accompanying expert report of Professor Kunz, the limited documentation provided by AET leads to the conclusion that AET breached Swiss law through its conduct until the end of 2017. Under the applicable principles of international law (see below, at 1.), Respondent therefore objects to an investment-treaty claim being brought that, on Claimant's own case on quantum, should never have existed, had AET observed its obligations under Swiss law in 2011-2017 and made meaningful attempts to sell its shares in the Lünen Plant (at 2.).

187. Respondent notes that raising this issue as a preliminary objection enables Claimant to comment on its efforts, if any, to divest in 2011-2017 in its Rejoinder on Preliminary Objections.

1. Legal standard: principles of good faith in international law

188. The present fact-pattern concerns an investor's intentional violation of its home State's law regarding an obligation to divest. To Respondent's knowledge, this fact-pattern has not been addressed in investment treaty jurisprudence yet. The explanation may be that it is rare for a home State to obligate an investor to divest foreign investments. There is, however, the following authority on which Respondent bases its preliminary objection.

189. Respondent bases its objection on the principle of good faith. The duty of good faith is deeply rooted in international law. Professor Hersch Lauterpacht observed in 1958: "*There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused.*"¹⁵⁴ The ICJ formulated in the Nuclear Tests case: "*One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.*"¹⁵⁵ Subsequently, the VCLT codified in Article 31 that treaties must be interpreted in good faith. The WTO Appellate Body confirmed in 1998 the general applicability of the principle of good faith and principles of abuse of rights:

“the principle of good faith, at once a general principle of law and general principle of international law, controls the exercise of rights by States.

¹⁵⁴ **RL-0122**, Hersch Lauterpacht, *Development of International Law by the International Court*, London, 1958, p. 164.

¹⁵⁵ **RL-0123**, *Nuclear Tests (New Zealand v. France)*, ICJ, Judgment, 20 December 1974, ¶ 49.

One application of this general principle, widely known as the doctrine of *abus de droit*.¹⁵⁶

190. In investment treaty arbitration in particular, considerable jurisprudence developed that investors are precluded from bringing investment-treaty claims if they did not act in good faith. From a functional perspective, a long list of well-known preliminary objections such as abuse of process, unclean hands, illegality, or corruption/transnational public policy have in common that they ultimately sanction an investor's act of bad faith through precluding the investor from bringing its claims.

191. In *Phoenix v. Czech Republic*, for example, the tribunal (Juan Fernandez Armesto, Professor Bucher, Professor Stern) considered the Respondent's ultimately successful objections of treaty-shopping and abuse of process as issues of good faith:

“107. [...] The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties ‘to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage’. This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused. [...]”

109. The Washington Convention as well as the BIT have to be construed with due regard to the international principle of good faith. The principle of good faith is also recognized in most, if not all, domestic legal systems. It appears therefore as a kind of “Janus concept”, with one face looking at the national legal order and one at the international legal order. And in most cases, but not in all, a violation of the international principle of good faith and a violation of the national principle of good faith go hand in hand.”¹⁵⁷

192. In *Churchill Mining v. Indonesia*, the tribunal (Professor Kaufmann-Kohler, Professor van den Berg, Michael Hwang) also confirmed explicitly that the principles on abuse of process and nationality planning are emanations of the principle of good faith:

“Theory of abuse of process, which is a variation of the prohibition of abuse of rights and, like the latter, an emanation of the principle of good faith also found application in the context of inadmissible corporate restructurings. That theory is another manifestation of the general

¹⁵⁶ **RL-0124**, *US Import prohibition of certain shrimps and shrimps products*, WTO Appellate Body - Decision WT/DS58/AB/R, 12 October 1998, ¶ 158.

¹⁵⁷ **RL-0125**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 107, 109.

principle that one does not benefit from treaty protection when underlying conduct is deemed improper.”¹⁵⁸

193. Numerous other arbitral tribunals confirm that the principles on abuse of process/abuse of rights are emanations of the general principle of good faith.¹⁵⁹ Amongst them, the tribunal in the 2024 award in *WM Mining v. Mongolia* (Eduardo Zuleta, Professor van den Berg, Stephen Drymer) held that as an emanation of the principle of good faith, the objection of abuse of rights/abuse of process must not be limited to nationality planning:

“120. The doctrine of abuse of process derives from the doctrine of abuse of rights and the principle of good faith, a recognized principle of international law applicable in investment arbitration. Conduct deemed to violate good faith can be considered abusive and may prevent the tribunal from hearing the case. Whether conduct constitutes an abuse of process depends on the specific circumstances of each case and involves careful consideration of all relevant facts.

121. The Claimant is correct that abuse of process in investment disputes has generally been discussed in situations involving corporate restructurings intended to secure treaty protection for the claimant at a time when a dispute with the host state had already arisen or was foreseeable, which is not the case here. [...]

122. However, a finding of abuse of process or abuse of rights is not limited to cases of corporate restructurings. Even though there is no catalogue of situations or acts that qualify as an abuse of rights, investment tribunals have considered that conduct such as corporate restructuring aimed at securing jurisdiction under an investment treaty, the multiplication of arbitral proceedings to maximize chances of success, or the use of a treaty to gain advantages that are inconsistent with the purpose of international arbitration, may be considered abusive.”¹⁶⁰

¹⁵⁸ **RL-0120**, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Award, 6 December 2016, ¶ 492.

¹⁵⁹ **RL-0137**, *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 170; **RL-0130**, ICC Institute Dossier XXII, *Good Faith in International Arbitration - A Versatile Chameleon?*, 2025, Chapters 9 and 11, pp. 192-192, 199, 222, 228; **RL-0138**, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 116; **RL-0139**, *WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. The Czech Republic*, PCA Case No. 2016-12, Interim Award on Jurisdiction, 25 April 2018, ¶ 518; **RL-0140**, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, Award, 15 May 2019, ¶¶ 314-315; **RL-0141**, *Voltaic Network GmbH v. The Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019, ¶¶ 266-267; **RL-0142**, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, ¶¶ 333-334; **RL-0143**, *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶ 226.

¹⁶⁰ **RL-0126**, *WM Mining Company, LLC v. Mongolia*, ICSID Case No. ARB/21/8, Award, 29 August 2024, ¶¶ 120-122.

194. Another emanation concerns fraud and illegality. In *Inceysa v. El Salvador*, the Tribunal sustained the respondent's jurisdictional objection regarding false information submitted by the investor during the tender leading to the investment on grounds of good faith:

“234. It is clear to this Tribunal that the investment made by Inceysa in the territory of El Salvador, which gave rise to the present dispute, was made in violation of the principle of good faith. [...]

237. The conduct mentioned above constitutes an obvious violation of the principle of good faith that must prevail in any legal relationship. This Tribunal considers that these transgressions of this principle committed by Inceysa represent violations of the fundamental rules of the bid that made it possible for Inceysa to make the investment that generated the present dispute.”¹⁶¹

195. The duty of good faith is also a consideration behind the well-established rule that investments procured through corruption cannot be invoked in treaty arbitration as confirmed by the tribunal in *Krederi v. Ukraine* (Professor Reinisch, Gavan Griffith, Markus Wirth):

“385. [...] But also in the absence of an express "in accordance with host State law"-clause, such kind of illegality must be regarded as contrary to the international or transnational ordre public. Violating core values protected by international law would clearly be not in good faith and lead to the loss of investment protection under the Treaty. [...]

387. The problem in this case simply is one of lack of sufficient evidence of corruption or what appears to the Tribunal even an almost deliberate withholding of evidence from the Tribunal by both Parties.”¹⁶²

196. In addition, the duty of good faith was raised as the contextual background behind objections based on the ‘unclean hands’ doctrine as in *Sanum v. Laos*.¹⁶³

197. Finally, Respondent also refers to the doctrine of estoppel which was seen as a related principle to the doctrine of good faith. The doctrine of estoppel was frequently applied as a general principle of international law by the ICJ and treaty tribunals. While the doctrine of estoppel may be relevant for several fact-patterns, the most important emanation for the present purposes has been confirmed by the tribunal in *Siag v. Egypt* (David A.R. Williams, Michael Pryles, Professor Orrego Vicuña). It held that the principle prohibits a person to benefit from his or her wrongs:

¹⁶¹ **RL-0127**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶¶ 234, 237.

¹⁶² **RL-0128**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶¶ 385, 387.

¹⁶³ Cf. **RL-0129**, *Sanum Investments Limited v. Lao People's Democratic Republic (I)*, PCA Case No. 2013-13, Award, 6 August 2019, ¶¶ 101, 104, 171, 172, 247.

“As a creation of equity, estoppel is grounded in the notion that a person ought not to benefit from his or her wrongs. Brownlie, in his text *Principles of Public International Law* notes that “[a] considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency.” Sir Hersch Lauterpacht, in addition to the statement cited above, offered the view that “[a] State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance becomes onerous. It is of little consequence whether that rule is based on what in English law is known as the principle of estoppels or the more generally conceived requirement of good faith. The former is probably not more than one of the aspects of the latter.”¹⁶⁴

198. In conclusion, while a fact-pattern such as the present (the investor’s home State obligating the investor to divest many years before the disputed measure) has not been addressed in treaty jurisprudence yet, there is considerable authority that the investor’s duty of good faith provides the appropriate legal standard that this issue must be assessed under.

2. Application: but-for AET’s violation of Swiss law, there would not be a dispute

199. In the present case, AET violated its duty of good faith because it has been violating Swiss law for many years before the 2020 Act.

200. Based on the documents from 2011-2017 obtained through document-production summarized above, at II.B., Respondent instructed Professor Kunz to also assess whether AET complied with its obligation under the 2011 AET Law in 2011-2017. Professor Kunz concludes that based on the documentation provided by AET, AET did not comply with its obligation.

201. *First*, Professor Kunz sets out in detail that the 2011 AET Law imposed a clear and unequivocal obligation on AET to divest as soon as possible without losses. The threshold for the losses, in his expert opinion, is the book value of AET’s shares in the Lünen Plant.¹⁶⁵

202. *Second*, Professor Kunz concludes that the obligation would have required immediate action, the engagement of consultants such as an investment bank and clear efforts to divest.¹⁶⁶

203. *Third*, Professor Kunz concludes that based on the documentation provided by AET, it violated its duties. In particular, AET’s efforts in 2011-2012 were limited to participating in an

¹⁶⁴ **RL-00084**, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 483.

¹⁶⁵ Kunz ER, ¶¶ 146-165.

¹⁶⁶ Kunz ER, ¶¶ 166-168.

attempt of a sale of the entire Lünen Plant while AET’s obligation was also to take steps to divest its individual shares. The subsequent documents – a 1.5 text-page memo from 2014 and an email chain from 2017 – are insufficient to document compliance with the obligations under the 2011 AET Law. The very limited documentation on such efforts did not suffice.¹⁶⁷

204. [REDACTED]
[REDACTED]
[REDACTED]

205. Therefore, based on the documents it produced, AET violated Swiss law.

206. AET’s violation of Swiss law should lead to the inadmissibility of its treaty claims. Above all, had AET complied with Swiss law and made serious efforts to sell its shares as soon as possible, it should have, on its own case, sold its shares many years before any dispute with Respondent arose. AET’s own case is that its shares had a positive fair market value but-for the 2020 Act. While Respondent disputes this on quantum (sect. V. below), for the purposes of admissibility, AET must be held to its own assertions on quantum. In AET’s own case, a willing buyer would pay for AET’s shares even if he assumed the liability under the PPA. Hence, the only step left was to find that willing buyer. However, AET made no meaningful efforts to do so despite having been obligated under the 2011 AET Law. AET cannot use a treaty arbitration to claim lost profits for an alleged measure which, on AET’s own quantum case, would have had no effect on AET had AET not been violating its obligations under Swiss law for many years.

¹⁶⁷ Kunz ER, ¶¶ 169-173.

¹⁶⁸ Kunz ER, ¶¶ 174-177.

IV. LIABILITY

207. Claimant's claims are unfounded. They will be addressed in the same order as in the Memorial, Counter-Memorial and Reply. Respondent begins with Claimant's main claims for expropriation (see below, at B.), under the ECT's umbrella clause (at C.), and FET (at D.). Respondent then concludes with Claimant's ancillary claims in which Claimant raises no facts beyond those already invoked for the unfounded main claims (at E.).

A. THE ICJ'S 2025 CLIMATE CHANGE OPINION

208. Before addressing Claimant's claims one-by-one, Respondent addresses a preliminary matter on which Claimant did not comment at all in the Reply. On 23 July 2025, the ICJ rendered its Advisory Opinion on Obligations of States in respect of Climate Change. Respondent submits it as RL-0131.

209. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

210. [REDACTED]
[REDACTED]
[REDACTED]

211. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

212. [REDACTED]

[REDACTED]

213. [REDACTED]

[REDACTED]

[REDACTED]

214. [REDACTED]

[REDACTED]

[REDACTED]

215. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

216. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

169 [REDACTED]

170 [REDACTED]

171 [REDACTED]

172 [REDACTED]

[REDACTED]

217. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

218. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

219. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

173 [REDACTED]

174 [REDACTED]

175 [REDACTED]

176 [REDACTED]

177 [REDACTED]

178 [REDACTED]

[REDACTED]

[REDACTED]

220. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

221. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

222.

223.

B. EXPROPRIATION

224. Claimant's expropriation claim is unfounded. The reasons set out already in detail in the Counter-Memorial stand. The 2020 Act is a legitimate exercise of Germany's police powers

¹⁷⁹ *Id.*, ¶ 456.

¹⁸⁰ **RL-0149**, *Obligations in respect of Climate Change* (Advisory Opinion), ICJ, Declaration of Judge Cleveland, 23 July 2025, ¶¶ 21-22.

(see below, at 1.). Even if the Tribunal were not to apply the police-powers doctrine (*quod non*), the 2020 Act does not constitute an indirect expropriation (at 2.).

1. The 2020 Act constitutes a legitimate exercise of Germany's police powers

225. In the Counter-Memorial, Respondent set out in detail the factual and legal considerations underpinning Respondent's defense against Claimant's expropriation claims under the police-powers doctrine. In the Reply, several key aspects remained undisputed.

226. Respondent's extensive evidence from the Counter-Memorial that climate change is an existential threat to the human population, ecosystems and economies stands undisputed.¹⁸¹

227. Respondent's case that Respondent is obligated to take actions aimed at mitigating climate change under international law, stands undisputed. This includes, in particular, the obligation to take actions aimed at limiting global warming to 1.5°C under the 2015 Paris Agreement¹⁸² and Respondent's obligations under international human rights.¹⁸³

228. Also, Respondent's obligations to take actions aimed at mitigating climate change under EU law, German constitutional law and the German Climate Action Act stand undisputed. Claimant does not challenge any of these regulations.

229. Moreover, Respondent's case that the police-powers doctrine is a rule of customary international law; that, as such, it was applied by numerous investment treaty tribunals, including for health and environmental considerations; and that the police-powers doctrine applies to both, the implementation of *existing* regulation and *additional* regulation, stands undisputed.¹⁸⁴

a. Article 24 ECT does not insulate the ECT from the police-powers doctrine

230. Apart from Claimant's discrimination allegations (see in detail below, at b.), Claimant's reply on the police-powers doctrine remained very narrow. Claimant's only other assertion advanced in a meaningful manner is that Article 24(1) ECT would exclude the application of the police-powers doctrine. That is, while Claimant does not dispute that the police-powers doctrine is a rule of customary international law, Claimant's case is that this rule of

¹⁸¹ See Counter-Memorial, sect. II.C., II.F. and the Schellnhuber ER I.

¹⁸² See Counter-Memorial, ¶¶ 144-150.

¹⁸³ See Counter-Memorial, ¶¶ 420-431.

¹⁸⁴ See Counter-Memorial, ¶¶ 383-401.

customary international law would not apply in an arbitration under the ECT because of Article 24(1). Claimant's legal theory is incorrect.

231. Before addressing Article 24, it is worth emphasizing Article 26(6) ECT because Claimant does not address this provision. The provision assures the systemic integration of the ECT in international law and stipulates that ECT tribunals such as the present apply not only the ECT but also other norms of customary international law (such as the police-powers doctrine).

“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.”

232. Aware of the police-powers doctrine's status as customary international law and aware of the latter's applicability under Article 26(6) ECT, Claimant seeks to circumvent the application of customary international law through Article 24(1) ECT.¹⁸⁵ Article 24 ECT states:

“(1) This Article shall not apply to Articles 12, 13 and 29.

(2) The provisions of this Treaty other than (a) those referred to in paragraph (1); and (b) with respect to subparagraph (i), Part III of the Treaty shall not preclude any Contracting Party from adopting or enforcing any measure (i) necessary to protect human, animal or plant life or health [...].

(3) The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:

(a) for the protection of its essential security interests including those

(i) relating to the supply of Energy Materials and Products to a military establishment; or

(ii) taken in time of war, armed conflict or other emergency in international relations;

(b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or

(c) for the maintenance of public order.”

233. Claimant relies on the carve-out for expropriations under Article 24(1) ECT and asserts: *“If the treaty-based exception clauses are specifically meant not to limit the protection under Part III and do not even apply in an expropriation scenario, however, there is no room to*

¹⁸⁵ Reply, ¶¶ 443-447.

have recourse to a doctrine based in customary law such as the police powers doctrine. [...] such an approach would constitute an interpretation of the ECT contra legem.”¹⁸⁶

234. Claimant’s assertion is incorrect. Article 24(1) ECT does not exclude the application of the police-powers doctrine with respect to climate change. For the following reasons, Article 24 ECT and implementing the international law on climate change through the police-powers doctrine are two distinct topics:

235. *First*, the historical contexts of Article 24 ECT and the police-powers doctrine are distinct. Clauses such as Article 24 ECT have been inserted particularly into investment treaties concluded by the U.S. since the 1980s. These clauses bear a relationship to the doctrine of necessity under Article 25 ILC Articles.¹⁸⁷ The U.S.-style provision of Article 24 ECT found its way into the ECT because the U.S. participated in the negotiations of the ECT.¹⁸⁸

236. The historical context of the police-powers doctrine has been set out in the Counter-Memorial.¹⁸⁹ The doctrine is separate. The police-powers doctrine has not been regarded as related to these U.S. style clauses or the doctrine of necessity in any of the legal authorities presented in the Counter-Memorial.

237. *Second*, none of the police-powers cases rendered under BITs with essential-security clauses even considered whether the essential-security clauses would exclude or limit the police-powers doctrine. This shows that they are two separate topics.

238. This is the case for the NAFTA cases. Article 2102 NAFTA contains a restrictive essential-security clause (limited to war, weapons and nuclear weapons).¹⁹⁰ None of the NAFTA

¹⁸⁶ Reply, ¶ 447.

¹⁸⁷ These clauses have caused separate views on whether they are *lex specialis* to the exception of State necessity as codified in Article 25 of the ILC Articles or only related clauses.

¹⁸⁸ Cf. **RL-0146**, Energy Charter Secretariat, *US and the Energy Charter Process*, 10 February 1998.

¹⁸⁹ See Counter-Memorial, ¶¶ 383-393.

¹⁹⁰ **RL-0132**, North American Free Trade Agreement (1992), adopted on 17 December 1992, Article 2102: “National Security Subject to Articles 607 (Energy - National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this Agreement shall be construed:

- a. to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;
- b. to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests
- i. relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

cases applying or considering the police-powers doctrine even considered it an issue whether this restrictive essential-security clauses bars the police-powers doctrine for other interests. The tribunals applied the doctrine regardless of the narrow exception in Article 2102 NAFTA.¹⁹¹

239. Similarly, in *Burlington v. Ecuador*, the tribunal accepted that there can only be an expropriation, if the measure was not justified under the police powers doctrine.¹⁹² The tribunal applied the police powers doctrine as part of its expropriation analysis regardless of the essential security exception in Article IX(1) of the applicable Ecuador-U.S. BIT.¹⁹³

240. Finally, also in *Eco Oro v. Colombia*, the tribunal rejected the expropriation claim because the contested measure (designation of part of the mining concession area as a protected ecological zone to safeguard water resources and biodiversity) was a legitimate exercise of Colombia's police powers.¹⁹⁴ The tribunal applied the police powers doctrine regardless of the essential security clause in Article 2201(3) of the applicable Canada-Colombia FTA.¹⁹⁵

ii. taken in time of war or other emergency in international relations, or

iii. relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or

c. to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”

¹⁹¹ **RL-0022**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 103; **RL-0024**, *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV – Chapter D ¶ 7; **RL-0029**, *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, 2 August 2010, ¶ 266 ; **RL-0059**, *GAMI Invs. Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 114.

¹⁹² **RL-0033**, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 471.

¹⁹³ **RL-0133**, Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments (1993), adopted on 27 August 1993, Article IX(1): “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”

¹⁹⁴ Counter-Memorial, ¶ 398, citing to **RL-0028**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶¶ 636 and 642: “[I]t cannot be disputed that the Challenged Measures were for the protection of the environment. [...] [T]he Challenged Measures were non-discriminatory and designed and applied to protect a legitimate public welfare objective, namely the protection of the environment. They were adopted in good faith. The Challenged Measures were therefore a legitimate exercise by Colombia of its police powers [...]”

¹⁹⁵ **RL-0134**, Canada-Colombia FTA, Article 2201(3): “For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;

To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or

For the conservation of living or non-living exhaustible natural resources.”

241. To conclude on legal authorities, Claimant has not pointed to a single case authority or even academic publication that would support its contention of Article 24(1) ECT limiting the customary international law on police powers. Claimant's only assertion on jurisprudence in the respective sub-section of the Reply is: "*the limits of the State's regulatory powers – which Claimant as such does not contest – are to be found primarily in the applicable investment treaty. The arbitral tribunal in ADC v. Hungary set this out in the following way, which was relied on subsequently both by non-ECT and ECT tribunals.*"¹⁹⁶ The references for Claimant's abstract sentence are irrelevant. None of the cases supports that an essential-security clause would exclude the police-powers doctrine. Neither the *ADC v. Hungary* award nor the Spain awards Claimant relies on even include the term 'police powers'.

242. *Third*, also on substance, Article 24 ECT and the police-powers doctrine are distinct. They have different legal consequences and follow different objectives.

243. Article 24 ECT (as Article 25 ILC Articles) codifies that certain conduct does not constitute a treaty breach ("*shall not preclude*"). This is irrelevant for expropriations. Expropriations are not *per se* prohibited by international law.¹⁹⁷ Similarly, Article 13 ECT does not prohibit expropriations. In Respondent's view this is also the simple explanation why the Contracting States agreed on Article 24(1) ECT. The provision is simply declaratory in that the ECT never precludes States to expropriate *per se*.

244. By contrast, the police-powers doctrine establishes that measures do not trigger any obligation to compensate under Article 13 ECT because the relevant conduct does not qualify as expropriation in the first place.

245. Instead of preventing treaty breaches (such as Article 24), the police-powers doctrine has gained its function as a corrective and counterweight to an excessive notion of indirect expropriations. This is *e.g.* illustrated through the 2008 Canada-Colombia FTA under which the 2021 *Eco Oro* award cited in the Counter-Memorial was rendered. The FTA codifies the police-

¹⁹⁶ Reply, ¶ 441.

¹⁹⁷ **RL-0147**, Cordell Hull, *The Secretary of State to the Mexican Ambassador (Castillo Nájera)*, 21 July 1938, Foreign Relations of the United States, Diplomatic Papers, 1938, The American Republics, Volume V: "My Government has frequently asserted the right of all countries freely to determine their own social, agrarian and industrial problems. This right includes the sovereign right of any government to expropriate private property within its borders in furtherance of public purposes." **RL-0144**, UN Resolution No. 3281(XXIX), 1974, Article 2.c: "Each State has the right: (...) (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent." (emphasis added).

powers doctrine and underlines that it is a direct response to indirect expropriation views. Annex 811(2) *lit. b* of the FTA states:

“Indirect Expropriation

1. Paragraph 1 of Article 811 addresses two situations. The first situation is direct expropriation, where an investment is nationalized or otherwise directly expropriated as provided for under international law.

2. The second situation is indirect expropriation, which results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred, (ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations, and (iii) the character of the measure or series of measures;

(b) Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation.”¹⁹⁸

246. *Fourth*, Claimant’s reading of Article 24(1) ECT would lead to absurd results. Under Article 24(1) ECT, also Article 24(3) ECT is inapplicable to expropriations. In Claimant’s theory, also conduct falling under Article 24(3) ECT would therefore trigger compensation obligations under Article 13 ECT. As quoted above, Article 24(3) ECT covers *e.g.* essential security interests during times of war and regarding nuclear weapons. That is, Claimant’s theory is that under the ECT, the police-powers doctrine would not even prevent compensation for seizing *e.g.* illegal nuclear weapons. This shows that Claimant’s theory is absurd.

247. *Fifth*, even taking Claimant’s case at its highest and assuming that through Article 24(1) ECT, the police-powers doctrine could not be invoked for measures “*necessary to protect human, animal or plant life or health*” (Article 24(2) *lit. b.i* ECT), *quod non*, there is nothing in Article 24 ECT prohibiting Respondent to comply with Respondent’s obligations under

¹⁹⁸ **RL-0134**, Canada-Colombia FTA, Annex 811.

international law applicable under Article 26(6) ECT. To recall, Respondent's case is that there is a two-fold necessity for climate action: (i) climate action is necessary as a matter of fact to save species and mankind; (ii) Respondent is obligated to adopt climate action measures under international, EU and German law. The obligations under international law include the obligations to take actions aimed at reaching the 1.5°C target under the Paris Agreement, the obligations under customary international law and international human rights. The obligations of the international community were confirmed in great detail by the ICJ in its Climate Change Opinion.

248. Even if Article 24(1) ECT prevented Respondent from invoking the *factual* necessity for climate action, *quod non*, there is nothing in Article 24 ECT which would imply a decision of the ECT signatories that States could not even invoke obligations under international law under Article 26(6) ECT against indirect expropriation claims. Otherwise, the ECT would expose Contracting States to a conflict of treaty norms which cannot be the purpose of the ECT.

Interim conclusion

249. Claimant's first main reply to the police-powers doctrine that the customary international law on police powers (as reinforced through the Paris Agreement and human rights) would be barred by Article 24(1) ECT is incorrect. Article 24 ECT is distinct and, in any case, would not bar Respondent from invoking its self-standing obligations under treaties (such as the Paris Agreement), customary international law and human rights.

b. The 2020 Act is not discriminatory

250. On the facts, Claimant's main alleged case against the police-powers doctrine is that the 2020 Act would be discriminatory. In the Counter-Memorial, Respondent has already addressed Claimant's discrimination allegations in great detail.¹⁹⁹ In the Reply, Claimant has relied on very limited new evidence in this context. Instead, Claimant mainly repeats its allegations from the Memorial.

251. Claimant summarises its allegations as follows: "*The [2020 Act], seen as a whole, affords unjustified benefits to: [i] older, fully depreciated hard-coal assets than can monetise exit through auctions and [ii] lignite operators protected by bespoke negotiated arrangements and higher compensation, while imposing a disproportionate burden on a limited number of newer*

¹⁹⁹ Counter-Memorial, ¶¶ 4, 201, 204, 213-233, 243-247, 443-448.

highly efficient hard-coal plants.”²⁰⁰ Claimant’s discrimination case is already unfounded because AET is treated like any domestic or other foreign investor. Claimant does not invoke nationality-related issues (see below, at i.). Even if the Tribunal nonetheless continues assessing Claimant’s discrimination allegations (*quod non*), there is none. The Lünen Plant is treated like any other hard-coal power plant (at ii.). Lignite, in turn, is a distinct industry (at iii.).

(i) *Nationality-related differentiations are not in issue*

252. In the Counter-Memorial, Respondent has already set out that the 2020 Act is not discriminatory because Claimant does not invoke any nationality-based differentiation.²⁰¹ Also after the Reply, nationality-related matters are not at issue. It is undisputed that the 2020 Act treats AET like any other domestic investor. AET is treated like its co-shareholders of the Lünen Plant. Most other hard-coal power plants on the German market, including those of a vintage comparable to the Lünen Plant, are owned by German utility companies.

253. The 2020 Act also treats AET like any other foreign owner of power plants. To name two examples:

- The Moorburg power plant (which has an age comparable to the Lünen Plant and participated in the auctions) is owned by a subsidiary of Vattenfall AB, a Swedish utility company.
- The owner of the Wilhelmshaven power plant (again of a comparable age, still operating and also subject to a future Coal-Firing Stop) has been acquired by Riverstone subsidiary Onyx Power Group Ltd. (UK) from French Engie in 2019.

254. Hence, Claimant’s nationality is irrelevant for the 2020 Act’s application. Respondent never targeted Claimant because of any nationality. In the Reply, Claimant alleges that this fact would be “*irrelevant*”²⁰². This is false. The requirement that expropriations must not be discriminatory is a nationality-based requirement. This follows from the ordinary meaning of the term ‘discrimination’ in Article 13 ECT, the object and purpose of investment treaties, and established jurisprudence.

²⁰⁰ Reply, ¶ 477.

²⁰¹ Counter-Memorial, ¶ 444.

²⁰² Reply, ¶ 472.

255. Claimant established neither in the Memorial nor in the Reply that any of the legal authorities relied on considered an expropriation unlawful because of differentiations that applied irrespective of nationality.

256. For example, the tribunal in *Crystallex v. Venezuela* on which Claimant relies twice in the Reply²⁰³ held in the context of the expropriation claim:

“With regard to discrimination, the Tribunal similarly refers to its earlier findings on discrimination under FET which it considers relevant, *mutatis mutandis*, for its examination of the fulfilment of this particular requirement under expropriation. The Tribunal recalls that to show discrimination the investor must prove that it was subjected to different treatment in similar circumstances without reasonable justification, typically on the basis of its nationality or similar characteristics. [...] While the Tribunal has not overlooked the repeated and rather derogatory references to “transnationals” and “transnational companies” in the President’s and the Ministers’ statements, it is not satisfied that there are conclusive elements in the record which would support the conclusion that the expropriation was carried out in a discriminatory manner.”²⁰⁴

257. Indeed, Claimant confirms in the Reply that discrimination not only requires difference in treatment but also the absence of any “*plausible*” reason for the difference. In the Reply, Claimant spends several pages on addressing five cases relied on in the Counter-Memorial with regard to States’ margin of appreciation (*Pawlowski v. Czech Republic*; *GAMI v. Mexico*; *Pope & Talbot v. Canada*; *SD Myers v. Canada*; *Feldman v. Mexico*). Claimant’s conclusion is the following: “*those cases demonstrate that a plausible or reasonable connection reasoning was necessary in order to uphold the measure as non-discriminatory.*”²⁰⁵

258. This absence of plausibility requires a particular, reprehensible element only met through nationality-based or similar distinction. Indeed, all of these five cases which Claimant addresses are cases addressing MFN and national treatment. Similarly, other cases on which Claimant relies on in the Reply are all cases regarding MFN and national treatment.²⁰⁶

Interim conclusion

²⁰³ Reply, ¶¶ 712, 894.

²⁰⁴ **CLA-0198**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF) 11/2, Award, 4 April 2016, ¶ 715. See also **RL-0155**, *The Bank of Nova Scotia v. Republic Peru*, ICSID Case No. ARB/22/30, Counter-Memorial, 27 June 2025, pp. 102 *et seqq.*

²⁰⁵ Reply, ¶ 635.

²⁰⁶ **CLA-0188**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶ 173.

259. In conclusion, under the applicable legal standard, Germany does have a margin of appreciation to determine which sectors are and which are not in ‘like’ circumstances. The ECT neither empowers nor burdens arbitral tribunals to adopt the role of policymakers.

(ii) *The Lünen Plant is treated like all other hard-coal power plants*

260. If the Tribunal considers Claimant’s discrimination allegations despite the nationality not being at issue (*quod non*), Claimant’s allegations regarding alleged differentiations between the Lünen Plant and other hard-coal power plants remain flawed. Claimant’s discrimination case is the following (to recall the *verbatim* quote above): “*The [2020 Act], seen as a whole, affords unjustified benefits to: older, fully depreciated hard-coal assets than can monetise exit through auctions [...] while imposing a disproportionate burden on a limited number of newer highly efficient hard-coal plants.*”²⁰⁷

261. In the Counter-Memorial, Respondent has already refuted Claimant’s allegations. The reason is straightforward. The 2020 Act’s provisions apply identically to all hard-coal plants.²⁰⁸ In the Reply, Claimant did not rely on any meaningful new evidence for its alleged discrimination case. Instead, Claimant repeats at length prior allegations. Similarly, while Claimant has its experts from Frontier now also address this issue of liability in sect. 8.2 of their Second Report, Frontier does not invoke any material new evidence either.

262. Claimant’s and its experts’ repetitive allegations remain misplaced. Claimant does not have a discrimination case. Claimant’s true and flawed case is not about unequal treatment. Instead, Claimant’s actual complaint is that it was treated *like* other hard-coal power plants. Claimant alleges that it should have been treated *differently*, *i.e.* better than other hard-coal power plants. This is clear because the central facts are, indeed, undisputed after the Reply:

263. It is undisputed that the order of Coal-Firing Stops will be based strictly on age. No hard-coal power plant older than the Lünen Plant will receive its Coal-Firing Stop after the Lünen Plant. Claimant noted the fact explicitly in the Reply and did not dispute it.²⁰⁹

264. It is also undisputed that the Lünen Plant was able to participate in the auctions and that in these auctions the same formula applied to all participants. In the Reply, Claimant explicitly

²⁰⁷ Reply, ¶ 477.

²⁰⁸ Counter-Memorial, ¶¶ 199-206, 446.

²⁰⁹ Cf. Reply, ¶ 477.

acknowledges this fact and does not dispute it, but only tries to distract from it (“*not even an argument at all*”)²¹⁰. Similarly, sect. 8.2 of the Second Report of Claimant’s experts from Frontier does not allege that a different formula would have applied.

265. It is also undisputed that the Lünen Plant was treated like the other plants of the same age. Some of these plants still operate and will also receive a Coal-Firing Stop. Despite ultimate foreign ownership as in the case of the Wilhelmshaven Power Plant, investors have not brought alleged investment claims. Other power plants, *i.e.* Vattenfall’s Moorburg and RWE’s Westfalen Power Plants have even participated in the auctions. While Claimant speculates that these plants may have had technical issues,²¹¹ Claimant does not dispute that the same auction formula applied to all power plants.

266. In this context, Respondent also takes the opportunity to note that the allegations of Claimant’s experts from Frontier in sect. 4.4, and 8 of their Second Report that the public decisions of the EU Commission on the compatibility of the 2020 Act with EU State Aid law would be beneficial for Claimant’s case, are false. The EU Commission underlined that all participants had access to the same, transparent formula applying to all hard-coal power plants:

“(132) The auction mechanism is transparent and based on clear rules available to all participants in advance of the auction. [...]

(134) The criteria to evaluate the bids have also been established upfront in a transparent manner. [...]

(135) The Commission is also of the view that the auctions are non-discriminatory. The auctions are open to all hard coal-fired power installations active in Germany [...].”²¹²

267. As an interim conclusion, Claimant:

- does not allege that it would have been targeted as a foreign investor;
- does not allege that the Coal-Firing Stops would be based on anything other than age;
- does not allege that the auction formula was different for certain market participants;
- does not allege that comparably-old power plants would have been treated differently than Claimant’s Lünen Plant.

²¹⁰ Reply, ¶ 476.

²¹¹ See further below, ¶¶ 470-478.

²¹² **FE-91**, European Commission, Decision on 2020 Act auctions, 25 November 2020, ¶¶ 132-135.

268. Therefore, the true and flawed core of Claimant's case is that it should have been treated *differently*, i.e. better than all other hard-coal power plants. In particular, Claimant invokes that because of its own decision to heavily leverage the Lünen Plant, it should receive a higher compensation taking into account Claimant's longer time to repay the loan and amortize the interest costs.

Interim conclusion

269. Claimant's allegations that the Lünen Plant was discriminated against compared to other hard-coal power plants because the Lünen Plant was treated like and not better than other power plants are misplaced. Discrimination is not about the right to be treated better in 'like' circumstances. The international law on discrimination concerns equal treatment in 'like circumstances'. Claimant receives the same treatment as any other hard-coal power plant.

(iii) The mining perspective renders lignite a different industry

270. Claimant's other allegation is that the Lünen Plant would have been discriminated against compared to the lignite sector. In the Counter-Memorial, Respondent refuted this allegation, too. In summary, there was no discrimination because hard-coal and lignite are two different industries. Respondent based its reasons, *inter alia*, on contemporaneous documents such as from the Coal Commission and on the Witness Statements of Mr. [REDACTED] and Mr. [REDACTED]. The reply allegations in pp. 68-77 of the Reply and sect. 8 of Frontier's Second Report are unfounded.

271. Claimant begins by alleging: "*Respondent's argument that 'lignite and hard-coal are two different industries' is a post-hoc rationalisation for blatant discrimination.*"²¹³ This is incorrect. The evidence on record confirms that the phase-outs of hard-coal and lignite were assessed separately from the very beginning of the work of the 2020 Act. The Coal Commission already emphasized the "*existing structural differences between the lignite and coal-fired power stations in relation to CO₂ emissions, operating company structure, the relationship with mining operations and the associated number of affected jobs.*"²¹⁴ Mr. [REDACTED] also confirms in his

²¹³ Reply, ¶ 214.

²¹⁴ R-0003-ENG/GER, Final Report of the Coal Commission, January 2019.

Second Witness Statement that the differences are not *post-hoc*, but were recognized from the outset of the legislative process.²¹⁵

272. Claimant then alleges: “*lignite and hard-coal plants serve identical functions in electricity generation, compete in the same wholesale power markets, and were subject to the same emissions trading system.*”²¹⁶ As a preliminary matter, Claimant’s statement would apply to all fossil fuels used for electricity production. Following this logic, the legislature could not differentiate between gas-fired power plants and the lignite sector. This would be absurd.

273. On substance, the key fact which Claimant’s statement is neglecting is that lignite plants and lignite mines are interconnected. This interconnection does not apply to hard-coal plants (or to other fossil fuel plants). As Respondent set out in detail in the Counter-Memorial, this mining perspective is the very reason for the compensation of the lignite sector. This is also re-confirmed in the Second Witness Statement of Mr. [REDACTED] to which Respondent refers in full.

274. In this regard, Claimant alleges: “*The convergence of power generation phase out with mining closure does not negate comparability at the level of the regulated activity, i.e. electricity production.*”²¹⁷ Claimant’s allegation (made without any evidence) is incorrect. The special perspective of lignite mining does negate comparability of lignite and hard-coal plants. Due to the mining perspective, many differences exist, for example:

- Lignite mining is open-pit mining.
- The lignite-mining sector operates app. 60,000 employees as estimated by the Coal Commission.
- The phase-out requires to assess either early retirement options or alternative positions for these employees.
- Upon ordinary retirement, the employees have pension claims.
- The lignite operators must rehabilitate the lignite pits.
- Profits of lignite plants cannot be determined without the costs of the lignite mines.

²¹⁵ [REDACTED] WS II, ¶ 33.

²¹⁶ Reply, ¶ 216.

²¹⁷ Reply, ¶ 218.

275. Claimant then alleges: “Respondent’s submissions rather confirm that political factors played a decisive role in deciding the treat lignite different from hard coal.”²¹⁸ The statement is in line with the heading of Claimant’s sub-section on this topic: “Respondent favoured lignite for purely political reasons”.²¹⁹ Claimant seems to understand the term “political” as some form of proof for treaty breaches or discrimination. Claimant’s implication that political decisions would be made as a presumption to discriminate and violate international law is false. In case of the lignite phase-out, the negotiated result was a careful political decision because of the long list of factors set out in detail in the Counter-Memorial and above, including the special mining perspective, the rehabilitation of the lignite pits, the 60,000 employees and energy security. In a study undertaken for RWE in 2018, Claimant’s experts from Frontier confirmed that the thousands of employees are contingent on the lignite industry.²²⁰

276. Afterwards, Claimant essentially repeats its prior allegations: “social policy considerations do not alter the fact that both lignite and hard coal power plant operators are engaged in the same regulated activity – producing electricity”.²²¹ Claimant’s statement is incorrect. Lignite operators and hard-coal power plants do not engage in the same regulated activity. Lignite operators operate lignite plants and lignite mines. Claimant did not dispute that lignite power plants and mines are interwoven. Lignite open-pit mining is a regulated activity, too. This is inseparable from electricity production.

277. Claimant alleges afterwards: “Structure support for mining regions may be a legitimate policy goal. It does not justify depriving efficient hard coal power plant operators of compensation for the same State mandated loss of generating rights and value.”²²² Claimant’s allegation is misplaced. As confirmed in Mr. [REDACTED] Second Witness Statement, it is

²¹⁸ Reply, ¶ 219.

²¹⁹ Reply, before ¶ 212.

²²⁰ **R-0224-ENG/GER**, Frontier *et al.*, *Impact Assessment of the CO2 Sector Target – Study Commissioned by RWE AG*, 15 August 2018, adobe p. 2: “The decline in lignite-fired power generation—and consequently in lignite production—is hitting lignite-mining regions the hardest. To meet the 2030 sectoral target, there will already be a significant shift in the mining structures of these regions. According to the study, this will result in a total loss of value added of more than 31 billion euros in the lignite-producing states (North Rhine-Westphalia, Saxony, Saxony-Anhalt, and Brandenburg). At its peak, over 23,000 jobs (in 2030) will be lost. Not only would open-pit mines and power plants be affected—the losses would extend to all sectors of the economy.” **R-0224-ENG/GER**, Frontier *et al.*, *Impact Assessment of the CO2 Sector Target – Study Commissioned by RWE AG*, 15 August 2018, adobe p. 101: “The significant regional economic importance of the lignite industry is evident from the €6.7 billion in revenue generated in Germany’s three lignite-mining regions, which is associated with €2 billion in value added and 19,700 jobs. Through the value chains, these effects subsequently spread to other sectors of the broader economy.”

²²¹ Reply, ¶ 219.

²²² Reply, ¶ 219.

incorrect to imply that compensation would have been foreseen for hard-coal power plants but then taken away and given to the lignite operators instead. Instead, the two industries were assessed separately from the outset, *inter alia*, because of the structural dimension. Due to the latter, lignite and hard-coal were not in ‘like’ circumstances.

278. Claimant’s next assertion is: “*the lignite mining industry has received state aid long before the [2020 Act]*.”²²³ Claimant’s assertion is misleading. Subsidies were not paid for ‘the’ industry, but only to the Eastern German operators (which receive a significantly lower compensation under the 2020 Act than RWE from Western Germany). Unlike for hard-coal mines, subsidies were not paid to subsidize the re-sale price, but only for rehabilitation reserves. The reason was the unification of Germany. In Eastern Germany, the lignite operators did not have any obligation to rehabilitate the open pits. They incurred this obligation only through the German unification and the applicability of the laws of Western Germany. Finally, the subsidies paid for rehabilitation reserves in Eastern Germany were a fraction of the subsidies paid to hard-coal mines since the 1950s. For further details, Respondent refers in full to paras. 3-11 of the Second Witness Statement of Mr. [REDACTED].

279. On the past, enormous subsidies for the hard-coal mining sector in Germany (which had been phased out already long before the 2020 Act), Claimant asserts: “*It [Respondent] provides no evidence linking past hard-coal mining subsidies to Claimant’s power plant or to the Coal Ban Law’s specific impacts on production value.*”²²⁴ Claimant mislabels the relevance of past hard-coal mining subsidies. The subsidies are evidence that mining issues, capacity to employ thousands of employees, and mine-rehabilitation costs have always been an important topic for the legislature’s margin of appreciation.

280. Claimant then alleges that Respondent should have undertaken negotiations also with all hard-coal power plants. Claimant’s allegation is unrealistic and irrelevant. As already set out in the Counter-Memorial, whereas the lignite market is dominated by mainly two operators (RWE and LEAG, ultimately owned by Czech EPH), there are many times more players on the hard-coal market. Given that Claimant makes a case on discrimination, it suffices that, therefore, the lignite and hard-coal markets were not in ‘like’ circumstances when it comes to the feasibility of negotiations.

²²³ Reply, ¶ 221.

²²⁴ Reply, ¶ 222.

281. On the risk of ‘domino effects’ in the lignite sector without a negotiated phase-out, Claimant alleges: “*Managing lignite specific operational risks does not negate the comparability of generators for compensation purposes*”.²²⁵ Claimant’s allegation suffers from the same flaw as the previous: the generators are not comparable because lignite operators operate both the mines and the power plants. This is the very reason for the risk of the ‘domino effect’. To recall, one lignite pit is, on average, supplying three lignite power plants. If one closes, the other two may no longer be able to bear the costs of the pit and close, too. The lignite pit will then also close. This is a lignite-specific risk that does not exist in the hard-coal sector which, again, shows that the two are not in ‘like’ circumstances.

282. As stated above, Claimant’s experts from Frontier allege that the public documents from the EU State Aid proceedings regarding the lignite phase-out would constitute evidence against Respondent’s case.²²⁶ This is incorrect. The public documents from the State aid proceedings before the EU Commission on record confirm the distinct nature of the hard-coal and lignite industries. The three documents are the EU Commission’s decision to initiate State aid proceedings, the decision to extend proceedings, and the State aid decision on RWE’s compensation. On numerous aspects, the documents validate the testimony of Mr. [REDACTED] Witness Statements. They record that before the EU Commission, Respondent gave explanations in line with Mr. [REDACTED] testimony.

283. Also, before the EU Commission, Respondent insisted that lignite power plants are interwoven with lignite mines.²²⁷ The EU Commission agreed that this was the case.²²⁸ Notably, the EU Commission had already noted in its earlier decision on the hard-coal auctions:

“Germany chose different instruments to phase-out hard coal and lignite due to their physical configuration and the number of players. There are only two major players generating lignite-fired power, whereas there are multiple undertakings generating power from hard coal. Also, contrary to hard coal, lignite plants are located close to the lignite mines providing

²²⁵ Reply, ¶ 226.

²²⁶ Cf. Frontier ER II, ¶ 384.

²²⁷ **FE-92**, European Commission, Proceedings SA.53625(2020/N), Decision of 2 March 2021, ¶ 14; **SD-84**, European Commission, Proceedings SA.53625(2020/N), Decision of 2 March 2023, ¶ 97; **FE-142**, European Commission, Proceedings SA.53625(2020/N), Decision of 11 December 2023, ¶ 234: “Lignite as an overall system of power stations and open-case mines: There is a direct operational link between power stations and open-case mines in the case of lignite”; ¶ 251: “hard coal [...] can economically be sourced from the world market, and there are no opencast mines. However, in Germany’s view, it is precisely the connection of power plants and opencast mines in a systemic unit which makes the phasing out of lignite particularly burdensome and complex”.

²²⁸ Cf. **FE-142**, European Commission, Proceedings SA.53625(2020/N), Decision of 11 December 2023, ¶¶ 383, 405.

the combustion input, which is not a tradable commodity. The closure of the lignite plants therefore has a strong impact on the functioning of the related mines, and has to be coordinated to give predictability to the mining operations. The closure of the lignite plants would inevitably lead to the closure of the mines and vice-versa.”²²⁹

284. Moreover, the decisions record that the compensation for the lignite operators was intended to be used to cover also the rehabilitation costs of the open-cast mines.²³⁰ Respondent considered the latter significant (in RWE’s case almost equal to the entire compensation).²³¹

285. In addition, the decisions show that the compensation for the lignite operators follows the purpose of “*social pacification*.”²³² In this context, LEAG confirmed increased costs through the lignite phase-out, *inter alia*, socially-acceptable personnel adjustments for thousands of employees.²³³ Notably, as per a press release of the union for mining workers (IGBCE) representing the LEAG employees, LEAG had committed itself in a *Tarifvertrag* (collective bargaining agreement) not to terminate employee contracts for operational reasons, to increase the payments received by employees in case of early retirement, to undertake professional qualification and educational programs for employees with a view to positions in other areas, and to identify positions for lignite-pit employees in other segments.²³⁴

286. With regard to the calculation of compensation, the decisions also reflect that the underlying calculation submitted by Respondent to the EU Commission, *i.e.* the model from r2b

²²⁹ **FE-91**, European Commission, Decision on 2020 Act auctions, 25 November 2020, ¶ 16.

²³⁰ **FE-92**, European Commission, Proceedings SA.53625(2020/N), Decision of 2 March 2021, ¶ 28: “compensation is to be used to cover the rehabilitation costs for the opencast mines in a timely manner”

²³¹ **FE-92**, European Commission, Proceedings SA.53625(2020/N), Decision of 2 March 2021, ¶ 62: “the additional costs for RWE [for rehabilitation] were estimated to be between around EUR 1.9 billion and EUR 2.3 billion”. See also ¶ 429.

²³² **FE-142**, European Commission, Proceedings SA.53625(2020/N), Decision of 11 December 2023, ¶ 232: “social pacification”.

²³³ **FE-92**, European Commission, Proceedings SA.53625(2020/N), Decision of 2 March 2021, ¶ 74.

²³⁴ **R-0230-GER/ENG**, Industrial Union of Mining, Chemicals, and Energy (IGBCE), Press Release: “IG BCE and the employer have agreed on a comprehensive safety net for employees affected by the coal phase-out. The collective bargaining agreement provides for a general ban on layoffs for operational reasons [...]. The collective bargaining agreement applies to nearly 8,000 LEAG employees in Germany and runs through the end of 2043. It is a crucial prerequisite for LEAG to be able to phase out its lignite-fired power plants by 2038 in a socially responsible manner. [...] We have achieved: the fundamental exclusion of layoffs for operational reasons; an increase in the state adjustment allowance to 85 percent of the last net salary; the right to training measures and placement in other employment. The employment relationship continues during the training measures. The company bears the costs of the measures.”

for lost profits was an intertwined model for both lignite mining and lignite electricity production.²³⁵

287. Furthermore, the decisions record that Respondent gave explanations as to why *e.g.* a minimum price for CO₂ would not have been a suitable alternative to the 2020 Act that correspond to Mr. [REDACTED] First Witness Statement.²³⁶ The EU Commission considered this explanation convincing.²³⁷

288. Lastly, Claimant's experts also allege that lignite power plants would be compensated for lost profits in the 2030s.²³⁸ These allegations are addressed in Mr. [REDACTED] Second Witness Statement. He confirms that this is a matter particular to LEAG (the operator of the Eastern German lignite pits). He adds that this is a new development that will not increase but, if anything, decrease the compensation LEAG receives (if any):

“The European Commission's directions and the amendment to the 2020 Act quoted by Frontier's experts post-date my First Witness Statement. After my First Witness Statement, the European Commission directed that LEAG's compensation be assessed under EU State Aid law at the time of the plants' actual closure. Under this eventual assessment, plants closing after 2030 will be considered. This eventual assessment is a new development.

On substance, the assessment will not increase the originally-negotiated compensation. Instead, the new development may decrease LEAG's compensation. It is unclear whether any compensation will be due under this assessment at all. The profitability, if any, of lignite mines and power plants in the 2030s is uncertain. I would also like to add that the compensation will not be paid to LEAG itself but to two companies founded specifically for the decommissioning of the lignite open-mine pits in Brandenburg and Sachsen.”²³⁹

Interim conclusion

²³⁵ **FE-142**, European Commission, Proceedings SA.53625(2020/N), Decision of 11 December 2023, ¶ 259: “Germany also notes that the revised calculation is done in a way that holistically reflects the economics of lignite-fired electricity generation in which the mines are inseparable from the power plants”.

²³⁶ **FE-92**, European Commission, Proceedings SA.53625(2020/N), Decision of 2 March 2021, ¶¶ 7-9; **FE-142**, European Commission, Proceedings SA.53625(2020/N), Decision of 11 December 2023, ¶¶ 25-27; [REDACTED] WS I, ¶ 29.

²³⁷ **FE-142**, European Commission, Proceedings SA.53625(2020/N), Decision of 11 December 2023, ¶ 377.

²³⁸ Cf. Frontier ER II, ¶¶ 385, 391.

²³⁹ [REDACTED] WS, ¶¶ 18-19.

289. In conclusion, the 2020 Act is not discriminatory. It treats AET like any other domestic or foreign investor. It treats the Lünen Plant like any other hard-coal power plant. Hard-coal and lignite, in turn, are distinct industries and, hence, not in ‘like’ circumstances.

c. Claimant has no further meaningful case against the police-powers doctrine

290. In the Counter-Memorial, Respondent set out that the 2020 Act meets the police-powers doctrine’s other requirements (a *bona fide* act of general application in the public interest). In summary, the 2020 Act aims at mitigating the existential risks caused by climate change through phasing out the most CO₂-intensive form of electricity production. As set out in detail at paras. 394-401 of the Counter-Memorial, a considerable body of arbitral jurisprudence has accepted the applicability of the police powers doctrine to additional/new legislation protecting the environment and public health. To recall, these authorities include *Philip Morris v. Uruguay*, *Magyar Farming v. Hungary*, *Eco Oro Minerals v. Colombia*, *Feldmann v. Mexico*, and *Chemtura v. Canada*.²⁴⁰ These authorities should apply *a fortiori* to the present issue of climate change.

291. Apart from its discrimination allegations, Claimant’s other allegations on the application of the police-powers doctrine remain very brief on pp. 144-146 of the Reply. They can be rebutted as briefly:

292. *First*, Claimant comments: “*climate change measures are certainly not commonly accepted*”²⁴¹ as falling within the police powers doctrine. It remains unclear from Claimant’s Reply whether Claimant truly seeks to assert that climate action would not be a *bona fide* action in the public interest. Should Claimant take this position at the Oral Hearing, Respondent refers to the extensive evidence submitted with the Counter-Memorial (and largely undisputed by Claimant) about climate change being an existential threat to ecosystems and mankind. Climate action is necessary to save species, mitigate poverty and prevent geopolitical conflicts. This is undisputed. Given the precedents on the police-powers doctrine in the context of public health and environmental concerns, climate action must fall under the doctrine *a fortiori*.

293. *Second*, Claimant states: “*Respondent does not even offer a potential approach as to how to distinguish a valid exercise of police powers from an indirect expropriation.*”²⁴² Should

²⁴⁰ Counter-Memorial, ¶¶ 394-401.

²⁴¹ Reply, ¶ 451.

²⁴² *Id.*

Claimant mean to argue that the police-powers doctrine applies only to measures that do not otherwise constitute an indirect expropriation, this would be illogical and render the police-powers doctrine redundant. If a measure does not meet the threshold of an indirect expropriation, an Article 13 ECT claim fails, without the need to address the police-powers doctrine.

294. Contrary to Claimant, the jurisprudence on the police-powers doctrine sets out clear criteria. As explained in the Counter-Memorial, the police-powers doctrine has specific requirements confirmed in extensive jurisprudence (*bone fide* measure, in the public interest, of general application, and without discrimination). If these requirements are met, a measure is exempt from constituting an expropriation that triggers any compensation obligation. Claimant's implication that the numerous tribunals applying the police-powers doctrine would have overlooked that these criteria would equal those of a lawful expropriation²⁴³ is implausible.

295. Claimant then proposes that the Tribunal should apply a test mentioned in para. 276 of the award in *Continental Casualty v. Argentina* to 'assess' whether the 2020 Act falls outside the scope of the police powers doctrine.²⁴⁴ However, the award does not concern the police-powers doctrine. The term 'police powers' is not included in the tribunal's reasoning.²⁴⁵

296. *Third*, Claimant's final allegation is that the Tribunal should assess whether the non-payment of compensation is proportional.²⁴⁶ Claimant's concept of proportionality is misguided. Any assessment must be about the objective of the measure as such (climate action) not the decision against further compensation. Following Claimant's logic, every police-powers assessment would not be about public health, the environment etc., but about State budgets.

297. Further, jurisprudence does not support Claimant's assertion that the police-powers doctrine includes a proportionality assessment. The doctrine requires a *bona fide* measure in the public interest of general application. These requirements are met. Even if proportionality were required (*quod non*), the threshold is met. Claimant did not establish that any less severe measure would prevent as much CO₂ from being emitted as phasing out hard-coal power plants. In conclusion, the 2020 Act falls under the general requirements of the police-powers doctrine.

²⁴³ *Id.*, ¶ 450.

²⁴⁴ *Id.*, ¶ 452.

²⁴⁵ **CLA-0049**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶¶ 271-285.

²⁴⁶ Reply, ¶ 454: "Not paying compensation does not contribute to climate protection."

Conclusion on the police-powers doctrine

298. Claimant's expropriation claim must be dismissed because the 2020 Act is a legitimate exercise of Germany's police powers mitigating the existential risks of climate change. Claimant raises only two defenses against the police-powers doctrine in a meaningful manner. Both are unfounded. *First*, Article 24(1) ECT on essential security interests does not carve-out the customary international law on police powers because the latter is a separate topic. In any event, Article 24(1) ECT does not prohibit a State from invoking its obligations under other treaties. *Second*, the 2020 Act is not discriminatory. It treats AET like any domestic or other foreign investor. It treats the Lünen Plant like all other hard-coal power plants. The lignite sector, in turn, is a different industry and not in 'like circumstances'.

2. In any case, the 2020 Act does not meet the threshold of an indirect expropriation

299. Should the Tribunal decide not to apply the police-powers doctrine (*quod non*), the facts on record do not, contrary to Claimant's assertions, suffice to meet the high threshold for an indirect expropriation.

300. In the Counter-Memorial, Respondent set out numerous further reasons why, even if the Tribunal decides not to apply the police-powers doctrine (*quod non*), the 2020 Act does not meet the threshold of an indirect expropriation.²⁴⁷ As a preliminary matter, Respondent set out that the legal standard under numerous legal authorities sets a very high threshold requiring that the Investment be virtually annihilated. Claimant did not comment on these authorities.

301. On the facts, Respondent relied on the following:

- the Lünen Plant generated more than EUR [REDACTED] in interest for the banks that financed most of the investment costs;
- AET retains its title;
- AET retains the options to convert the Lünen Plant into a gas-fired power plant;
- the 2020 Act did not cause any debt for AET towards the banks;
- the Lünen Plant did not have a final and binding permit at the time of the 2020 Act;
- the 2020 Act confers benefits on AET's remaining portfolio.

²⁴⁷ Counter-Memorial, ¶¶ 462-470.

302. Claimant's Reply is in large parts repetitive of the Memorial. In the interest of avoiding repetition of the Counter-Memorial, Respondent therefore concentrates on the new facts and allegations. These are the following. Since several of these matters are addressed also on FET below and Respondent expects the expropriation claim to be dismissed already under the police-powers doctrine, Respondent will avoid repetition and restrict the below to a summary:

303. *First*, Claimant alleges that the assessment of indirect expropriation would be exclusively about the value of its shares following the 2020 Act's enactment and no further considerations.²⁴⁸ This is incorrect. Determining whether an indirect expropriation occurred is not a mechanical exercise dictated by valuation experts' results. The assessment has a necessary legal dimension and must be subject to fairness and balancing considerations. In particular, it is detrimental also for Claimant's alleged expropriation case that Claimant concedes that it did not have any legitimate expectations.²⁴⁹ Both the jurisprudence of the European Court of Human Rights and the German Constitutional Court confirm that if the title to property is not affected (which is the case in the present case), the mere restriction of the use of property (beyond which Claimant's case does not extend) does not trigger compensation obligations when the owner did not have any legitimate expectations in such use.²⁵⁰ This should be persuasive.

304. *Second*, as set out above, document-production validated that the 2020 Act did not cause any debt for AET towards the banks. [REDACTED]

[REDACTED]

[REDACTED]

305. *Third*, it is undisputed that Claimant has the option to convert the Lünen Plant into a gas-fired power plant. Claimant and its experts did not comment meaningfully on two of the conversion options set out in the Report by Messrs. Wunsch and Dambeck, *i.e.* to either install a gas turbine or a combined turbine-steam installation. On the third option (replacing the hard-coal burner through a gas burner), the main new development is that Claimant and its experts attempted to revise in passing their concession from the Memorial that a conversion results in a net benefit

²⁴⁸ Reply, ¶ 487: "The expropriation analysis concerns the value of the actual hard-coal investment at the time the Coal Ban Law became known [...]."

²⁴⁹ Reply, ¶ 576: "As regards the allegedly lacking legitimate expectations, Claimant gladly repeats that it does not depend on the existence of subjective expectations."

²⁵⁰ See further below, ¶ **Error! Reference source not found.** Kirchhof ER, ¶¶ 82-94.

²⁵¹ See above, II.C.-D.

of EUR [REDACTED] However, Claimant's experts have not disclosed the precise modifications they made nor the calculations on which they base this change which must therefore be dismissed.²⁵²

306. *Fourth*, a new development is that Claimant and its experts seek to explain RWE's decision to participate in the hard-coal auctions with the Westfalen Plant (which has a comparable age to the Lünen Plant) with RWE's corporate strategy to become carbon-neutral.²⁵³ RWE is a stock corporation whose shares are traded on the German stock exchange. RWE's board of directors cannot take decisions that go against the company's best interests. As per Claimant's own case, carbon-neutrality are amongst these interests. If carbon-neutrality is seen as an important factor for shareholder value by RWE, a listed stock-corporation, carbon-neutrality needs to be taken into account. Claimant's alleged expropriation case makes no assessment in this regard.

307. *Finally*, document-production has revealed a reason that, on its own, undermines Claimant's alleged expropriation claim. To summarize the facts set out in detail in sect. II.B. above:

- From 1 August 2011 until the failed negotiations [REDACTED] in 2018, AET was unable to procure a single offer for AET's shares even though AET had been obligated to divest as soon as possible without losses ever since 2011.
- Either AET intentionally violated its obligations under Swiss law or AET's shares were not attractive for any potential buyer.
- Since the 2011 AET Law obligates AET to relinquish its shares in 2035 at the latest, AET could not have made any profits from holding its shares after 2035.

308. These facts are detrimental for AET's expropriation case. For many years, *i.e.* since 1 August 2011, AET has been obligated to monetarize profits (if any) and sell its shares "*as soon as possible as soon as possible, provided they do not generate financial losses*" (2011 AET Law). Until the failed negotiations [REDACTED] in 2018, AET did not procure a single offer. Given this track-record, AET's alleged Investment must be deemed not to have had any value at the time of the 2020 Act.

²⁵² See below, ¶ 593.

²⁵³ Reply, ¶ 256: "RWE submitted bids for the one operational Westfalen block and another coal-fired power plant and emphasised that the shutdown was in line with RWE's strategic goal to become carbon-neutral by 2040."

309. Expropriation is not a mechanical exercise determined by valuation experts' opinions on an actual scenario as of a certain valuation date. Expropriation also entails a legal assessment. Under such assessment, it must reflect negatively on Claimant's case that Claimant had to, but did not sell its shares before the 2020 Act.

Conclusion on Claimant's expropriation claim

310. In conclusion, Claimant's expropriation claim must be dismissed under the police-powers doctrine and, even if the Tribunal decides otherwise (*quod non*), because the 2020 Act does not meet the threshold of an indirect expropriation.

C. UMBRELLA CLAUSE

311. Claimant's claim under the ECT's umbrella clause remains unfounded for the three reasons set out in the Counter-Memorial. Each of these reasons, on its own, undermines Claimant's claim:

- AET does not rely on a contract (see below, at 1.).
- AET did not invest in reliance on the 2013 Preliminary Permit (at 2.).
- Even if relevant, the 2013 Preliminary Permit did not impose any relevant obligations on the German legislature under the – undisputedly – applicable German law (at 3.).

1. AET made no meaningful new arguments for an application beyond contracts

312. In the Counter-Memorial, Respondent set out numerous reasons why Article 10(1) sentence 5 ECT applies only to contractual obligations. In summary, these were the following:

- the wording of the ECT in English ("*entered into*") and especially other authentic versions ("*contraído*", "*contractées*");
- the context of the requirements for legitimate expectations under Article 10(1) sentence 3 ECT (FET) – these requirements would be undermined if every operating permit would be protected by the umbrella clause;
- the object and purpose of the ECT which is not to turn treaty tribunals into appeal bodies on matters of national law;
- the object and purpose of Article 10(1) sentence 5 ECT to bind a State to obligations tailored for and negotiated with an investor before the investment;

-
- the historical context of umbrella clauses going back to the 1967 Draft OECD Convention which was regarded by contemporaneous commentators such as Professors Elihu Lauterpacht, F.A. Mann and Prosper Weil as tailored for contracts.²⁵⁴

313. In the Counter-Memorial, Respondent has also provided legal authorities that endorsed all of these arguments and all concluded that the specific umbrella clause in Article 10(1) sentence 5 ECT is limited to contractual obligations.²⁵⁵

314. In the Reply, Claimant does not address any of these arguments and instead repeats the allegations from its Memorial. Therefore, Respondent's arguments from the Counter-Memorial stand and need not be repeated. Respondent refers the Tribunal to the Counter-Memorial in full.

315. Claimant's main new substantive comment is the following: "*If a State can internationalise only commitments that it chooses to express in a contract, but never commitments it chooses to express in a permit, the host States retains unilateral control over whether the umbrella clause ever applies.*"²⁵⁶

316. Claimant's comment is correct. The State does retain control whether the umbrella clause applies through retaining control over whether to contract with an investor. This is exactly how umbrella clauses are intended to operate.

317. Such operation of umbrella clauses is fair. In exchange for the *State* controlling the applicability of the umbrella clause, the *investor* has control over its decision whether or not to invest. Umbrella clauses are conceived for those situations in which the investor requires an investment contract and the State, in appreciation of the importance of the investment, agrees to such contract. That is, umbrella clauses are a subject of negotiations.

318. Therefore, the ECT's umbrella clause is limited to contracts. Claimant, however, does not rely on any contract. Claimant's only allegation in this regard was that its operating permits would be "*contract-like*".²⁵⁷ In the Counter-Memorial, Respondent has already confirmed that

²⁵⁴ Counter-Memorial, ¶¶ 476-483.

²⁵⁵ Counter-Memorial, Fn. 569-570.

²⁵⁶ Reply, ¶ 502.

²⁵⁷ Memorial, ¶ 409.

Claimant's assertion was erroneous from the perspective of German law.²⁵⁸ In the Reply, Claimant's only further allegation on this topic is: "*Respondent contends that an operating permit under FICL [Federal Immission Control Law] would not be different from other operating permits. Claimant agrees – with one caveat: the important difference is that an operating permit under FICL usually relates to a substantial investment*".²⁵⁹

319. Claimant's allegation that some permits would be contract-like when the project is, simply put, 'big enough', is erroneous under international and German law. The ECT is tailored for energy investments. Regularly, they are substantial. For the sake of completeness, the FICL applies irrespective of the size of a project.

Interim conclusion

320. In line with established jurisprudence and numerous compelling arguments, the ECT's umbrella clause is limited to contracts. Claimant does not rely on a contract. Its umbrella-clause claim should already be dismissed on this ground.

2. Claimant has not addressed the issues of fact about the 2013 Permit's timing

321. Even if the Tribunal decides to apply the ECT's umbrella clause beyond contracts on one-sided permits (*quod non*), an obligation can only be relevant under the umbrella clause if it induced an investment. This aspect of the legal standard is undisputed. Claimant confirmed it in the Memorial.²⁶⁰

322. Respondent has emphasized in the Counter-Memorial that even taken at its highest, the 2013 Preliminary Permit cannot be relevant under Article 10(1) sentence 5 ECT. It cannot have induced the investment because it post-dates the investment. Further, the 2013 Preliminary Permit was not final and binding at the time of the 2020 Act.²⁶¹

323. In the Reply, Claimant mainly relies on the expert report of its expert Dr. Krahnefeld who once acted together with Claimant's Counsel in another case against Respondent.²⁶² On substance, Dr. Krahnefeld's report is irrelevant for the present issue. The present issue is an issue

²⁵⁸ Counter-Memorial, ¶¶ 492-493.

²⁵⁹ Reply, ¶ 512.

²⁶⁰ See Memorial, ¶ 391; Counter-Memorial, ¶¶ 488-490;

²⁶¹ Counter-Memorial, ¶¶ 494-500.

²⁶² See Krahnefeld ER, ¶ 2.

of *fact*, i.e. that an alleged obligation post-dating the investment by several years cannot have induced the investment, let alone when that alleged obligation remained only preliminary at the time of the alleged Measure. Claimant failed to present any authority under international law or any precedent applying the umbrella clause on such a timeline.

3. Claimant's supplementary argument on the applicable German law is incorrect

324. Should the Tribunal, despite these considerations, consider the 2013 Preliminary Permit relevant under the ECT's umbrella clause (*quod non*), the 2013 Preliminary Permit does still not establish an umbrella-clause claim. It is undisputed that the law applicable to assessing any obligation would be German law. Respondent has set this out in detail in the Counter-Memorial.²⁶³ In the Reply, Claimant did not express any disagreement.

325. Respondent highlighted in the Counter-Memorial that the 2013 Preliminary Permit issued by an administrative authority of a Federal State creates no obligations on the legislature. Claimant's Reply in this regard remains brief. Claimant submitted a report of a new expert, Dr. Krahnefeld who has a section on the obligations resulting from the 2013 Preliminary Permit under German law, including on the protection of legitimate expectations (*Vertrauensschutz*).

326. Also in response, Respondent instructed Professor Kirchhof to assess in detail the obligations, if any, of the legislature regarding the Lünen Plant and AET. He concludes that the 2013 Preliminary Permit created no obligations under German law (including constitutional law) not to legislate the hard-coal phase-out. Respondent refers to Professor Kirchhof's report in full. His key conclusions include the following:

“7. There is no obligation to compensate for the phase-out of coal-fired power generation, because the legislature is free to redesign its energy policy and enforce systemic change by law. [...]

9. Mere concerns about a loss in revenue or a reduction of market opportunities are not protected by the fundamental right to property.

10. The state has not established special legitimate expectations for the Lünen Plant that would result in an obligation to compensate. Mere expenses, general political statements or the establishment of overriding public interest as per section 34 of the Act on Nature Conservation and Landscape Management (Bundesnaturschutzgesetz – BNatSchG) do not establish special legitimate expectations of this sort.

²⁶³ Counter-Memorial, ¶¶ 485-487.

11. In the 2020 Act, the legislature determined the content of property in hard-coal-fired power plants in a proportionate way. The objective of environmental protection is an objective reason enshrined in constitutional law under Art. 20a of the Basic Law, the effects of the 2020 Act will not have an existential impact on AET and TKL, and the legislature has provided for a long transition period.

12. The legislature has equitably and fairly determined the content of property in hard-coal-fired power plants in the 2020 Act, as the different rules that apply to lignite-fired power generation affect a market that is structured quite differently and thus requires different measures.”²⁶⁴

Conclusion on Claimant’s umbrella-clause claim

327. Claimant’s umbrella-clause claim must be dismissed because (i) Claimant does not rely on a contract, (ii) Claimant relies on an operating permit that post-dates the alleged Investment by five years, and (iii) under the applicable German law, this operating permit does not impose any obligation on the German legislature not to phase out hard-coal power plants. Each of these reasons, on its own, undermines Claimant’s umbrella-clause claim.

D. FAIR AND EQUITABLE TREATMENT

328. Claimant’s FET claim is unfounded. Claimant requests a first-of-its-kind award, *i.e.* the first award holding a State liable for an abstract change of regulation despite the investor not even claiming legitimate expectations. In this context, Claimant also seeks an award confirming that the ECT would constitute some explicit decision against climate action (see below, at 1.). On the facts, the list of considerations set out in the Counter-Memorial and undermining any FET claim stand (at 2.).

1. Legal standard

329. In the Counter-Memorial, Respondent has set out the key characteristics of the legal standard on FET. Several aspects are not in dispute.

330. Respondent began by underlining that Article 10(1) sentence 1 ECT does not include any isolated obligation.²⁶⁵ In the Reply, Claimant confirmed this.²⁶⁶

²⁶⁴ Kirchhof ER, p. 3 (Summary).

²⁶⁵ Counter-Memorial, sect. IV.C.1.a.

²⁶⁶ Reply, ¶ 519: “[Claimant] does not base the claim on the first sentence as a free-standing ‘stability clause’.”

331. Respondent continued that traditionally, FET guarantees a narrow set of categories *e.g.* the protection of legitimate expectations and the absence of arbitrary treatment.²⁶⁷ In the Reply, Claimant did not disagree.

332. Above all, Respondent highlighted in the Counter-Memorial that Claimant's FET claim is extraordinary. Claimant does not invoke legitimate expectations or arbitrary treatment, but alleges that FET would establish abstract obligations against regulation *per se*. In the Reply, Claimant confirmed: "*Claimant does not explicitly invoke legitimate expectations. Claimant considers the protection against fundamental changes to be separate from the obligation to protect legitimate expectations.*"²⁶⁸ Against this background Respondent focuses on the two key disagreements on the legal standard that require the Tribunal's decision.

a. An FET award as requested by Claimant would be the first-of-its-kind

333. The most important issue on the legal standard is that FET claims against regulation *per se*, *i.e.* in the absence of a violation of legitimate expectations, arbitrary treatment or discrimination, should not be possible at all. Even if the Tribunal holds otherwise (*quod non*), there must be a very high threshold for such abstract regulatory-change claims.

334. Claimant asks the Tribunal to render a first-of-its-kind award. There does not exist any precedent awarding damages to an investor only based on Claimant's reading of FET. In sect. D.IV.1 of the Reply, Claimant selected quotes from cases that either rejected the investors' claims altogether; were based on distinct fact-patterns (*e.g.* investment contracts or legislative assurances to investors); or were tied to legitimate expectations (which Claimant does not invoke).

335. In the Counter-Memorial, Respondent relied on numerous authorities outlining the high legal threshold. In the Reply, Claimant remained silent on almost all. Hence, Respondent will not repeat its comments from the Counter-Memorial which stand.

336. By contrast, the limited number of authorities that Claimant invokes are of no avail. In the Memorial, Claimant's main line of authorities are some Spanish renewable cases that awarded damages to investors only based on a 'reasonable rate of return'. In the Counter-Memorial, Respondent highlighted that these cases were only the minority jurisprudence. Unlike the majority jurisprudence, they dismissed the investors' claims for the fixed feed-in tariff of

²⁶⁷ Counter-Memorial, sect. IV.C.1.b.

²⁶⁸ Reply, ¶ 540.

44 c€/kWh increased by inflation under Article 44(3) Spanish Royal-Decree 661/2007.²⁶⁹ In the Reply, Claimant alleges: “Respondent’s second distinction asserts that Spain cases involved ‘legitimate expectations’ claims whereas Claimant does not. That is erroneous sophistry. Claimant pleads a fundamental change through the [2020 Act], and tribunals in Spanish cases have found this to be in breach of the ECT’s FET standard. [...] the Spain cases establish a controlling legal principle: FET is breached when regulatory frameworks upon which an investor relied are fundamentally altered [...]”.²⁷⁰ Claimant’s assertions are incorrect.

337. To begin with, Claimant is wrong to label its authorities “*the Spain cases*” (verbatim quote from Reply in para. above). Claimant invokes only the *minority* jurisprudence that accepted Spain’s argument to limit claims to a ‘reasonable rate of return’. The *majority* jurisprudence is straightforward. It held that Spain, through a specific legislative provision, *i.e.* Article 44(3) RD 661/2007, created legitimate expectations for the remuneration of PV plants over their entire lifetime. As all Members of the Tribunal set in tribunals rendering awards in this majority jurisprudence several years ago (*Sun-Flower*, *Eiser (I)*, *Masdar*), the Members of the Tribunal will be familiar with the relevant Spanish legislation and how the latter differs from the present case. Claimant’s case is distinct because Claimant does not even invoke legitimate expectations, let alone based on a legislative commitment such as Article 44(3) RD 661/2007.

338. Even if the Tribunal were to consider the minority jurisprudence in Spain cases relevant (*quod non*), this minority jurisprudence was intended to *cap* the investors’ legitimate expectations at a ‘reasonable rate of return’. They did so on liability (not on quantum, as Claimant implies). Therefore, the minority jurisprudence cannot support Claimant’s theory that the investor would not have to make any case on legitimate expectations at all. The minority Spain cases held that the investors had such expectations, but only for a ‘reasonable rate of return’.

339. The only authority in the Reply from the majority jurisprudence that Claimant relies on is *Foresight, Greentech et al. v. Spain*.²⁷¹ To begin with, the award has been set-aside at the arbitral seat.²⁷² Also on substance, it does not support Claimant’s claim. Instead, *Foresight* illustrates the distinction between the cases of Spanish renewables investors and Claimant. This tribunal held: “*The Claimants’ legitimate expectation that the remuneration and benefits their PV*

²⁶⁹ Counter-Memorial, ¶¶ 534-538.

²⁷⁰ Reply, ¶¶ 563-564, 570.

²⁷¹ Invoked at Reply, ¶ 522.

²⁷² **RL-0135**, *Foresight et al. v. Kingdom of Spain*, Judgment of the Svea Court of Appeal, 28 June 2024.

*facilities received would not be radically changed were based foremost on the express language of RD 661/2007, which sets out fixed FiTs to be paid for entire operating life of a PV facility.”*²⁷³ Claimant does not invoke legitimate expectations, let alone based on alleged legislative promises.

340. The other cases that Claimant relies on the Reply can be swiftly distinguished one-by-one. Respondent addresses them in the order raised in the Reply. None of these cases sustains an abstract regulatory-change claim as Claimant implies:

341. *AES v. Kazakhstan, Isolux v. Spain* (in which the investors’ claims were dismissed in their entirety) and *Stadtwerke München v. Spain* (in which the investors’ claims were dismissed in their entirety) all involved cases and assessments of legitimate expectations, as Claimant had to concede in the Reply upon Respondent highlighting it in the Counter-Memorial.²⁷⁴ None of the investors in these cases made an abstract regulatory-change claim as Claimant does.

342. *Plama v. Bulgaria*²⁷⁵ rejected the investors’ claims on Bulgaria’s preliminary objections and *obiter* also on the merits.²⁷⁶

343. *Occidental v. Ecuador* does not, contrary to Claimant’s implications,²⁷⁷ constitute an authority for Claimant’s assertion that proportionality would limit the State’s right to make regulatory changes. In this case, the tribunal held that principles of proportionality govern whether the State’s termination of an individual contract (a production-sharing agreement in the oil sector) because of certain prior breaches by the investor was lawful.²⁷⁸ Unlike AET, the investor in *Occidental* did not invoke legislation applicable to an industry in its entirety, but measures aimed

²⁷³ **CLA-0065**, *Foresight Luxembourg Solar 1 S.À.R.L., Greentech Energy Systems A/S et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018, ¶ 378.

²⁷⁴ Reply, ¶ 521: “Those tribunals also did not disagree in substance that there was an obligation not to fundamentally alter the legal framework on which an investor relied. They merely reviewed it within the context of legitimate expectations.”

²⁷⁵ Invoked at Reply, ¶ 522.

²⁷⁶ **CLA-0016**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 325.

²⁷⁷ Cf. Reply, ¶ 529: “This [proportionality], however, is a limiting test, not a post hoc justification, as suggested by Respondent. The tribunal in *Occidental* illustratively outlined this: ‘The obligation for fair and equitable treatment has on several occasions been interpreted to import an obligation of proportionality’”.

²⁷⁸ **CLA-0063**, *Occidental and others v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 416: “In cases where the administration wishes to impose a severe penalty, then it appears to the Tribunal that the State must be able to demonstrate (i) that sufficiently serious harm was caused by the offender; and/or (ii) that there had been a flagrant or persistent breach of the relevant contract/law, sufficient to warrant the sanction imposed; and/or (iii) that for reasons of deterrence and good governance it is appropriate that a significant penalty be imposed, even though the harm suffered in the particular instance may not have been serious.”

at a particular oil company and a particular contract.²⁷⁹ Therefore, contrary to Claimant's implications, *Occidental* does not employ proportionality as an abstract restriction of legislation (let alone, for climate action), but as a restriction of holding contract breaches against the investor for the termination of contracts.

344. *Electrabel v. Hungary*²⁸⁰ dismissed the claimant's claims.²⁸¹

345. *Sun-Reserve v. Italy*²⁸² also dismissed the investor's claims. Notably, the tribunal dismissed the claims even though the investors relied on many facts that Claimant does not and cannot invoke, e.g. legislative decrees stipulating certain remuneration as well as letters from and contracts with public authorities.²⁸³ Therefore, the very heading of the main part of the tribunal's analysis – from which Claimant quotes – was “*Legitimate Expectations*.”²⁸⁴ Since Claimant does not invoke such legitimate expectations, explicit legislative promises, or specific promises to AET, the case is irrelevant. At best, the case shows the high threshold for FET claims against regulation in the energy sector.

346. *ACF Renewables v. Bulgaria*²⁸⁵ is a legitimate-expectations case, not an abstract regulatory change case. In its section V.C.1, the award contains the tribunal's analysis of the investor's FET claim. This section headed “*a. legitimate expectations*”²⁸⁶ has 40 pages and concludes by sustaining the investor's main claims. It is followed by a mere 5 pages under the heading “*b. Fundamentally altering the investment Framework, non-transparent and inconsistent*

²⁷⁹ *Id.*, ¶¶ 199-200: “On 15 May 2006, Minister Rodríguez issued the Caducidad Decree. The Decree terminated, with immediate effect, OEPC's Participation Contract and ordered OEPC to turn over to PetroEcuador all its assets relating to Block 15. The thirty-three page Decree included: (i) a summary of the termination process; (ii) block quotes from the. [...] On 16 May 2006, State officials arrived at OEPC's offices in Quito and seized all of its property, including computers, files and other equipment, which were now said to be the property of the State. The next day, 17 May, other State officials, accompanied by the National Police, seized OEPC's oil fields in Block 15, including wells, drills, storage facilities and other oil exploration and production assets.”

²⁸⁰ Invoked at Reply, ¶ 529.

²⁸¹ **CLA-0084**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 237.

²⁸² Invoked at Reply, ¶¶ 536-538.

²⁸³ **CLA-0174**, *SunReserve Luxco Holdings S.A.R.L. et al. v. The Italian Republic*, SCC Case No. V(2016/32), Final Award, 25 March 2020, ¶ 601: “According to Claimants, their legitimate expectations regarding the level of support that would be afforded to their photovoltaic facilities in Italy was based on the following factors: [...] (ii) The five Conto Energia Decrees enacted by Respondent from 2005 to 2012, containing explicit promises to investors that the support that they would receive through the Conto Energia incentives and other elements of the regime would remain constant for 20 years; (iii) GSE's tariff confirmation letters and the GSE contracts entered into with respect to each photovoltaic plant receiving the tariffs [...]”

²⁸⁴ *Id.*, before ¶ 694.

²⁸⁵ Invoked at Reply, ¶ 541.

²⁸⁶ **CLA-0176**, *ACF Renewable Energy Limited v. Republic of Bulgaria*, ICSID Case No. ARB/18/1, Award, 5 January 2024, ¶¶ 1528-1723.

treatment”²⁸⁷ on which Claimant relies. However, the *ACF* tribunal confirms, indeed immediately after the passage quoted by Claimant, that its analysis is intertwined with legitimate expectations.²⁸⁸ Moreover, the tribunal confirmed that this 5-page passage was subsidiary to the *ACF* tribunal’s 40-page determination of the investor’s detailed legitimate expectations in Bulgaria’s renewable-energy framework because it concerned only ancillary claims for three subsidiary measures.²⁸⁹ Notably, the *ACF* tribunal rejected these ancillary claims for all but one measure.²⁹⁰ The only measure that the *ACF* tribunal considered to breach the treaty under this standard were retroactive measures claiming reimbursement from the investors for past feed-in tariffs,²⁹¹ a fact-pattern that is irrelevant for the present case.

347. *EP Wind v. Romania*²⁹² follows the same pattern. The end of the section from which Claimant quotes concludes by rejecting the investors’ claims referring to the legitimate-expectations assessment which occurred in the award’s prior section and which had priority:

“In sum, for the reasons set out above, the Tribunal finds that there was no breach of the so-called "fundamental change" standard because the alleged key characteristics of the GC Scheme either do not exist or have already been taken into account in the Tribunal's findings above concerning the Claimant's legitimate expectation.”²⁹³

348. The final allegation on legal authorities in the Reply concerns German law and proportionality. Claimant alleges: “Respondent should be well aware that one of the main functions of the principle of proportionality, which has its roots in German administrative and constitutional law, is to balance State’s power with rights of individuals.”²⁹⁴ Claimant’s comments on proportionality are misplaced. Under German constitutional law, proportionality restricts State power because the German Basic Law (*Grundgesetz*) provides a comprehensive

²⁸⁷ *Id.*, ¶¶ 1724-1744.

²⁸⁸ *Id.*, ¶¶ 1728-1729.

²⁸⁹ *Id.*, ¶ 1731: “First, the importance of this part of the Tribunal's analysis, following the above consideration of the legitimate-expectations claim, is limited, especially because the most fundamental changes to the ERSR Regime, the APC and the Transition from FiP to FiT, have already been conclusively dealt with above. This part of the Tribunal's analysis will be applied only to the Claimant's claims regarding the Temporary Grid Access Fee and the Balancing Cost Exposure.”

²⁹⁰ *Id.*, ¶¶ 1738-1757.

²⁹¹ *Id.*, ¶¶ 1745-1757.

²⁹² Invoked at Reply, ¶ 542.

²⁹³ **CLA-0177**, *EP Wind Project (Rom) Six Ltd. v. Romania*, ICSID Case No. ARB/20/15, Decision on Jurisdiction, Liability and Select Issues of Quantum, 17 March 2025, ¶ 736.

²⁹⁴ Reply, ¶ 527.

protection of fundamental rights (*lückenloser Grundrechtsschutz*). Therefore, the considerations on proportionality under domestic law are not transferrable.

349. In conclusion, Claimant requests the Tribunal to render a first-of-its-kind award because Claimant failed to present precedent that investors could raise FET claims against regulatory changes without making any case on legitimate expectations or arbitrary treatment.

b. The ECT is not less climate-friendly than other norms of international law

350. The second main issue on the legal standard of FET that crystallized through Claimant's Reply is whether the ECT, unlike the other treaties, would limit the States' right to enact climate action as required by the Paris Agreement and would obligate its signatories to violate existing obligations for climate action under international law. In the Counter-Memorial, Respondent set out that multiple norms in the ECT itself confirm that the ECT is not intended to freeze climate-action regulation and not intended to create a 'chilling effect' on climate action.²⁹⁵ Respondent also set out that FET in general is not intended as a restriction of the right to regulate and that a long list of arbitral tribunals confirm that States enjoy a high degree of deference in regulatory cases.²⁹⁶

351. Claimant did not engage in any discussion with the many case authorities invoked in the Counter-Memorial. Therefore, the latter stand.

352. Instead, Claimant's reply appears to be that, unlike other investment treaties, the ECT would include some decision against climate-action regulation.²⁹⁷ Claimant alleges *e.g.*: "*The Contracting Parties were aware of the Convention [the UNFCCC] and the need to combat climate change, but did not include any substantive provision on it.*"²⁹⁸ Claimant also alleges: "*it lies in the nature of investment treaties such as the ECT to restrict a State's margin of appreciation.*"²⁹⁹

²⁹⁵ Counter-Memorial, sect. IV.D.1.c.

²⁹⁶ Counter-Memorial, sect. IV.D.1.d.

²⁹⁷ Cf. Reply, ¶¶ 536, 539.

²⁹⁸ Reply, ¶ 549.

²⁹⁹ Reply, ¶ 553.

353. Claimant's assertions are incorrect. In line with other treaties and established FET jurisprudence, States enjoy a significant margin of appreciation in regulatory matters also under the ECT. Claimant's attempts to portray the ECT as a climate-unfriendly treaty must be rejected.

354. On Article 24(2) ECT ("*The provisions of this Treaty other than [...] (b) with respect to subparagraph (i), Part III of the Treaty shall not preclude any Contracting Party from adopting or enforcing any measure (i) necessary to protect human, animal or plant life or health*"), Claimant alleges that the provision would be irrelevant for Part III of the ECT.³⁰⁰ Claimant provides no authority for its position and remains silent on the comments in the Counter-Memorial on *RWE v. Spain* (Exhibit CLA-76). Notably, Claimant relies heavily on *RWE* in other matters.³⁰¹ On Article 24(2) ECT, the *RWE* tribunal set out that the most plausible explanation for the language of the Article 24(2) ECT is that the Contracting Parties never considered measures necessary to protect human, animal or plant life as a violation of FET in the first place:

"[...] they [the Claimants] did not explain and substantiate their position that under the ECT investor protection was being prioritised over protection of human life etc. The Tribunal notes that the drafters of Article 24(2) appear to have taken Article XX GATT as their starting point, and the doctrine and cases with respect to Article XX may shed light on the intention behind Article 24(2). However, the Tribunal was not referred to such materials. It considers that the limitation of the general exception in Article 24(2) with respect to human life etc is more readily comprehensible if the ECT Contracting Parties understood themselves to be adopting a series of confined investment protections in Part III such that, for example, a regulation adopted to protect human life would not be regarded as unfair and inequitable unless it was arbitrary or discriminatory or in some other way contrary to customary international law."³⁰²

355. On Article 19 ECT, Claimant alleges: "*Its [Respondent's] argumentation also borders on misrepresentation. It stops reproducing the text of Article 19 when it comes to the various and detailed best-efforts obligations of Contracting States. The provision does not mention a need to undertake all necessary measures (let alone any) to combat climate change, nor does it constitute an explicit exception to Part III ECT. Unlike Article 17 ECT, Article 19 is not even contained in Part III ECT [...]*".³⁰³ The deficits of Claimant's allegations are the following: *first*, Article 19

³⁰⁰ Reply, ¶ 546.

³⁰¹ Memorial, ¶¶ 448, 450, 454; Reply, ¶¶ 529, 555, 613.

³⁰² **CLA-0076**, *RWE Innogy GmbH v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum of 30 December 2019, ¶ 446.

³⁰³ Reply, ¶ 548: "The Contracting Parties were aware of the Convention and the need to combat climate change, but did not include any substantive provision on it."

ECT does not need to be in or refer to Part III ECT in order to be relevant to interpret Article 10 ECT in accordance with the context of Article 10 ECT under Article 31(1), (2) VCLT.³⁰⁴ *Second*, depriving Article 19 ECT of any relevance for claims under Part III ECT – in practice, the most frequent framework of ECT disputes – would deprive Article 19 ECT of its meaningful purpose and thus contravene the requirement of effective treaty interpretation under the VCLT.

356. With the same theory, Claimant dedicated only one sentence to the 1991 Energy Charter and the preamble of the 1994 Protocol on Energy Efficiency. Claimant is mistaken. Under Article 31(1), (2) VCLT, these provisions on the environment and sustainability must be taken into account when interpreting Article 10 ECT. Therefore, they underline the rigorous threshold for FET claims in climate-action settings and the high degree of deference that States must enjoy.

357. Claimant’s final allegation (quoted in para. 352 above) is that the reference to the UN Framework Convention on Climate Combat (UNFCCC) in the ECT’s preamble would evidence some decision to restrict climate action by virtue of Part III.³⁰⁵ Portraying the ECT as a conscious decision against further climate action is untenable. There is no basis to read any decision against climate action into the Preamble.

358. In conclusion, contrary to Claimant, the Tribunal should confirm that the ECT’s Preamble, Articles 19 and 24 ECT, 1991 Energy Charter and the 1994 Protocol on Energy Efficiency are not all irrelevant, let alone show a conscious decision against climate action. They rather confirm that States enjoy a considerable margin of appreciation and degree of deference under Article 10(1) ECT to ensure that States’ right to regulate in the interest of climate action is not infringed through a ‘chilling effect’.

³⁰⁴ **RL-0136**, Vienna Convention on the Law of Treaties, 1969, Article 31 (1) and (2):

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”

³⁰⁵ Cf. Reply, ¶ 549.

2. Application

359. The following facts undermine Claimant’s FET claim. Many of them, on their own, are sufficient to undermine the claim. Respondent begins with the most important fact, *i.e.* the necessity for climate action (see below, at a.) and then addresses the other facts in chronological order (at b.-l.).

a. Climate action is required by a scientific consensus and international law

360. In the Counter-Memorial, Respondent set out in detail that the 2020 Act combats climate change as required under a scientific consensus, international law, and unchallenged German/EU law. This, in itself, already suffices to hold the 2020 Act compliant with FET.

361. On the scientific consensus, Respondent set out in detail how the United Nation’s Intergovernmental Panel on Climate Change (“UN IPCC”) established through its assessment reports the overwhelming scientific consensus that global warming beyond 1.5°C threatens irreversible harm to ecosystems, species, human health and safety, the global economy, and geopolitical stability.³⁰⁶ Respondent also explained how specifically the 5th UN IPCC Assessment Report (“AR5”) and the 2018 UN IPCC Special Report informed policy decisions and served as the authoritative scientific foundation for Respondent’s legally binding obligations to mitigate climate change.³⁰⁷ Respondent further provided multiple studies, reports and an expert opinion by Prof. Dr. Schellnhuber evidencing the necessity and urgency for climate change mitigation.³⁰⁸

362. Respondent also provided a detailed explanation of how the 2020 Act aligns with international and national climate action targets enshrined in public international law, EU law, and German law. In 2015, based on the findings of the 5th IPCC Assessment Report, the Paris Agreement established the 1.5°C objective as a rule of public international law.³⁰⁹ In 2015 and 2016, the EU and Germany adopted the 1.5°C objective respectively.³¹⁰ Following the 2018 UN IPCC Special Report, the EU and Germany further tightened their climate targets.³¹¹ In 2019, Respondent introduced the Federal Climate Action Act. The act formalised the goal of achieving

³⁰⁶ Counter-Memorial, ¶¶ 136-143, 156-162, 284-300, 719-781.

³⁰⁷ Counter-Memorial, ¶¶ 136-143, 156-162

³⁰⁸ Counter-Memorial, ¶¶ 301-336.

³⁰⁹ Counter-Memorial, ¶¶ 144-150.

³¹⁰ Counter-Memorial, ¶¶ 151-155.

³¹¹ Counter-Memorial, ¶¶ 163-179.

climate neutrality by 2050 and reducing greenhouse gas emissions by 55% by 2033.³¹² Following a landmark ruling by Germany’s Federal Constitutional Court, the timeline for climate neutrality was amended to 2045.³¹³ Also in 2019, the EU adopted the European Green Deal, which set the goal of achieving climate neutrality by 2050 and reducing GHG emissions by 55% by 2030 at a European level.³¹⁴ In 2021, Regulation (EU) 2021/1119 codified these targets and incorporated them into EU primary legislation.³¹⁵

363. After the Counter-Memorial, the ICJ rendered its Climate Change Opinion in which the Court commented on the urgency and importance of climate action and the obligations of the international community to adopt climate-action measures.

364. In the Reply, Claimant does not address, let alone refute the necessity or urgency of climate action. Nor does Claimant dispute the scientific evidence underlying the findings of the UN IPCC assessment reports. Nor does Claimant dispute the binding nature of the Paris Agreement, that the Paris Agreement formulates the 1.5°C target, the binding nature of EU climate action law, or the unchallenged status of the German Climate Action Act. Hence, the necessity to adopt climate-action measures is undisputed as a matter of fact and as a matter of Respondent’s legal obligations.

365. Instead, Claimant’s case appears to be that climate action should be pursued differently than through phasing out hard-coal energy because, allegedly, no ‘hard law’ would have required to phase out hard-coal. Upon the brief and inconclusive comment that “*the IPCC Reports, which Respondent summarises at great length, are also no ‘hard law’ or specific recommendations*”³¹⁶, Claimant alleges “*neither the Paris Agreement nor European climate law prescribe specific regulatory measures, let alone a coal phase out.*”³¹⁷

366. The international consensus on the need to reduce CO₂ emissions and the hard-coal industry’s role as a main polluter refute Claimant’s allegations.

367. Both, AR5 and the 2018 UN IPCC Special Report concluded that continued power generation from coal-fired power plants is incompatible with even the 2°C objective and thus, a

³¹² Counter-Memorial, ¶¶ 169-171.

³¹³ Counter-Memorial, ¶¶ 175-177.

³¹⁴ Counter-Memorial, ¶ 166.

³¹⁵ Counter-Memorial, ¶ 178.

³¹⁶ Reply, ¶ 164.

³¹⁷ Reply, ¶ 165.

fortiori, with the 1.5°C objective. All climate change mitigation scenarios compatible with limiting global warming to below 1.5°C or even 2°C have one thing in common, *i.e.* the need to phase out coal-fired power generation.

368. AR5 highlighted that the increased use of coal had reversed the trend of gradual decarbonization of the world's energy supply.³¹⁸ The report projected that if the course were not changed, CO₂ emissions from the energy sector were to double or even triple by 2050 compared to 2010 levels.³¹⁹ AR5 also emphasized that delaying mitigation efforts through 2030 would make it substantially more difficult to transition to low emission levels in the long term resulting in failure to limit global warming to 2°C.³²⁰

369. AR5 then identified response options for climate change mitigation in every major greenhouse gas (“GHG”) emitting sector (energy supply, industry, buildings, transport, and ‘AFOLU’, *i.e.* agriculture, forestry and other land use). Between these sectors, the energy supply sector plays a pioneering role as decarbonisation happens more rapidly than in any other sector.³²¹ For energy supply, every main mitigation measure and below 2°C-compliant scenario warrants the replacement of coal either through renewable energy, nuclear energy or carbon capture storage.³²² In this regard, AR5 also explicitly highlighted that conversions of coal-fired power plants into gas-fired power plants would significantly reduce GHG emission in the energy sector:

“GHG emissions from energy supply can be reduced significantly by replacing current world average coal-fired power plants with modern, highly efficient natural gas combined-cycle power plants or combined heat and power plants, provided that natural gas is available and the fugitive emissions associated with extraction and supply are low or mitigated.”³²³

370. The 2018 UN IPCC Special Report modelled emission pathways consistent with the 1.5°C objective under different assumptions about future human and economic development. What all pathways with no or limited overshoot have in common is that CO₂ emissions fall to net

³¹⁸ **R-0075**, UN IPCC Climate Change 2014: Mitigation of Climate Change, Summary for Policymakers, adobe p. 10.

³¹⁹ *Id.*, adobe p. 22.

³²⁰ *Id.*, adobe p. 14.

³²¹ **R-0074**, UN IPCC Climate Change 2014: Synthesis Report, 1 November 2014, adobe p. 99.

³²² *Id.*, adobe pp. 100-101, 103.

³²³ *Id.*, adobe p. 100.

zero and that the use of coal must be largely phased out by mid-century. Notably this refers to the entire world, not only industrial States such as the Federal Republic of Germany:

Pathway classification	No or limited overshoot	No or limited overshoot	No or limited overshoot	Higher overshoot	No or limited overshoot
CO ₂ emission change in 2030 (% rel to 2010)	-58	-47	-41	4	(-58,-40)
↳ in 2050 (% rel to 2010)	-93	-95	-91	-97	(-107,-94)
Kyoto-GHG emissions* in 2030 (% rel to 2010)	-50	-49	-35	-2	(-51,-39)
↳ in 2050 (% rel to 2010)	-82	-89	-78	-80	(-93,-81)
Final energy demand** in 2030 (% rel to 2010)	-15	-5	17	39	(-12,7)
↳ in 2050 (% rel to 2010)	-32	2	21	44	(-11,22)
Renewable share in electricity in 2030 (%)	60	58	48	25	(47,65)
↳ in 2050 (%)	77	81	63	70	(69,86)
Primary energy from coal in 2030 (% rel to 2010)	-78	-61	-75	-59	(-78,-59)
↳ in 2050 (% rel to 2010)	-97	-77	-73	-97	(-95,-74)

Source: **R-0085**, UN IPCC Special Report on Global Warming of 1.5°C, Summary for Policymakers, Figure SPM.3b adobe p. 14.

371. The changes in GHG emission reductions come even faster in the energy supply sector which must be fully decarbonised by mid-century. For coal this means that its use in the power sector falls close to 0% by 2050:

“In modelled 1.5°C pathways with limited or no overshoot, the use of CCS would allow the electricity generation share of gas to be approximately 8% (3–11% interquartile range) of global electricity in 2050, while the use of coal shows a steep reduction in all pathways and would be reduced to close to 0% (0–2% interquartile range) of electricity (high confidence).”³²⁴

372. The 2018 UN IPCC Special Report made it clear that in order to comply with the 1.5°C objective, younger coal-fired power stations may need to close before they have been fully amortised:

“Furthermore, some fossil investments made over the next few years – or those made in the last few – will likely need to be retired prior to fully recovering their capital investment or before the end of their operational lifetime.”³²⁵

373. At the same time, the 2018 UN IPCC Special Report was just as clear that phasing out coal must be conducted through a balanced compromise that considers the interests of workers in the mining sector:

“Hence, accompanying policies and measures would be required to ease job losses and correct for relatively higher prices of alternative energy [...]. Research on historical transitions shows that managing the impacts

³²⁴ **R-0085**, UN IPCC Special Report on Global Warming of 1.5°C, Summary for Policymakers, C.2.2., adobe p. 15.

³²⁵ **R-0217**, UN IPCC Special Report on Global Warming of 1.5°C, Chapter 2, adobe p. 154.

on workers through retraining programmes is essential in order to align the phase-down of mining industries with meeting ambitious climate targets, and the objectives of a ‘just transition’ [...].”³²⁶

374. AR5 established that continued reliance on coal-fired energy would double the energy sector’s GHG emissions by mid-century and sharpened awareness for the fact that mitigation measures must be introduced before 2030. It then made it abundantly clear that any effective mitigation option would require the phase-out of coal. Building on this, the 2018 UN IPCC Special Report found that coal-fired energy production must be reduced by ca. two-thirds by 2030 and effectively neutralised by 2050 to comply with the 1.5°C objective. To achieve this objective, the report foresaw that certain investors would not recover their full investment. Furthermore, it acknowledged that any effective mitigation measure must consider the ramifications of structural changes resulting from the phase-out of coal mining.

375. Finally, Claimant also alleged that Professor Schellnhuber’s illustration that the Lünen Plant, on its own, would already use up a significant portion of Germany’s entire share of the remaining global CO₂ budget under the UN IPCC’s latest analysis, would be misleading. In essence, Claimant takes issue with the German Advisory Council on the Environment having calculated the national budget on the basis of the UN IPCC’s global budget. As Professor Schellnhuber sets out in detail in his Second Report, Claimant’s assertion is incorrect. Budget calculations are scientific standard.³²⁷

376. Professor Schellnhuber also updated his scientific expert opinion on the foundations and risks of climate change, incorporating publications post-dating his First Report. The result shows that with every year, the issue of climate change becomes more dramatic. Above all, recent studies confirm that even the UN IPCC’s budget calculations may be too optimistic because they are based on averages. However, already brief periods of extreme temperatures may have lasting effects. In addition, Professor Schellnhuber shows that recent research concluded that climate change is more dramatic than anticipated for human health. Apart from immediate dangers for the health through heat, global warming has an increasing effect on the spreading of significant diseases.³²⁸ For the details, Respondent refers to Professor Schellnhuber’s Second Report in full.

Interim conclusion

³²⁶ **R-0218**, UN IPCC Special Report on Global Warming of 1.5°C, Chapter 5, adobe p. 461.

³²⁷ Schellnhuber ER II, ¶¶ 7-15.

³²⁸ Schellnhuber ER II, ¶¶ 16-46.

377. The 2020 Act's object and purpose to mitigate climate change already undermines Claimant's FET claim. Climate action is necessary to save species, mitigate poverty and prevent geopolitical conflicts. This is undisputed. Climate action is also an obligation of Respondent under international law (as concluded by the ICJ's in its 2025 Climate Change Opinion) and unchallenged EU/German law. This is also undisputed. Claimant's only reply that climate action should be pursued through means other than phasing out hard-coal energy is flawed. Hard-coal power plants are amongst the heaviest polluters.

b. Undisputedly, Claimant received neither commitments nor due diligences

378. Another fact that, on its own, suffices to undermine Claimant's claim is the absence of formal commitments. As already addressed in the legal standard, Claimant's FET case is a first-of-its-kind. To recall, Claimant does not invoke legitimate expectations. Instead, Claimant invokes the theory that FET would establish abstract prohibitions against regulation.

379. Claimant may have adopted this theory for its case because of the very limited facts it can rely on. The following undisputed facts already suffice to undermine Claimant's case:

380. To begin with, it is undisputed that Claimant never received any formal and explicit commitment from Respondent about the Lünen Plant's lifetime in a contract, a permit, or any statutory act. Respondent already stated as much in the Counter-Memorial.³²⁹ The Reply did not consider Respondent's summary inaccurate. Claimant added: "*such formal commitments would be highly unusual in a highly regulated industry such as electricity production.*"

381. It is now also undisputed that Claimant's case in this arbitration is not about any meeting with government representatives. In the Counter-Memorial, Respondent highlighted the absence of evidence to this extent.³³⁰ In the Reply, Claimant conceded: "*Claimant does not rely on individual specific statements made towards it [...]*".³³¹ Even taken at their highest, mere meetings would not make an FET claim. However, in this case, Claimant does not even assert that any such meeting between Claimant and the government happened.

382. Crucially, Claimant does not assert either that any of its co-shareholders in the Lünen Plant (most of which are utilities owned by German municipalities) received any specific

³²⁹ Counter-Memorial, sect. II.A.2.

³³⁰ Counter-Memorial, sect. II.A.4.

³³¹ Reply, ¶ 40.

representations regarding the Lünen Plant from politicians. Hence, it can also be treated as undisputed that Claimant’s case is not about any meeting between its co-shareholders with government representatives.

383. Another devastating fact that became undisputed after the Reply is that neither the State government, the Federal government, nor the legislature intervened or assisted in any manner in the Lünen Plant’s permitting procedure. Instead, Claimant’s case is that the Lünen Plant’s permit resulted in a straightforward manner from ordinary administrative proceedings as with every other power plant. In Claimant’s case, there was nothing exceptional in granting the permits to the Lünen Plant. Claimant’s case is: “*The operator therefore has a legal entitlement to the permit. The authority has no general political discretion to deny or later withdraw it simply because energy-policy preferences change.*”³³²

384. It is also undisputed that Claimant invested at a time at which climate action had already been subject to regulation and Germany pursued the objective of limiting global warming to 2.0°C.³³³ In the Reply, Claimant confirmed: “*Claimant does not dispute that Germany pursued the objective to limit climate change. In particular, it does not contest the European Union’s and Germany’s ‘2.0°C objective’, nor the corresponding emission reduction targets at the time.*”³³⁴ Claimant’s reply is that Germany should have informed Claimant already in 2008 of any intention to phase out hard-coal energy. This puts the legal standard on FET on its head. Claimant must establish that the State made certain promises. FET does not obligate the State to inform an investor at the time of the alleged Investment of every possible measure for the next decades. It was on Claimant to conduct due diligence on the legislature’s power to phase out hard-coal energy.

385. Another matter that became undisputed is that Claimant neither commissioned nor received any due diligence on German law, let alone on the legislature’s power to phase out hard-coal powers plants. In document-production, Claimant was ordered to produce its due diligences. Claimant did not produce any documents from outside legal counsel as addressed above, at II.A.

³³² Reply, ¶ 122. Respondent notes for the record that Claimant’s use of the English term ‘political discretion’ is an incorrect translation for the German term *Ermessen*. The latter does not refer to political matters. *Ermessen* is a specific term of German administrative law describing and limiting the margin of appreciation of administrative authorities.

³³³ Counter-Memorial, sect. II.A.3.

³³⁴ Reply, ¶ 31.

Claimant cannot raise a claim for the change of the legal framework if it did not even commission any analysis of this framework at the time of the decision to invest.

386. Finally, to address Claimant's repetitive allegation in the Reply that it had trusted on climate action being achieved only through the ETS and CO₂ certificates,³³⁵ the Tribunal can already comfortably reject this allegation as contradictory. On quantum, Claimant and its experts apply CO₂ prices far below what is necessary to reduce emissions to the appropriate climate-action goal. This fact stands undisputed. Claimant and its experts assert that the market would expect the world to warm far above 1.5°C.³³⁶ For the avoidance of doubt, it was already clear at the time of the alleged Investment that CO₂ certificates would have to become far more expensive than now opined by Claimant's experts on damages. For example, the price per ton CO₂ that Claimant's experts assume for 2030 in their damages valuation is a fraction of the price the UN IPCC recommended as necessary by 2030 in its Fourth Assessment Report of 2007.³³⁷ Therefore, Claimant cannot on liability allege that it trusted in the ETS but on quantum allege that the market expects the ETS to be insufficient for climate action.

Interim conclusion

387. In conclusion, Claimant does not rely on any commitments about the Lünen Plant's lifetime expressed by any official of the State towards Claimant or any other shareholder of the Lünen Plant. Instead, Claimant's case rests on irrelevant public speeches (see below, at c.-d.) and an ordinary operating permit from 2013, issued five years after the alleged Investment (at e.).

c. Claimant's new exhibits fail to proof reliance on political speeches

388. In the Memorial, Claimant focused its case regarding the timeframe of the alleged Investment on public political speeches. In the Counter-Memorial, Respondent has shown that, contrary to Claimant's implications, these political speeches all also addressed renewable energy.³³⁸ In the Reply, Claimant had to confirm this fact.³³⁹ Claimant repeated the content of its

³³⁵ Cf. Reply, ¶¶ 54-69.

³³⁶ See in detail below, sect. V.A.4.

³³⁷ **R-0216**, UN IPCC Climate Change 2007: Mitigation of Climate Change, Technical Summary, pp. 39, 80 third paragraph.

³³⁸ Counter-Memorial, sect. II.A.

³³⁹ Reply, ¶ 44: "Germany wanted investment in renewable energy and New Plants".

political speeches without adding anything material. Hence, Respondent will not go through these exhibits again and refers to its Counter-Memorial in the interest of avoiding duplication.

389. Above all, as already outlined in the Counter-Memorial, these political speeches are irrelevant. *First*, they cannot rectify Claimant’s shortcomings of proving any formal commitment (see above, at a.).

390. *Second*, Claimant failed to present any evidence that any member of the German executive or legislative ever stated that hard-coal power plants would operate in the 2030s, 2040s or 2050s (for which Claimant claims lost profits in this arbitration). Especially, after pages of irrelevant quotes from political speeches in paras. 54-68 of the Reply, Claimant alleges in para. 69 of the Reply: “*Summary – Germany’s strategy [...] included the promise that it would not regulatorily interfere in the power plant market.*” (emphasis added) Claimant’s summary is not backed up by its own evidence. Respondent invites the Tribunal to simply review the quotes presented by Claimant at paras. 54-68 of the Reply. None of them, even taken at their highest, include a “*promise not [to] regulatorily interfere in the power plant market.*”

391. *Third*, Claimant failed to present any evidence that Claimant actually relied on the political speeches it now invokes for purposes of the arbitration.³⁴⁰ In the Reply, Claimant speaks of “*trust in the German government*”³⁴¹ and alleges that “*Claimant did not only rely on ‘hopes’ in the market, but rather on Germany’s long-standing and well-known climate change strategy.*”³⁴² However, Claimant did not submit any evidence that it trusted in or relied on the government. Claimant’s evidence only shows that Claimant made its own projections of how the market may develop. These deficiencies persist after the Reply. Claimant decided, again, against offering any fact witness on the contemporaneous considerations of its alleged Investment.

392. Instead, Claimant dedicated sect. B.II.6 of the Reply (paras. 79-100) to this issue and submitted several new exhibits (Exhibits C-133 through C-139). However, contrary to Claimant’s assertions, none of these documents constitute evidence that Claimant relied on or even considered any of the political speeches now submitted in this arbitration at the time of the alleged Investment. Instead, the documents and additional documents obtained in document-production aggravate the

³⁴⁰ Counter-Memorial, sect. II.A.7.

³⁴¹ Reply, ¶ 81.

³⁴² Reply, ¶ 325.

deficiencies in Claimant's case. They reveal that Claimant was aware of additional risks and decided to invest despite these risks because of the mere demands of its trading business. In detail:

393. C-133, AET Message to Ticino, 28 March 2008: AET's Message begins with citing the requirement to obtain the Canton's approval on substantial investments under Article 5(4) Law. AET then advertises for such approval. As the other documents on record, the document shows that AET's main concern was not German politics (let alone, German law), but AET's own interests to diversify its production portfolio to help the trading business. This aspect is the emphasis of the document. AET writes the following sentence which is the only sentence on which it relies in the Reply in this arbitration: *"Now that the nuclear option has been abandoned, and the availability of gas is limited in any case, Germany can only achieve the twofold aim of covering its electricity needs and meeting the Kyoto Protocol targets by building new, efficient hard coal-fired power plants to replace the old, inefficient ones."*³⁴³ The sentence equals a sentence in Exhibit C-63 (AET's message to the Ticino Parliament) already addressed in the Counter-Memorial.³⁴⁴ The conclusion is the same. AET's assertion from 2008 that Germany "*can only*" achieve certain targets through hard-coal plants does not suggest anything beyond AET's own hopes. It does not evidence that AET relied on political assurances. However, FET claims require explicit and specific assurances by the State to an investor, not mere investor hopes.³⁴⁵

394. The more important new information from this document is that in 2008, AET had not only certain hopes in slow expansion of renewables on the German electricity market, but also other hopes that did not materialize. AET made its alleged Investment also with the hope that carbon-capture storage (CCS) technologies would allow the Lünen Plant to emit less CO₂:

³⁴³ *Id.*, p. 11.

³⁴⁴ Counter-Memorial, ¶¶ 96-97.

³⁴⁵ **CLA-0071**, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum, 19 February 2019, ¶¶ 387, 393; **CLA-0174**, *SunReserve Luxco Holdings S.A.R.L. et al. v. Italy*, SCC Case No. V(2016/32), Final Award, 25 March 2020, ¶¶ 708, 709; **CLA-0189**, *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 344. See also **RL-0150**, *Landika v. Slovenia*, ECtHR, Application no. 45987/22, Judgment, 3 March 2026, ¶ 87; **RL-0151**, *Telhai v. Albania*, ECtHR, Application no. 57815/08, Decision as to the admissibility of the application, 17 November 2009.

C-133, AET Message to Ticino, 28 March 2008, p. 16:

Articles about the possibility of applying CO₂ capture and storage methods are currently gaining a lot of traction in the trade press. At the planned sites, a plot of land will be left free that will, as far as we know, be suitable for the future installation of a CO₂ storage or Carbon Capture and Storage (CCS) facility.

Currently, the technologies and approaches available for capturing CO₂ are varied, and there remains a substantial need for research and development. The European Union will support a dozen demonstration projects until 2015. These have been launched with the aim of finding a way to divert and store carbon dioxide, thus avoiding its release into the atmosphere and helping significantly to reduce greenhouse gas emissions.

At present, it is hoped to develop technology that can be applied on an industrial scale within 12 to 15 years.

395. AET's hope in CCS technologies will be pivotal in light of the next new document that became available.

396. C-134/135, AET's email exchange with Canton, 2008 (incl. attachment): The new email from AET (C-134) to the Canton and its attachment (C-135) are devastating for Claimant's case. Claimant asserts that the attachment would show that AET relied on certain political statements from Germany.³⁴⁶

397. Claimant's assertion is inaccurate. The attachment (C-135) is a Power Point presentation from Trianel. The only slide where Trianel references government publications is on slide 6. However, this slide only shows the government's contemporaneous CO₂ emission targets until 2020. The targets stem from a document (Exhibit C-11) already addressed in the Counter-Memorial. In summary, the targets end in 2020. They contain no statement, let alone assurance well into the 2050s (the timeframe until which AET claims lost profits in this arbitration).³⁴⁷

398. The more important passage of Trianel's presentation to AET begins on slide 10. Slides 10 through 14 show that Trianel and its shareholders had certain hopes in the CCS technology. Claimant has not translated this section in its English translation of Exhibit C-135. Therefore, Respondent puts an amended translation on record. In particular, Trianel referred to the EU's potential subsidies:

³⁴⁶ Reply, ¶ 86.

³⁴⁷ Counter-Memorial, ¶ 69.

EUKOM: SEC (2006)1723

„Communication on Sustainable Power Generation from Fossil Fuels: Aiming for Near-Zero Emissions from Coal after 2020”

- + CO₂ Storage Potential: The confirmed geological storage formations alone (North Sea Aquifer Formations) are capable of providing sufficient capacity to store a volume of CO₂ equivalent to centuries of Europe's current emissions.
- + The goal of a funding program for sustainable coal technologies should be the creation of conditions for their development and widespread dissemination in the shortest possible time.

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399. The referenced Commission document is the EU Commission's public Staff Document "*Communication on Sustainable Power Generation from Fossil Fuels: Aiming for Near-Zero Emissions from Coal after 2020*" of 10 January 2007. That Trianel flagged this document towards its shareholders is devastating for Claimant's assertion in the present case about alleged hopes in the electricity market well into the 2050s.

400. The EU Commission was unequivocal that coal power plants are the strongest polluters on the electricity market (in line with Respondent's case in the present arbitration):

Coal is the fossil fuel with strongest negative environmental impact. While substantial improvements have been achieved on traditional pollutants (NO_x, SO_x, particulate matter), coal's high carbon content results in high levels of carbon dioxide from its combustion. In the EU27, around 950 million tonnes of CO₂ were emitted from coal-fired power generation in 2005. This represents 70% of Europe's total CO₂ emissions from power generation and 24% of EU CO₂ emissions across all sectors. The latest global figures available are even more striking: nearly 8 billion tonnes of CO₂ emitted from coal-fired power generation, representing 76% of emissions from power generation and around 30% of total global emissions of CO₂.

401. Claimant was referred to a document in which the policymakers described coal as “*the fossil fuel with strongest negative environmental impact*” and aimed at reducing emissions drastically after 2020.

402. C-136, Second PÖYRY Opinion for AET, 30 May 2008: The next document is an excerpt from a PÖYRY Power Point that Claimant submitted with the Reply. Claimant translated four text slides from this document. It remains unclear how they should evidence that Claimant relied on alleged public political assurances. Instead, the slides mainly record PÖYRY's own calculations about the calculated demand for hard-coal energy until 2020.

403. Claimant alleges that PÖYRY would have “*analys[ed] the position of the Federal Government.*”³⁴⁸ This overstates PÖYRY's work. PÖYRY are economic consultants, not legal consultants. PÖYRY made calculations. PÖYRY neither reviewed from a legal perspective the applicable regulatory framework nor made any assessments of the powers and likelihood of the legislature enacting stricter regulations. Economic consultants such as PÖYRY do not make such legal assessment because they have no admissions to do so and would be uninsured.

404. On slide 38 (from 78 slides, most of them not translated by Claimant), PÖYRY quoted in passing from one official answer from the Federal government to a parliamentary inquiry why new hard-coal plants would not be prohibited.³⁴⁹ However, even if this quote by PÖYRY as mere economic consultants were relevant (*quod non*), not prohibiting certain investments does not create any legitimate expectations. Investors can make investments at their own risk. FET is not an all-risk insurance. On the same slide, PÖYRY states that the Federal Network Plan foresees

³⁴⁸ Reply, ¶ 88.

³⁴⁹ **C-0136-DE/EN**, Second Opinion of PÖYRY for AET, Hard Coal-Fired Power Plant Project of TKL in Lünen, Germany, 30 May 2008, slide 38.

hard-coal energy until 2030. This is correct – and the Lünen Plant will still operate in 2030. However, Claimant’s claims are for lost profits until the 2050s. Claimant did not substantiate any statements on this timeframe.

405. A separate, more relevant matter shown through the PÖYRY presentation is raised on slide 26 which Claimant has not translated. It evidences that AET had been informed about several hard-coal projects having been cancelled, *inter alia*, due to political issues. PÖYRY informed: “Six hard coal-fired power stations have already been withdrawn from the planning stage due to regional policy considerations and increased construction costs.” PÖYRY then provided the following overview informed of e.g. a public consultation resulting in a 70 % result against a hard-coal power plant in Ens Dorf.

C136_ENcorrected, PÖYRY Opinion, 30 May 2008:

Location	Client	Capacity (MW)	Comment
Bremen-Mittelbüren	swb	910	swb has withdrawn the plans due to increased construction costs for the power station
Ens Dorf	RWE	1,600	In a public consultation, 70% of Ens Dorf residents had spoken out against the power station
Hamburg-Moorburg	Vattenfall	1,640	According to the CDU/Green coalition agreement, can now only be realised as a gas-fired power station
Cologne-Niehl	RheinEnergie	800	Due to increased construction costs (+30% in 2007) and incalculable risks regarding CO2 emissions trading, no decision to proceed with construction was taken
Krefeld-Uerdingen	Trianel	750	Disagreements with the City of Krefeld regarding the development plan. Trianel is sticking to its plans. The outcome of the negotiations is still open
Quierschied	EVONIK	750	STEAG has completed planning

406. PÖYRY then continues by also addressing CCS options at length on slides 40-45.

407. C-137, AET Power Point, 27 November 2009: Claimant submitted an extract of one text slide from 50-slide Power Point deck. The cover page of Claimant’s translation states that the

deck would be dated “27 November 2019”. This appears to be a translation error because the Italian original states that the deck is dated 27 November 2009. However, this still post-dates the last investment (made in 2008) by many months. Therefore, it cannot constitute evidence of Claimant’s alleged expectations at the time of the alleged Investment.

408. On substance, the one translated slide includes no meaningful conclusion. Neither this slide nor any of the non-translated slides address specific laws or assurances from the German government. Instead, the presentation is focused on AET’s own needs for conventional energy production for purposes of its trading business.

409. C-138, AET-Trianel Workshop, 21 May 2010: Claimant refers to a Power Point presentation from 2010, *i.e.* approximately two years after AET’s alleged Investment. In the Reply, Claimant quotes *in verbatim* the sentence that certain political parties would advertise for new hard-coal power plants. However, the full text of the slide shows that several other parties, including the government of Bavaria, were not:

C-138_ENcorrected, AET-Trianel Workshop, May 2010, slide 78:



What is the political stance on coal-fired power plants?

- The CDU, SPD and FDP at federal level and in North Rhine-Westphalia are calling on the industry to invest in new fossil-fuel-fired power plants. At the same time, they are also advocating the expansion of renewable energies.
- The Greens and The Left want to halt the construction of new coal-fired power plants. They advocate the parallel expansion of wind energy and gas-fired power plants as baseload power plants.
- However, there are significant differences depending on the federal state and the political constellation; for instance, The Left in Brandenburg, as the governing party, supports the continued use of lignite.
- The CSU distances itself from coal-fired power plants; it supports the *Laufzeitverlängerung* (lifetime extension for nuclear power plants).



410. Just one slide afterwards, Trianel’s presentation shows that Trianel and AET were already aware of significant opposition in the German public from an environmental perspective:



What is the public's stance on coal-fired power plants?

- The debate on coal-fired power plants is also highly emotional in Germany. Alongside the NIMBY phenomenon (the 'St Florian principle'), there are increasingly more BANANA advocates (NIMBY – Not in my back yard / BANANA – Build absolutely nothing anywhere near anybody)
- The main argument put forward by environmental organisations is the alleged additional CO₂ emissions from new power plants and the claim that Germany exports more electricity than it consumes. Consequently, they argue, the construction of new base-load power plant is unnecessary. Locally, negative consequences for health and the environment are also cited.
- Replacing coal-fired power plants with combined cycle gas turbine (CCGT) plants is increasingly being offered as a compromise.
- However, for some years now, any major project has had to reckon with opposition. New wind turbines, pumped-storage power plants and biogas plants are also the subject of complaints.



411. Therefore, the Power Point presentation from the 2010 AET-Trianel workshop is at best a summary of a mixed political discussion, not of specific, let alone formal political assurances made towards anyone from Trianel.

412. C-46, Ministry for Environment, National Climate Programme 2005: Claimant then repeats its allegations from the Memorial that the Ministry for Environment's 2005 report on climate action stated that in 2020, a certain share of electricity would be produced through fossil fuels. It remains unclear how this should have any relevance for Claimant's damages claim in the present case. Claimant claims damages for receiving a Coal-Firing Stop in the 2030s. The years after 2020, let alone the years 2031-2053 for which Claimant claims damages, are not addressed in this document. The only remark in this regard comes towards the end of the document, in a passage not translated by Claimant into English, *i.e.* sect 4.1. Here, the Ministry states that the international regime on climate action needs to be developed further beyond the Kyoto Protocol.

413. C-139, Ethics Committee, Publication on Nuclear Phase-Out, 30 May 2011: The last documentary evidence Claimant introduced with its Reply is an isolated paragraph in a publication of the German Ethics Committee. Compared to this isolated paragraph, the Committee

emphasized the need for gas-fired power plants and for climate action more significantly.³⁵⁰ However, all of this is irrelevant for Claimant's FET claim because this document post-dates Claimant's alleged Investment by three years. Hence, Claimant cannot possibly have relied on it at the time of the alleged Investment.

414. In conclusion, none of the new documents introduced by Claimant with the Reply evidence (i) that, let alone, how Claimant relied on the specific political speeches it now invokes for purposes of the arbitration or (ii) that the government made any statement about the timeframe of 2031-2053 for which Claimant now claims lost profits. Instead, as set out in the Counter-Memorial, Claimant's documentation shows that Claimant mainly relied on its own and its advisors' projections how the energy market would develop, without foreseeing accurately the expansion of renewable energies. Therefore, Respondent's conclusion from the Counter-Memorial that Claimant mainly relied on its own hopes in the market stands.

Interim conclusion

415. Contrary to its repetitive allegations in the Reply, Claimant's public political speeches do not make an FET case. They cannot replace formal commitments (which Claimant did not receive). They cannot replace meetings (which, in Claimant's case, neither Claimant nor its co-shareholders undertook with the government). They did not address explicitly the 2030s through 2050s (for which Claimant claims lost profits). Claimant neither attended nor has proven to rely on these speeches.

d. The events on the [REDACTED] Plant also refute any reliance on political speeches

416. Further facts that refute AET's assertions in the Reply and show that both AET and its co-shareholders in the Lünen Plant were already aware of public concerns against hard-coal power plants are those in relation to a separate hard-coal power plant that they had planned but never realized.

417. Respondent stated already in the Counter-Memorial that Claimant submitted the approval for the Lünen Plant to the Ticino Parliament along with a proposal for a second hard-coal power plant in [REDACTED], Germany ("the [REDACTED]

³⁵⁰ C-0139-DE/EN, Ethics Committee, *Germany's energy transition – A joint effort for the future*, 30 May 2011, pp. 34-35.

Plant”).³⁵¹ The [REDACTED] Plant was also going to be developed through a partnership with Trianel GmbH, Claimant’s main co-shareholder in the Lünen Plant.³⁵² For context, most of the other shareholders in the Lünen Plant also hold additional shares in Trianel GmbH.

418. However, the Ticino Parliament only approved of Claimant’s participation in the Lünen Plant.³⁵³ These facts remained undisputed in the Reply.

419. Claimant’s allegations on political speeches in the Reply are further refuted by the following facts. The facts demonstrate that the co-shareholders were already aware at the time about the critical reception of the high CO₂ emissions caused by hard-coal power plants.

420. In 2008, Trianel GmbH had submitted the application for the building permit of the [REDACTED] Plant to the regulatory authorities.³⁵⁴ In the same year, AET also submitted its application to the Ticino Parliament for participation in this project.³⁵⁵

421. On 23 March 2010, the Ticino Parliament decided on these applications and approved only the participation in the Lünen Plant, not in the Uerdingen Plant.

422. Indeed, until 2010, the entire approval process for the [REDACTED] Plant had been stalled due to growing political and public opposition to coal-fired power generation. As a direct result, Trianel GmbH began examining the feasibility of abandoning the hard-coal project altogether and built a gas power plant instead. The annual report from 2010 of Trianel GmbH, *i.e.* the main shareholder also in the Lünen Plant, notes the “*political and public*” obstacles for a hard-coal power plant:

“The approval process for this project was further delayed during the reporting year. In view of ongoing obstacles to gaining acceptance for a hard coal-fired power station in the political and public sphere, the

³⁵¹ Counter-Memorial, ¶ 362.

³⁵² **C-0063-IT/EN**, Department of Finance and Economic Affairs of the Canton of Ticino, *Message No. 6091 to the Grand Council of the Republic and Canton of Ticino on the Participation of AET in a company for the construction of a thermal power plant in Germany*, 9 July 2008, pp. 15-16.

³⁵³ **R-0158-ENG/ITA**, Legislative Decree concerning the participation of the Azienda Elettrica Ticinese in a company to build a thermal power plant in Germany of 23 March 2010 in Official Bulletin of Laws and Executive Acts Volume 136 17/2020, p. 130.

³⁵⁴ **R-0215-ENG/GER**, Trianel GmbH 2008 Annual Report, p. 29.

³⁵⁵ **C-0063-IT/EN**, Department of Finance and Economic Affairs of the Canton of Ticino, *Message No. 6091 to the Grand Council of the Republic and Canton of Ticino on the Participation of AET in a company for the construction of a thermal power plant in Germany*, 9 July 2008, adobe p. 27.

planning of a combined cycle gas turbine power station at the [REDACTED] site is currently being examined as an alternative.”³⁵⁶

423. In July 2011, the shareholders of the [REDACTED] Plant’s project company resolved to convert the planned coal-fired power plant from coal to gas. Trianel GmbH’s annual report on 2011 explicitly cites Germany’s energy transition and changed political, economic, and social conditions as the reason:

“The shareholders of [REDACTED] have resolved to convert a CHP plant planned for the northern extension site of [REDACTED] from hard coal to gas. These changes take account of the altered political, economic and social conditions resulting from the energy transition.”³⁵⁷

424. Trianel GmbH calls this decision an active contribution to Germany’s energy transition and an effort to meet public demands for decisive and swift CO₂ reductions:

“The redesign of the project site in [REDACTED] from coal to gas took account of the changed political, economic and social conditions of the energy transition. The power plant now planned will, on the one hand, be highly efficient thanks to the planned steam extraction and, on the other hand, set new standards for large-scale power plants in terms of flexibility. This illustrates that Trianel GmbH places a strong emphasis on actively supporting municipal utilities in the restructuring of the energy sector for the ‘renewable era’ whilst simultaneously meeting society’s expectation to actively drive the energy transition forward.”³⁵⁸

425. In conclusion, Claimant’s allegations from the Reply are refuted by the contemporaneous evidence from 2010/2011. The main shareholder in the Lünen Plant, Trianel GmbH (in which most of the Lünen Plant’s other shareholders hold further shares) abandoned another project for a hard-coal power plant because “*obstacles [...] in the public and political sphere*” (Trianel GmbH 2010 annual report). Instead, it resolved to build a gas-fired power plant specifically to participate “*to actively drive the energy transition forward*” (Trianel GmbH 2011 annual report). This evidence from 2010/2011 establishes that the shareholders in the Lünen Plant were aware of the risks faced by hard-coal power plants from the outset.

³⁵⁶ R-0225-ENG/GER, Trianel GmbH 2010 Annual Report, p. 45.

³⁵⁷ R-0226-ENG/GER, Trianel GmbH 2011 Annual Report, p. 26.

³⁵⁸ R-0226-ENG/GER, Trianel GmbH 2011 Annual Report, p. 40.

e. AET's supplementary case on the 2013 Permit misrepresents German law

426. In the Memorial, Claimant asserted that it would have invested in reliance on the confirmation of a public interest in the Lünen Plant in a permit.³⁵⁹ In the Counter-Memorial, Respondent has shown that Claimant kept silent about pertinent facts. In summary:

- The 2008 Preliminary Permit invoked in the Memorial had been revoked in court in 2011.
- The 2008 Preliminary Permit included only one sentence in an *obiter dictum* about immediate enforceability on public interest. This was a generic, standard sentence which had only minor relevance as also confirmed in the First Witness Statement of Mr. [REDACTED].³⁶⁰
- Claimant's other reference was a permit from 2013 – 5 years after the Investment.
- At the time of the enactment of the 2020 Act, the 2013 Preliminary Permit has still been subject to litigation.³⁶¹

427. In the Reply, Claimant amended its case on the permits significantly. Claimant shifted its attention away from the 2008 Preliminary Permit. Claimant now relies mainly on the 2013 Preliminary Permit's passages on alleged public interest. While Claimant refers to the 2013 Preliminary Permit in numerous passages of the Reply, the arguments are repetitive. The relevant matters for the FET claim can be grouped as follows:

428. *First*, Claimant, in reliance on the report from its expert Dr. Krahnefeld, alleges that the 2013 Preliminary Permit should be treated as having been rendered before the alleged Investment. For example, Claimant asserts: “*the 2013 Advance Decision is nothing other than the 2008 Advance Decision recast – with the initially missing environmental compatibility assessment.*”³⁶²

429. Claimant's assertion is refuted by the timeline of events. The passage on public interest in the 2013 Preliminary Permit that Claimant relies on was only issued in 2013. As a matter of fact, Claimant cannot have relied in 2008 on a passage issued in 2013 (and not included in the 2008 Preliminary Permit).

³⁵⁹ Cf. Memorial, adobe p. 14 (heading 4.).

³⁶⁰ Counter-Memorial, ¶¶ 75-89.

³⁶¹ Counter-Memorial, ¶¶ 119-127.

³⁶² Reply, ¶ 509.

430. *Second*, also on the substance of the 2008 and 2013 Preliminary Permit, Claimant's 'recast' theory is false. The 2013 Preliminary Permit includes its passage on public interest as an *obiter dictum* in the context of the environmental compatibility assessment.³⁶³ That environmental compatibility assessment was missing in the 2008 Preliminary Permit.³⁶⁴ This was the very reason why the 2008 Preliminary Permit was revoked in court.³⁶⁵ Hence, the 2013 Preliminary Permit's passage on which Claimant relies on is a topic not even addressed in the 2008 Preliminary Permit. Claimant invested in 2008. At the time, the – unlawful – 2008 Preliminary Permit did not include any environmental compatibility assessment. Claimant cannot rely on a passage only added to the 2013 Preliminary Permit as a consequence of the 2008 Preliminary Permit's unlawful nature.

431. *Third*, Claimant makes the new allegation that Respondent would be bound to an alleged finding on a public interest under German law. Claimant alleges: "*This evaluation as regards the 2013 Advance Decision has gained legal finality (Rechtskraft) and binds all German authorities, including the Government. It cannot be disputed in this arbitration.*"³⁶⁶

432. Claimant's allegation is misplaced to begin with. The decisive issue is whether Claimant invested in reliance on a permit mentioning a public interest. As a matter of fact, this was not the case. The 2013 Preliminary Permit contains no statement on what Claimant did or did not rely.

433. Further, under German law, Claimant's assertion is indeed erroneous as confirmed on p. 25 of the accompanying Expert Report of Professor Kirchhof. In summary, the finality of the 2013 Preliminary Permit is limited to its operative part. Reasonings, let alone *obiter dicta*, do not become binding in subsequent proceedings. A concept such as issue estoppel is unknown in German administrative law.

Interim conclusion

434. In conclusion, Claimant's supplementary case that the 2013 Preliminary Permit could constitute evidence that Claimant invested in reliance on a permit confirming a public interest in

³⁶³ **C-0030-ENcorrected**, District Government of Arnsberg, *2013 Advance Decision (Vorbescheid)*, 20 November 2013, adobe pp. 2, 8-13.

³⁶⁴ **C-0033-DE/EN**, District Government of Arnsberg, *2008 Advance Decision for the construction and operation of the Lünen hard coal-fired power plant (Vorbescheid) and First Partial Permit*, 6 May 2008.

³⁶⁵ **R-0045-ENG/GER**, Higher Administrative Court of North-Rhine-Westphalia (Oberverwaltungsgericht) Judgment of 1 December 2011 – 8 D 58/08.AK.

³⁶⁶ Reply, ¶ 78.

the Lünen Plant must be rejected. Claimant invested several years before the 2013 Preliminary Permit. The 2008 Preliminary Permit was revoked in Court and no longer exists. Further, the generic nature of the one sentence from the 2008 Preliminary Permit invoked by Claimant stands undisputed in the Reply.

f. AET’s revealed inaction under the 2011 AET Law must be held against it

435. Another factor weighing heavily against AET’s allegation that the 2020 Act would result in losses for AET are the facts revealed through document-production and set out in detail above. In summary, since 1 August 2011, AET was obligated to sell its shares as soon as possible without losses. However, until end of 2017, *i.e.* over a timeframe of many years and still well ahead of even the Coal Commission’s work, AET did not receive any offer. Indeed, the limited documentation establishes that AET hardly took any efforts to divest.³⁶⁷ This weighs heavily against Claimant. An investor cannot claim alleged loss of profits when the alleged Investment was not sold without losses 2011-2017 despite AET’s obligation to do so as soon as possible.

g. The new allegations on the Coal Commission’s bias are contradictory

436. In the Memorial, Claimant has not invoked the Coal Commission’s recommendations as measures in breach of the ECT. On the contrary, Claimant sought to rely on alleged deviations of the 2020 Act from the Coal Commission’s recommendations.³⁶⁸ Therefore, Respondent noted in the Counter-Memorial and in Claimant’s Redfern Schedule that Claimant does not challenge the Coal Commission’s recommendations as measures.³⁶⁹ Claimant has not challenged them as formal measures in the Reply either.

437. Against this background, the relevance of the Coal Commission’s recommendations on liability is the following:

438. *First*, Claimant repeated in one sentence its allegation that “*the Coal Commission recommended [...] compensation for forced shutdowns. [footnote 185: C-14, Final Report of the Coal Commission, pp. 62, 64].*” The allegation is false. The relevant paragraph on p. 62 of the Coal Commission’s Report states:

³⁶⁷ See in detail above, sect. II.B.

³⁶⁸ See Memorial, ¶¶ 11, 177.

³⁶⁹ Counter-Memorial, ¶ 182; PO 5, Annex A, Claimant’s Redfern Schedule, Request 2, Respondent’s objection.

“As far as compensation is concerned, the existing structural differences between the lignite and coal-fired power stations in relation to CO₂ emissions, operating company structure, the relationship with mining operations and the associated number of affected jobs will be taken into account. Insofar as no mutual agreement is achieved, the commission recommends a regulatory solution with compensation payments in the framework of the legal requirements.”

439. The relevant paragraphs on p. 64 states:

“If a mutual agreement with the operators of the hard coal capacity is not reached in time, the commission recommends that a regulatory solution be implemented with compensation payments in the framework of the legal requirements in accordance with the above reduction plan. This will ensure a planned development to safeguard the reliability of the supply.”³⁷⁰

440. Hence, first of all, the Coal Commission also saw the need to distinguish between hard-coal and lignite. As to the sentences about compensation, the Coal Commission only stated that *some* compensation would be required. Such compensation was offered in the auctions. The Coal Commission never stated that every closure would have to occur against compensation.

441. *Second*, Claimant not only relies on the Coal Commission but also criticizes the Coal Commission (without challenging it as a measure). Hence, Claimant’s pleadings include a certain contradiction. Specifically, in the Counter-Memorial, Respondent set out that the involvement of a broad group of stakeholders shows that the German legislature made its assessment very carefully. In the Reply, Claimant alleges: “*Even a democratic legitimisation is no shield of immunity.*”³⁷¹ However, democratic legitimacy stays important evidence for the lawful and reasonable nature of the legislation at issue.

442. Claimant then complains that only three members of the Coal Commission were from the Energy Sector.³⁷² However, Claimant does not purport to rely on any dissent of (if any) these three members to the Coal Commission’s Final Report. The Energy Sector’s representatives subscribed to the compromise proposed by the Coal Commission.

443. Claimant then alleges: “*Press articles evidence that political pressure from the Federal States involved in lignite mining led to an extension of the Coal Commissions [sic]*

³⁷⁰ **R-0003-ENG/GER**, Final Report of the Coal Commission, January 2019.

³⁷¹ Reply, ¶ 157.

³⁷² Reply, ¶ 188.

deliberations. [footnote 183: C-152, Frankfurter Allgemeine Zeitung, 22 November 2018]".³⁷³ Hence, Claimant quotes only one press article, not several "*articles*". On substance, this article is unremarkable. It does not go beyond describing ordinary political processes. Particularly, it does not contain even speculations that the deliberations on the lignite sector would have resulted in detrimental financial results for the hard-coal sector. The article does not even mention the hard-coal sector. For the avoidance of doubt, the sectors are distinct.

Interim conclusion

444. Also in the Reply, Claimant does not challenge the Coal Commission's recommendations as measure but seeks to rely on these recommendations. The reliance is misplaced. The Coal Commission never recommended any compensation beyond the auctions. Claimant's additional attempts to portray the Coal Commission as biased are contradictory and unsubstantiated.

h. AET's repetitive attempts to second-guess the 2020 Act are flawed

445. In sect. B.V.3 of the Reply (paras. 201-211), Claimant complains at length that the 2020 Act does not foresee further compensation for the Lünen Plant. The sub-section is just one of the examples in the Reply that cross the line to unnecessarily polemic language.

446. Claimant's individual complaints are repetitive and misplaced. They were all addressed in the Counter-Memorial³⁷⁴ and in the First Witness Statement of Mr. [REDACTED]. In the interest of avoiding repetition, Respondent only adds the following to its prior submissions:

447. *First*, Mr. [REDACTED] addresses Claimant's repetitive allegations again in the Second Witness Statement. Respondent refers to his Second Witness Statement in full. He has been in charge of the Ministry's unit handling the drafting process of the 2020 Act and responds to Claimant's criticism in detail and thoroughly based on his recollection and extensive knowledge. In summary, his explanations from the First Witness Statement stand.

³⁷³ Reply, ¶ 188.

³⁷⁴ Counter-Memorial, ¶¶ 207-223.

448. In particular, Mr. [REDACTED] reiterates that compensation for Coal-Firing Stops was perceived as an incentive *not* to participate in the voluntary auctions. This was considered clear by everyone involved and also by the EU Commission itself:

“Based on my involvement in the legislative drafting process, I disagree that the relationship between auctions and compensation would be unclear. The bidding behavior of market participants will be influenced by the alternative to receiving a bid, i.e. whether that alternative is closing without compensation or with compensation. During the legislative drafting process, this was considered obvious. Had market participants expected compensation for Coal-Firing Stops, this may have reduced the numbers of hard-coal plants that were willing to close voluntarily during the 2020s and/or driven the bids in the auctions higher.

In my recollection, during the consultations regarding the compatibility of then-planned 2020 Act and EU State Aid law, also the European Commission insisted that Coal-Firing Stops occur without compensation. The European Commission did so because it saw the risk that compensation expectations would affect the auctions and increase the bids.”³⁷⁵

449. *Second*, the new allegations in sect. 4.4, 8.1 of the Second Report of Claimant’s experts from Frontier that the EU Commission’s State Aid decisions would support Claimant’s case are incorrect. It has already been set out above that the EU Commission examined the 2020 Act closely to ensure that the payments made to the hard-coal power plants successful in the auctions and to the lignite operators are in line with EU State Aid law. In this context, the EU Commission confirmed (i) that the absence of compensation for hard-coal power plants was an important factor for the legality of the auctions³⁷⁶ and (ii) that lignite and hard-coal are separate topics.³⁷⁷

450. On the particular topic of compensation raised by Claimant, the EU Commission’s decision also undermines Claimant’s case. In line with Mr. [REDACTED] testimony, the EU Commission mentioned and relied on the absence of compensation for Coal-Firing Stops when holding the auction payments compatible with EU State Aid law:

“The regulatory closure path without compensation, which will accompany the measure as of 2024 also aims at encouraging installations to participate in the auctions. [...]”

³⁷⁵ [REDACTED] WS II, ¶¶ 6-7.

³⁷⁶ See above, ¶ 477 *et seq.*

³⁷⁷ See above, ¶¶ 282-287.

There are a number of elements in the auction design that further encourage early and broad participation, contributing to its competitiveness. This includes the fact that the auctions only run for a limited number of years and that nearly half of the installed capacity will have to close down without any compensation.”³⁷⁸

451. Moreover, in line with the Witness Statements of Mr. [REDACTED], the EU Commission recorded that neither the ETS nor a minimum price for CO₂ would have been suitable alternatives:

“Option (i): Relying on the EU ETS would have led to emission reductions at European level, but would not have allowed reaching national emission reduction targets in a similarly targeted way. It would not have been possible to plan a gradual closure path upfront, which would have had a more significant impact on security of supply and employees in the sector.

Option (ii): A minimum price for CO₂ would have led to higher costs for the energy sector, as well as industry. This would disadvantage German undertakings and distort the internal market. Like for the first option, the impact on coal-fired power generation would be difficult to predict and it would not have been possible to plan a gradual reduction path upfront. In addition, setting the price at the correct level is challenging. If the price were to be set too low, it would take longer to reach the desired environmental results. If the price would be set too high, this may lead to the sudden closure of a significant amount of coal-fired generation, which could have negative social impacts and threaten security of supply.”³⁷⁹

452. Later in the decision, the EU Commission confirmed again that these alternatives may have had negative consequences on the security of supply.³⁸⁰

453. Moreover, the EU Commission confirmed that the participants in the auctions were faced with additional costs due to the closures of the hard-coal plants at short notice in the 2020s.³⁸¹

454. Finally, EU Commission especially relied on the object and purpose of the 2020 Act to comply with the Paris Agreement:

“[I]n view of the Paris Agreement, Germany envisages to become climate neutral by 2050. As described in recital (5) above, Germany has also set intermediary targets, notably for the energy sector, which will have to

³⁷⁸ FE-91, European Commission, Decision on 2020 Act auctions, 25 November 2020, ¶¶ 41, 142.

³⁷⁹ *Id.*, ¶¶ 10-11.

³⁸⁰ *Id.*, ¶ 121.

³⁸¹ *Id.*, ¶ 35.

reduce its CO₂ emissions to 175 - 183 million tonnes CO₂ eq. by 2030. The gradual phase-out of coal-fired power generation until 2038 is a critical policy measure for Germany to achieve CO₂ neutrality.”³⁸²

455. *Third*, essentially, Claimant’s allegations against the 2020 Act and about an alleged right to compensation are re-packaged discrimination allegations. However, as already set out in detail above,³⁸³ there was no discrimination. The Lünen Plant is treated like all other hard-coal power plants, could participate in the same auction and is subject to the same, strictly age based closure order.

456. Throughout the Reply, Claimant keeps also circling back to the same allegations regarding the lignite industry. For example, Claimant makes the inappropriate allegation: “*If the necessity to phase-out coal were as existential as claimed, Germany would have not decided to shut down the more polluting lignite plants later than New Plants.*”³⁸⁴ Claimant also alleges that the 2020 Act “*forc[es] hard coal-fired power plants to shut down years earlier than the more polluting lignite-fired power plants. Respondent writes a lot about the Coal Ban Law, but does not dispute this fact.*”³⁸⁵ Claimant repeats: “*the Shutdown Path favours lignite-fired power plants. Respondent does not dispute that.*”³⁸⁶ The allegations are rejected for the reasons set out in the Counter-Memorial and above. In summary, lignite is a distinct industry. The lignite phase-out path was determined also by considerations of lignite mining in Germany, social security, thousands of employees, rehabilitating the lignite pits, and security of supply. If anything, Claimant’s allegation is proof that it seeks the Tribunal to second-guess complex balancing exercises undertaken by the legislature.

457. *Fourth*, Claimant’s allegations also include false statements on facts. At para. 206 of the Reply implies that the Federal Ministry of Justice would have “*advised*”, as Claimant puts it, to include a provision for compensating hard-coal power plants for Coal-Firing Stops.³⁸⁷ This is false. The evidence cited by Claimant (Exhibit C-155, the Ministry’s comments on the draft Pieroth/Hartmann report) does not support Claimant’s assertion.

³⁸² *Id.*, ¶¶ 103-104.

³⁸³ See above, ¶¶ 260-289.

³⁸⁴ Reply, ¶ 177.

³⁸⁵ Reply, ¶¶ 194-195.

³⁸⁶ Reply, ¶ 213.

³⁸⁷ Reply, ¶ 206.

458. Claimant also alleges: “*The tender mechanism selected thus does not reduce as much CO₂ emissions as quickly as possible but rather leads to more emissions.*”³⁸⁸ Claimant’s allegation that there would have been less CO₂ emissions but-for the voluntary phase-outs of hard-coal power plants in the 2020s is untenable and devoid of logic.

459. *Finally*, if anything, the allegations in paras. 201-211 of Claimant’s Reply illustrate that Claimant’s case is a case about second-guessing matters that fall within the legislature’s margin of appreciation. The German legislature had to make a comprehensive assessment for a pathway to phase out many hard-coal power plants while maintaining safety of electricity supply and reaching climate action targets in the 2020s and 2030s. Claimant is essentially attempting to second-guess these decisions. It is not the Tribunal’s mandate to act as a replacement legislature and replace this balancing exercise.

460. Indeed, the entire focus of Claimant’s allegations is misplaced. Claimant implies that it would be Respondent’s burden to establish why no compensation was paid. However, the payment of compensation is a *consequence* of an FET breach (in the form of damages), not a *requirement* to comply with FET (unlike under Article 13 ECT, for example). It is not on the State to explain the absence of compensation to avoid damages.

461. Instead, it falls on Claimant to make its case. Claimant’s case must establish more than why Claimant demands more money. Claimant’s case must establish why the 2020 Act’s primary directive that the Lünen Plant will be phased out in the 2030s allegedly violates the ECT’s FET clause. The 2020 Act does not. The phase-out complies with Germany’s undisputed legal obligations to undertake measures for climate action and mitigate the climate-change related risks regarding, *inter alia*, human health, animal and plant species, poverty and geopolitical conflicts.

462. In conclusion, Claimant’s allegations that compensation as such should be the focus of the FET assessment remains unsupported by jurisprudence. Claimant’s allegations only prove that Claimant seeks an exercise of the legislature’s margin of appreciation being review in full by a treaty tribunal. On Claimant’s unfounded discrimination allegations, Respondent refers to the section above in the interest of efficiency.³⁸⁹

³⁸⁸ Reply, ¶ 196.

³⁸⁹ See above, sect. IV.B.1.b.

i. AET’s new allegations on the 2020 Act’s constitutionality are incorrect

463. In the Counter-Memorial, Respondent insisted that the 2020 Act is constitutional. Indeed, under the Federal Constitutional Court’s seminal judgment from 2021, the German legislature has a constitutional obligation to take climate action measures and avoid excessive burdens for future generations.³⁹⁰ In the Reply, these facts as such stayed undisputed.

464. Claimant makes the technical remark that the expert report of Professors Pieroth and Hartmann (whose reputation Claimant does not dispute) cannot constitute an expert report under PO 1 because it had been issued during the 2020 Act’s drafting process.³⁹¹ However, the report stays documentary evidence. Also, Claimant complains in para. 231 of the Reply that four short legal opinions drafted prior to the final report from Professors Pieroth and Hartmann were not included in the record. Claimant had not requested them in document-production before its Reply. Nonetheless, Respondent puts them on record.³⁹²

465. On the Constitutional Court’s 2021 judgment, Claimant asserts: “*it does not address how compensation must be handled when specific investments are compelled to exit.*”³⁹³

466. In response, Respondent also submits the Expert Report of Professor Kirchhof who confirms in detail that the 2020 Act is constitutional and does not trigger compensation obligations because the interests of climate action outweigh financial interests. Professor Kirchhof’s key conclusions in this regard have also been quoted above, at para. 326 and will not be repeated here in the interest of efficiency.

j. Contrary to AET, the ECtHR’s judgment on the 2020 Act is persuasive

467. In the Counter-Memorial, Respondent has also put on record that the European Court of Human Rights held the 2020 Act compliant with the European Convention on Human Rights.³⁹⁴ In the Reply, Claimant remains silent on and does not dispute the summary of the

³⁹⁰ Counter-Memorial, ¶¶ 224-233

³⁹¹ Reply, ¶ 232.

³⁹² **R-0232**, Bodo Pieroth and Bernd Hartmann, *Constitutional Matters of the Coal Phase-Out Law – Short Legal Opinion on specific legal issues*, 30 November 2018; **R-0233**, Bodo Pieroth and Bernd Hartmann, *Legal protection regarding the phasing out of coal-fired power stations under a phase-out law*, 26 Juli 2019; **R-0234**, Bodo Pieroth and Bernd Hartmann, *Competences for the phase-out – first assessment*, 12 November 2019; **R-0235**, Bodo Pieroth and Bernd Hartmann, *Constitutional Matters of the Coal Phase-Out Law – Power grid aspects* 2 March 2020.

³⁹³ Reply, ¶ 233.

³⁹⁴ Counter-Memorial, ¶¶ 234-240.

Court’s judgment given in the Counter-Memorial. Instead, Claimant alleges: “it [the judgment] addresses different rights, different standards, and a different applicant.”³⁹⁵

468. To begin with, Claimant’s last allegation on the different applicant is unsubstantiated. Claimant did not provide any specifics which difference would be material. Nor could Claimant. In the Counter-Memorial, Respondent emphasized that the applicant before the European Court of Human Rights was STEAG GmbH. It is also owned by German municipalities (like the majority of the Lünen Plant). It owns a hard-coal power plant that commenced operations in 2013 (like the Lünen Plant). STEAG GmbH is even the operating company of the Lünen Plant. All of these facts remained undisputed in the Reply.

469. Claimant alleges that different standards under the European Convention of Human Rights and the ECT should lead the Tribunal to disregard the Court’s judgments are unsubstantiated. Claimant did not specify how, if at all, the ECT’s rights would go beyond the guarantees of property under the European Convention of Human Rights. Especially the concept of legitimate expectations is an important criterion in the Court’s jurisprudence to determine the legality of restrictions of the rights to property under Article 1 of the Additional Protocol.³⁹⁶ Therefore, the European Court of Human Rights’ finding, particularly that the distinctions between the lignite and hard-coal industry were based on “*objective and reasonable*” criteria, should be persuasive for the Tribunal.³⁹⁷

k. AET’s speculations about RWE’s reasons to bid make Respondent’s case

470. In the Counter-Memorial, Respondent put on record that plants of a vintage comparable to the Lünen Plant, *i.e.* the hard-coal power plant in Moorburg owned by a subsidiary of Vattenfall AB (the “**Moorburg Plant**”) and Block E of the Westfalen hard-coal power plant of the RWE AG (the “**Westfalen E Block**”) participated in the auctions under the 2020 Act. This fact, as such, stayed undisputed.

³⁹⁵ Reply, ¶ 188.

³⁹⁶ **RL-0152**, Registry of the European Court of Human Rights, *Guide on Article 1 of Protocol No. 1 to the European Convention of Human Rights*, updated 1 August 2025, ¶ 193; **RL-0153**, *Vendrame et al. v. Italian Republic*, ECtHR, Application no. 47565/22, Decision, 9 April 2026, ¶ 13; **RL-0154**, *Fredin v. Kingdom of Sweden*, ECtHR, Application no. 12033/86, Judgment, 18 February 1991, ¶ 54.

³⁹⁷ **R-0008**, *STEAG GmbH v. Germany*, no. 10857/21, 11 May 2023, ¶ 8.

471. In the Reply and the accompanying expert reports, Claimant and its experts make several allegations but submit little evidence on this issue. While some allegations are pure speculation, some of the topics raised by Claimant, indeed, make Respondent's case.

472. *First*, for RWE's Westfalen E Block, there is no evidence on record that it had technical issues. For context, this power-plant site had five blocks. Blocks A-C had been phased out already by 2015. Claimant and its experts then point to the fact that Block D was built but did not enter into operation.³⁹⁸ This is correct, but irrelevant. Block D did not participate in the auctions (because it never operated). Only Block E participated. The capacity of Block D was not taken into consideration in the bid to Block E. There is no evidence on record of technical issues of Block E. When Claimant's experts from Frontier allege "[i]t is possible that similar technical considerations have influenced RWE's view on Westfalen E's future value. [no footnote]", they do nothing more than speculate.

473. *Second*, public information not mentioned by Claimant or its experts is that RWE is now operating a large-scale battery for electricity storage on the Westfalen Plant's site, using the existing grid connection. Electricity from the battery can be fed into the grid at times of low electricity production for higher prices. This is in line with the options outlined in the First Expert Report of Mr. Wunsch and Mr. Dambeck.³⁹⁹

474. *Third*, Claimant concedes effectively that the Lünen Plant's heavy debt was a key and self-chosen obstacle against participating in the auctions: "*There is no evidence that either Moorburg or Westfalen were financed by project financing. Lünen, in contrast, is a plant owned by 29 partners and heavily financed by bank loans.*"⁴⁰⁰ The Lünen Plant's self-inflicted high leverage is not a fact that Claimant can rely on. It is a fact that weighs against Claimant's case. Especially, Claimant's own concession that market competitors may not have needed such leverage for comparable plants, refutes Claimant's allegations about the usual nature of such high leverage.

475. *Fourth*, the perhaps most remarkable statement with regard to RWE's Westfalen Plant is that Claimant and its expert also refer to a press statement of RWE linking the participation in the auctions with the company's strategy to become carbon-neutral by 2040. Claimant and its

³⁹⁸ Reply, ¶ 256; Frontier ER II, ¶ 316.b.

³⁹⁹ Cf. Prognos ER II, ¶¶ 92-94.

⁴⁰⁰ Reply, ¶ 257.

experts imply that this would render RWE an irrational market participant.⁴⁰¹ However, RWE is a stock corporation whose shares are traded on the German stock exchange. As a matter of German corporate law, RWE's board of directors cannot take decisions that go against the company's best interests. Apparently, carbon-neutrality are amongst these interests of the company and its shareholders. Claimant cannot base a treaty claim on the allegation that it does not share the carbon-neutrality interests of publicly-traded stock corporations.

476. *Fifth*, to conclude on the Moorburg Plant, Claimant and its experts refer to public information that the plant had to install a hybrid cooling tower to protect the river Elbe from warming too significantly.⁴⁰² This information is correct and may have reduced the plant's profitability. Especially, due to climate change, the river Elbe already became warmer in recent years (which shows that climate change itself also affects hard-coal plants). However, there is no evidence on record that the Moorburg Plant would have had no profitability at all. Vattenfall operated the Moorburg Plant for many years.⁴⁰³ This constitutes evidence against the Moorburg Plant having been unprofitable. Claimant did not explain why the Moorburg Plant would operate to incur deficits. Claimant's experts asserted at length in their First Reports that even the maximum bids in the auctions would have been only a fraction of the alleged value of the Lünen Plant.⁴⁰⁴ It would have fallen on Claimant's experts (who do not disclose the details of their model) to substantiate that the Moorburg Plant's profitability was below such alleged fraction.

477. Finally, Respondent notes that the EU Commission, in its decision of November 2020 on the compatibility of the 2020 Act auctions with EU State aid law, also held that the auctions can be of interests to power plants of a vintage comparable to the Lünen Plant:

“The Commission does not, therefore, subscribe to the view that the auctions are not of interest to newer installations and that this puts the competitiveness of the auction at risk.”⁴⁰⁵

Interim conclusion

478. In conclusion, especially RWE's participation in the hard-coal auctions constitutes evidence that the auctions, including their caps, were sufficient to attract hard-coal power plants

⁴⁰¹ Reply, ¶ 256; Frontier ER II, ¶ 316.b.

⁴⁰² Cf. Reply, ¶¶ 254-256; Frontier ER II, ¶ 316.

⁴⁰³ Cf. Prognos ER II, ¶ 91: “this alone does not allow a blanket conclusion that operation of the plant was uneconomic as a result.”

⁴⁰⁴ Frontier ER I, ¶¶ 66-67.

⁴⁰⁵ **FE-91**, European Commission, Decision on 2020 Act auctions, 25 November 2020, ¶ 139.

of a vintage comparable to the Lünen Plant. Claimant has no evidence on any technical constraints of RWE’s participating Westfalen E Block. Instead, Claimant refers to RWE’s strategy to achieve net zero and the possibility of RWE not having leveraged its plant as Claimant did. Both undermine Claimant’s case. If listed stock corporations see a value in achieving net zero, it cannot be ignored. If other power plants are not as heavily leveraged as Claimant’s plant, this undermines Claimant’s attempts to rely on its self-chosen leverage.

l. The 2020 Act did not cause any liability of AET towards the banks

479. Moreover, another detrimental fact for Claimant’s case set out in detail above is that the documents obtained in document-production confirm that in its own case, Claimant will not be liable for the outstanding loan towards the banks at the time the Coal-Firing Stop takes effect. In summary, under the disclosed 2023 PPA, Claimant is “*exclusively*” liable if the Coal-Firing Stop takes effect on [REDACTED] or later.⁴⁰⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

m. AET cannot rely on its highly-leveraged nonrecourse financing

480. In the Counter-Memorial, Respondent set out that Claimant neglected the financing perspective in its Memorial. The banks that financed the bulk of the Lünen Plant already collected more than EUR [REDACTED] in interest. This must weigh against Claimant’s FET claim. Simply put, but-for these significant interest payments, the owners of the Lünen Plant would reach the breakeven point and make a profit before the Coal-Firing Stop.⁴⁰⁸

481. In the Reply, Claimant does not dispute key facts. It is now undisputed that the banks already collected more than EUR [REDACTED] in interest and, at the time of the Coal-Firing Stop will have collected more than EUR [REDACTED] in interest.

⁴⁰⁶ **R-0214-ENG/GER**, Term sheet and approval of an agreement with the banks, 16 May 2023, p. 1: “The obligation to make a final payment applies, in accordance with the amendment to the electricity supply contract, exclusively in the event of the termination of power plant operations on or after [REDACTED].”

⁴⁰⁷ Memorial, ¶¶ 209-210.

⁴⁰⁸ Counter-Memorial, ¶¶ 128-131.

482. Nor does Claimant assert that Respondent should have known the Lünen Plant’s particular financing structure.

483. Claimant makes one allegation on fact and one on law in the Reply. Both are incorrect.

484. On the facts, Claimant alleges that the ■ % debt ratio of the Lünen Plant was “*the usual bankability model for merchant coal plants at the time*”, citing an IEA publication from 2017 that debt would usually be ■ % (Exhibit C-147).⁴⁰⁹ Claimant overstates Exhibit C-147. It does not state that the financing chosen by the Lünen Plant, *i.e.* project finance on non-recourse basis with the corresponding high interest rates, would be the standard. Instead, it includes corporate borrowing in this category, in which the owners are liable in exchange for lower interest rates:

“There are two main types of debt financing: corporate borrowing and project finance. In corporate borrowing, also known as on-balance sheet finance, the project company that is developing the power plant accepts all the project risk. If the project fails sometime during its life, the lender has the project company’s balance sheet assets as security. This is a low risk position for the lenders and loans can be arranged quickly at low rates of interest.”

485. As also confirmed in the accompanying Second Expert Report of Messrs. Delamer/Rozenberg, whether a financing is with or without non-recourse affects materially the interest rates charged by the bank. They also set out that the difference between an average debt financing of ■ % (incl. with corporate borrowing) and ■ % (as in the case of the Lünen Plant) is also material because ■ % equity is twice as much as ■ %.⁴¹⁰

486. On the law, Claimant alleges that the banking perspective would be irrelevant. Claimant asserts: “*It [Claimant] does not seek to recover any loss suffered by the banks, nor does it attempt to recoup interest the banks have already collected. There is therefore no risk of over-compensation or double counting at the level of the project.*”⁴¹¹ Contrary to Claimant, the issue is not about double-counting. The issue is whether Claimant can claim lost profits based on its voluntary decision to enter a highly-leveraged project.

⁴⁰⁹ Reply, ¶ 158.

⁴¹⁰ Compass Lexecon ER II, footnote 201: “there is a substantial (■%+) difference in equity requirements between a leverage of ■% cited by the IEA (which implies equity of ■%) and Trianel’s leverage of ■%+ (which implies equity of no more than ■%).”

⁴¹¹ Reply, ¶ 156.

487. *First*, Claimant made the voluntary choice to highly leverage the Lünen Plant. Claimant did so to maximize its profits. For context, Claimant’s damages claim including interest is almost [REDACTED] times the initial investment (after a decade in the 2010s with very low interest rates). Higher profit chances go together with higher risks. Claimant cannot expect to be compensated through investment law for such risks.

488. *Second*, Respondent cannot be expected to know and make provisions for the individual financing situation of every hard-coal power plant on the German market. Claimant never substantiated how this should work in practice.

Interim conclusion

489. Therefore, the fact that Claimant would reach the breakeven point before any Coal-Firing Stop but-for the self-chosen leverage and high interest rates should weigh against any FET claim.

n. AET profited from the 2020 Act and retains conversion options

490. Finally, as will be addressed in further detail below on quantum, AET also failed to rebut the evidence submitted with the Counter-Memorial that the Lünen Plant (i.) can be converted profitably into a gas-fired power plant and (ii.) that AET’s remaining portfolio profits from the increase in electricity prices caused by the 2020 Act. Should the Tribunal otherwise consider AET’s FET claim (*quod non*), these facts must also be assessed already on liability.

Conclusion on FET

491. In summary, there is no basis to render a first-of-its-kind award and grant AET damages for the abstract change of regulation despite legitimate expectations not even being invoked. The 2020 Act is a reasonable, fair and balanced measure to mitigate climate change. Claimant never received any formal commitments and does not even present proof of having relied on the public political speeches (which did not address the years 2031-2050) it now invokes in the arbitration. Claimant’s alleged detriments, if any, are the results of Claimant’s self-chosen leverage, violation of Swiss law and refusal to take other mitigating steps.

E. CLAIMANT’S SUBSIDIARY CLAIMS

492. The remaining three alleged legal bases invoked by Claimant (i. full protection and security, ii. reasonable treatment, iii. non-discrimination) repeat exclusively factual allegations already made by Claimant for its main claims. There is no possibility that once Claimant’s main claims addressed in sect. A.-C. above are dismissed, the factual allegations that were insufficient for the main claims could suffice for these subsidiary claims.

493. Correspondingly, Claimant did not refer to any authority that sustained claims under these ancillary legal bases in a scenario in which the expropriation and FET claims have failed. Therefore, Respondent keeps its comments brief.

1. Full protection and security

494. In the Memorial, Claimant essentially duplicated its regulatory-stability claim already made under the FET standard also under the standard of full protection and security (“FPS”). In the Counter-Memorial, Respondent has set out numerous arguments and legal authorities that the FPS standard is limited to *physical* protection and security and is not intended to serve as a second FET standard. After the Reply, Respondent’s arguments stand and need not be repeated. Respondent limits its rejoinder on the new arguments made by Claimant.

495. *First*, on jurisprudence, Claimant does not dispute that Respondent correctly cited the numerous awards confirming that FPS is limited to physical protection. Instead, Claimant’s only reply is: “*Almost all of these awards were rendered by tribunal on the basis of treaties other than the ECT.*”⁴¹² However, Claimant does not assert that the FPS clauses in the respective treaties would have had any relevant differences in wording to Article 10(1) sentence 5 ECT. Therefore, Claimant’s comment is irrelevant.

496. *Second*, with regard to Respondent’s argument that the Tribunal must interpret the standards so as to ensure a meaningful distinction between them, Claimant alleges: “*The ECT contains multiple, sometimes overlapping standards – FET, MCPS [FPS], expropriation, and the umbrella clause*”.⁴¹³ Claimant’s allegation is circular and incorrect. The only reason why Claimant alleges an overlap is because Claimant treats all of these standards as duplicates. This is shown by Claimant essentially repeating the same facts for all claims and offering only one *ex*

⁴¹² Reply, ¶ 588.

⁴¹³ Reply, ¶ 589.

ante valuation for all claims. Claimant’s approach that all of the ECT’s standards of protection are essentially the same would deprive these standards of their effective meaning.

497. *Third*, Claimant’s only substantive argument why FPS should go beyond physical protection is the following: “*Article 1(6) defines ‘Investment’ to include various intangible assets: shares, contractual rights, and intellectual property. An intangible asset cannot be physically protected.*”⁴¹⁴ Claimant’s assertion that intangible assets cannot be physically protected is false. The companies in which an investor has shares can be physically protected. The physical assets to which the contractual rights exist can be physically protected. The employees which survey that IP rights are complied with and patent infringers sued can be physically protected.

498. In conclusion, the FPS standard on physical protection is irrelevant in the present case. Should the Tribunal follow the outdated, minority jurisprudence and interpret FPS as going beyond physical protection (*quod non*), Respondent refers to its argument on FET set out above, in sect. IV.D.2 in full.

2. Unreasonable treatment under Article 10(1) sentence 3 ECT

499. In the Memorial, Claimant raised Article 10(1) sentence 3 ECT as essentially a duplicative FET claim. In the Counter-Memorial, Respondent set out that Article 10(1) sentence 3 ECT does not require the Tribunal to examine again the grounds already examined under FET. Instead, jurisprudence confirms that standards such as Article 10(1) sentence 3 ECT require only a plausible connection to a rational policy which is given – evidently – in the case of the 2020 Act and climate action.⁴¹⁵

500. In the Reply, Claimant hardly discusses the legal standard and instead repeats factual allegations made already in its FET claim.⁴¹⁶ The only assertion on the legal standard is another complete modification of that standard. Claimant asserts: “*it [the State] must have tailored its measure proportionally to its policy goal.*”⁴¹⁷ The assertion that Article 10(1) sentence 3 ECT would establish an abstract obligation of proportionality has not been made in the Memorial.

⁴¹⁴ Reply, ¶ 587.

⁴¹⁵ Counter-Memorial, ¶¶ 568-576.

⁴¹⁶ Reply, ¶¶ 601-613.

⁴¹⁷ Reply, ¶ 612.

501. For the avoidance of doubt, Claimant’s modification is incorrect. Reading an abstract obligation of proportionality into Article 10(1) sentence 3 ECT is not compatible with its wording (“*no Contracting Party shall in any way impair by unreasonable or discriminatory measures their [investments’] management, maintenance, use, enjoyment or disposal*”). It would also lead to the absurd result of Article 10(1) sentence 3 ECT having more lenient requirements than FET itself.

502. Claimant refers only to the *Electrabel v. Hungary* award for its modified legal standard.⁴¹⁸ This reference is inapposite. To begin with, the *Electrabel* tribunal dismissed the investor’s claims on the merits. The award does not contain an *obiter dictum* in Claimant’s favour either. The sentence immediately after the sentence quoted by Claimant continues: “*Provided that there is an appropriate correlation between the policy sought by the State and the measure, the decision by a State may be reasonable under the ECT’s FET standard even if others can disagree with that decision.*”⁴¹⁹ Hence, the use of the word ‘proportionate’ was not intended as re-writing a legal standard addressed already set out in ample jurisprudence. Notably, the *Electrabel* tribunal also addressed the FET standard, not an isolated standard under Article 10(1) sentence 3 ECT.

503. In conclusion, Article 10(1) sentence 3 ECT permits neither a duplicative FET claim (as Claimant’s argues in the Memorial) nor a proportionality claim (as Claimant argues in the Reply). Instead, the provision is limited to measures not having any plausible nexus to a reasonable policy. This is not the case for the 2020 Act, *i.e.* an important measure for climate action. Therefore, Claimant’s claim is unfounded.

504. Should the Tribunal find that Article 10(1) sentence 3 ECT would permit a wider inquiry overlapping with the FET standard as alleged by Claimant (*quod non*), Respondent refers to the reasons set out above, in section IV.D.2 correspondingly.

⁴¹⁸ Reply, ¶ 611: “the Electrabel tribunal stated that Hungary enjoyed ‘reasonable margin of appreciation’ and later confirmed that while enjoying a ‘wide scope of discretion’, it was required to apply a ‘balancing or weighing exercise so as to ensure that the effects of the intended measure remain proportionate in regard to the affected rights and interests’ [footnote 622: **CLA-0084**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 180].”

⁴¹⁹ **CLA-0084**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 180.

3. Discrimination under Article 10(1) sentence 3 ECT

505. In the Reply, Claimant continued to duplicate its allegations on discrimination already made in the context of the police-powers doctrine as a self-standing claim under Article 10(1) sentence 3 ECT. Therefore, in the interest of efficiency, Respondent refers to its arguments set out in detail in section IV.B.2 above. In summary, the 2020 Act is not discriminatory because, *first*, nationality is not at issue, *second*, Claimant cannot claim to be treated better than other hard-coal power plants and, *third*, lignite and hard-coal are two different industries.

F. SUMMARY ON LIABILITY

506. Contrary to Claimant's allegations, the 2020 Act complies with Respondent's obligations under the ECT. Claimant's claims must be dismissed for the following reasons:

507. *First*, the 2020 Act does not constitute an expropriation but a legitimate exercise of Respondent's police powers because it aims at mitigating the existential risks of climate change in line with Respondent's obligations under international law for climate action (see in detail above, at B.).

508. *Second*, the ECT's umbrella clause is irrelevant because the operating permit (i) is not a contract, (ii) post-dates the alleged Investment and (iii) under the applicable German law, did not obligate the legislature not to phase out hard-coal power plants (at C.).

509. *Third*, the 2020 Act complies with the ECT's FET clause. Claimant seeks a first-of-its-kind award, holding a sovereign State liable for regulatory changes in the absence of legitimate expectations having even been pleaded, let alone, proven. The 2020 Act is a reasonable, fair and balanced measure to mitigate climate change. Claimant's alleged detriments, if any, are the results of Claimant's self-chosen leverage, violation of Swiss law and refusal to take other mitigating steps (at D.).

510. *Fourth*, Claimant's ancillary claims invoke no meaningful argument beyond the three main claims (at E.).

V. QUANTUM

511. The quantification of Claimant’s claims remains deficient. Due to fundamental flaws, the entire claim should be struck from the outset (see below, at A.). Should the Tribunal decide otherwise (*quod non*), a still-long list of adjustments will be required (at B.). The reasons stand also after the Reply and the second round of Claimant’s expert reports.

A. FUNDAMENTAL FLAWS REQUIRING TO STRIKE DAMAGES FROM THE OUTSET

1. Claimant clarified that it brings a damages, not an Article 13(1) ECT claim

512. In the Counter-Memorial, Respondent highlighted that under Claimant’s primary legal basis for the quantification of its claim, Article 13(1) sentence 2 ECT, the claim would be at best EUR [REDACTED]. In summary, the clear wording of Article 13(1) sentence 2 ECT⁴²⁰ – in line with expropriation provisions in other treaties – allows only to claim compensation for the fair market value (“FMV”) but-for the alleged Measure. Claimant and its experts conceded that the FMV of Claimant’s alleged Investment but-for the 2020 Act is at best EUR [REDACTED].⁴²¹

513. The rebuttal section in Claimant’s Reply (paras. 681-691) shows that Claimant’s case suffers from the confusion of two separate standards. Claimant titled this section: “*Damages for expropriation are EUR [REDACTED], not EUR [REDACTED]*”. Claimant alleged in this section: “*Respondent makes the bizarre allegation that [...] [t]he remaining EUR [REDACTED] of negative Actual value would not qualify as damages under Article 13(1) ECT.*”⁴²²

514. That is, Claimant brings a damages claim. However, Claimant’s fundamental misunderstanding is that Article 13(1) ECT is not a provision on damages claims. Article 13(1) ECT is a provision for the calculation of a compensation claim. The difference is crucial.

⁴²⁰ Wording: “Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the ‘Valuation Date’).”

⁴²¹ Counter-Memorial, ¶¶ 579-581.

⁴²² Reply, ¶ 683.

515. Article 13(1) ECT cannot be a damages claim because expropriations *per se* are not treaty breaches. Every State has the right to expropriate if the conditions of a lawful expropriation are met.⁴²³ Article 13(1) ECT only sets forth compensation as one such requirement.

516. This obligation to compensate under Article 13(1) ECT is limited to compensating for the FMV but-for the Measure. The provision states:

“compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known”.

517. Damages can only be claimed under a distinct legal standard, *i.e.* the customary-international-law standard on claims for treaty breaches summarized in Article 36 ILC Articles.

518. Article 13(1) ECT requires compensation for the “*value of the Investment*”. By contrast, damages under customary international law are about assessing the losses of the investor (“*the damage caused*” as formulated by Article 36(1) ILC Articles).

519. Therefore, Claimant’s repetitive comments in the rebuttal section on “*the damages suffered*” (para. 684), the alleged “*standard formula [on] damages*” (para. 688) or the alleged example of Claimant’s experts on a house with a mortgage and resulting “*loss*” (para. 689) are all beside the point. Damages are to be quantified under the customary-international-law standard on treaty breaches. Article 13(1) sentence 2 ECT is not a provision on the consequences of treaty breaches, but a requirement how such breach is avoided.

520. Claimant’s only comment on the substance of Article 13(1) sentence 2 ECT is the following: “*If Respondent’s contention were right, a claimant with any investment that had debt obligations or other liabilities would be much better off, if a State directly expropriated its investment than a State doing so indirectly. In a direct expropriation, the States takes the title to property. By doing so, it becomes the new owner of the expropriated property – with all the rights and obligations thereof. [...] In an indirect expropriation, [...] the investor remains liable for repaying any debt [...]*.”⁴²⁴ There are two flaws in Claimant’s comparison:

521. *First*, loans are issued to entities, not to property. The taking of property may change the ownership in a collateral, but it does not change the debtor of a loan. Claimant’s statement on

⁴²³ See the legal authorities quoted above, ¶ 245.

⁴²⁴ Reply, ¶ 685.

the effect of direct expropriations is therefore false. In both of Claimant’s scenarios, the debtor stays liable towards the lender. In both of Claimant’s scenarios, the debtor loses the property – either to the State (in case of a direct expropriation) or to the bank (which claims the collateral in case of an indirect expropriation).

522. *Second*, if the debtor has other assets into which the lender enforced the debt, the recovery of these losses will be a matter of the customary-international-law standard. For this purpose, the debtor must prove a treaty breach by the State.

Interim conclusion

523. Claimant’s claim has nothing to do with Article 13(1) ECT. Instead, Claimant, as per its own, repeated choice of terms, brings only a claim for “*damages*” for alleged breaches of the ECT (heading of Reply, sect. E.I.1.). Article 13(1) ECT is not a provision on damages claims, but a provision on the compensation for lawful expropriations. Damages can only be claimed under the customary-international-law standard.

2. Incorrect valuation date under customary international law

524. Claimant’s damages claim does not comply with the customary-international-law standard either. Claimant did not instruct its experts to value the alleged damages as of the necessary valuation date which is a date as close to the Award as possible (*ex post* valuation).

525. As Respondent set out in significant detail in the Counter-Memorial, there are compelling reasons why the customary-international-standard requires an *ex post* valuation:

- the object and purpose of a damages valuation to identify which losses are caused by the disputed measures and which losses were caused by other events;
- the object and purpose of *ex ante* valuations to shield the investor from developments after the loss of control – which does not apply where the ownership does not pass to the State;
- the imperative to draw a meaningful distinction between Article 13 ECT and the customary-international-law standard;
- the imperative to avoid over-compensation;
- the wording of the ILC Articles; and

-
- persuasive legal authorities such as the treatise on damages by Professor Schreuer’s academic successor Professor Marboe as well as the *Quiborax v. Bolivia* award.⁴²⁵

526. First of all, with its Reply, Claimant had a chance to instruct its experts to undertake an *ex post* valuation and submit such valuation at least as a subsidiary case. Claimant made the conscious decision not to submit such valuation. Given Claimant’s opportunity to remedy its quantum case and its choice not to do so, the appropriate consequence is to dismiss Claimant’s claim from the outset for failing to apply the necessary valuation date on damages claims.

527. On substance, Claimant’s assertion that the customary-international-law standard would permit an *ex ante* valuation is incorrect:

528. *First*, Claimant did not even provide any reply to four of Respondent’s main substantive arguments, namely:

- the object and purpose of a damages valuation to also identify which losses are caused by the disputed measures and which losses were caused by other events;
- the inapplicability of the rationale to shield the investors from developments after a loss of control (which did not happen in the present case);
- the imperative to avoid over-compensation; or
- the wording of the ILC Articles.

529. Hence, four of Respondent’s six main arguments from the Counter-Memorial stand unrefuted in full.

530. *Second*, Claimant’s main case on substance is the complaint that its experts would have difficulties calculating the but-for scenario.⁴²⁶ However, the capabilities and the work of experts must follow the requirements under the legal standard. It cannot be *vice versa*. The legal standard cannot follow the limitations of an investor’s chosen experts. Further, Mr. Koenig and Messrs. Delamer/Rozenberg set out in each of their reports that all relevant, unchallenged regulation can be assessed independently from the 2020 Act in an *ex post* valuation.⁴²⁷

⁴²⁵ Counter-Memorial, ¶¶ 589-606.

⁴²⁶ Reply, ¶¶ 718-719: “an ex-post valuation using a current date would not provide the ‘clean’ but-for value that Article 13 ECT requires. [...] one would have to re-engineer six years of market history. [...] As Secretariat explain, doing so would require many highly speculative assumptions about how the German electricity market would have evolved but-for the law in circumstances where the law itself has been a key driver of that evolution.”

⁴²⁷ Aurora ER II, sect. 5.2.; Compass Lexecon ER II, sect. V.1.

531. Moreover, Claimant’s assertions are also misleading because a related problem arises in the actual scenario (with the 2020 Act in place) as of an *ex ante* valuation date. Here, too, experts must assess which of the market developments that happened in reality were already caused by the 2020 Act.

532. *Third*, with regard to the imperative to draw a meaningful distinction between the customary-international-law standard and Article 13 ECT, Claimant asserts: “*the existence of an express provision in an international treaty does not suggest that the customary international law says the opposite.*”⁴²⁸ However, to reiterate, Article 13 ECT is not a provision on damages. Its wording is limited to the compensation of the FMV but-for an expropriation. The terms ‘losses’ or ‘damages’ are not in Article 13 ECT. Its purpose is to define requirements of a lawful expropriation. Lawful expropriations are not treaty breaches. Damages for treaty breaches are dealt with through the customary-international-law standard.

533. *Fourth*, on legal authorities, Claimant does not address the detailed assessment in Professor Marboe’s treatise that Respondent relies on. Nor does Claimant address that in *Quiborax v. Bolivia*, the majority of the tribunal (Professor Kaufmann-Kohler, The Honourable Marc Lalonde) concluded after a thorough assessment that the customary-international-law standard requires an *ex post* valuation. Claimant relies only on the dissent by Professor Stern in *Quiborax*.⁴²⁹ The Majority’s decision should be more persuasive.

534. Claimant then refers to new authorities, *i.e.* certain awards rendered against Argentina and Spain applying the date of the breach as the date of valuation for FET claims. However, these cases are not authorities that arbitral tribunals decided the valuation date as an issue in dispute. Claimant’s authorities do not record that Argentina or Spain took issue with the valuation date. The valuation date can be changed by agreement of the Parties. Plausible explanations why they have done so may have been that, in potential quantum experts’ proposals, *ex ante* valuations are often cheaper than *ex post* valuations. Unlike *e.g.* the tribunal majority in *Quiborax v. Bolivia* or Professor Marboe’s treatise, these cases provide no substantiated assessment of the valuation-date issue under the customary-international-law standard.

⁴²⁸ Reply, ¶ 716.

⁴²⁹ Reply, ¶ 715.

Interim conclusion

535. In conclusion, Claimant's Reply offered no rebuttal to almost all of Respondent's substantive arguments why the customary-international-law standard must lead to an *ex post* valuation. Instead, Claimant's main reply on substance is that its experts would have difficulties assessing how the market would have developed 2020-2026 but-for the 2020 Act. However, the law cannot follow the limitations of the investor's chosen experts. Since Claimant, despite the opportunity to do so in the Reply, refused to instruct its experts to provide an *ex post* valuation, the claim should be dismissed.

3. Premature *ex ante* valuation date

536. In the Counter-Memorial, Respondent set out in detail that Claimant's *ex ante* valuation date of January 2020 is also premature. In summary, the 2020 Act stipulates that the precise date as of which hard-coal plants such as the Lünen Plant receive a Coal-Firing Stop will be in the assessment of the Federal Network Agency (*Bundesnetzagentur*). Further, geopolitical and market developments may have an impact. In reply, Claimant maintains that its anticipated closure date in 2031 would be appropriate.⁴³⁰

537. Claimant's main argument is that even if Claimant's calculation proves to be incorrect, "*this would not change that with the introduction of the Coal Ban Law, the value of Claimant's investment was already seriously impacted.*"⁴³¹ However, that alleged value is only EUR [REDACTED] in Claimant's own case. The bulk of Claimant's claim is an alleged damages claim for alleged other losses. For such claim, the current uncertainties render an *ex ante* valuation unfeasible. This underscores that an *ex post* valuation would be the only appropriate method. Since Claimant refused to provide such valuation, the claim should be dismissed.

4. Failure to respect Paris Agreement and market realities for hard-coal plants

538. In the Counter-Memorial, Respondent objected that another reason that, on its own, suffices to dismiss Claimant's claim is that the latter is contingent on input data that is inconsistent with the obligation under international law (as well as unchallenged norms of EU and German law) to take measures to achieve the 1.5°C target.⁴³² Replacing this input data with Paris-

⁴³⁰ Cf. Reply, ¶ 698.

⁴³¹ Reply, ¶ 698.

⁴³² Counter-Memorial, sect. V.A.4.

compliant input data results in EUR 0 damages, *inter alia*, because the Lünen Plant closes before any Coal-Firing Stop would take effect.

539. The cornerstones of this issue remained undisputed in Claimant’s Reply.

- Claimant and its experts do not dispute that *e.g.* the CO₂ certificate prices in their valuation are too low to achieve the 1.5°C target.
- Claimant and its experts do not assert that these CO₂ prices would be based on any assumption that States at least attempt to reach the 1.5°C target.
- Claimant and its experts do not dispute that with the replaced input data, the damages are EUR 0 as calculated by Respondent’s experts.

540. Instead, Claimant asserts that market expectations should have priority over binding norms of international law such as the Paris Agreement. Claimant alleges that market expectations and the FMV standard would be the sole criterion.⁴³³ Claimant then continues: “*at the valuation date, the climate targets were generally expected to be missed.*”⁴³⁴

541. Claimant’s assertions are flawed both legally and factually.

542. On the law, the 2015 Paris Agreement and other norms of international law such as environmental treaties, the law of the sea, customary international law and international human rights obligate the international community to adopt measures aimed at mitigating climate change. The 2015 Paris Agreement establishes the 1.5°C target with regard to limiting global warming. All of this was already set out in the Counter-Memorial and afterwards confirmed by the ICJ in its 2025 Climate Change Opinion addressed above.

543. Crucially, the international law on climate action, particularly the Paris Agreement, also binds Switzerland. Switzerland (through Ticino, as one of its Federal States) is the sole financial beneficiary of a hypothetical damages award in this arbitration because all profits of AET are distributed to Ticino. AET’s case is that damages should be calculated with CO₂ prices assuming a violation of the 2015 Paris Agreement obligations, including by Switzerland. Were AET to prevail with its theory, Germany would have to pay Switzerland (through AET and Ticino), and Switzerland would reap the financial benefits on the basis of a presumed failure of the Paris Agreement, *i.e.* on a presumption that States such as Switzerland would not even attempt

⁴³³ Cf. Reply, ¶¶ 727-731.

⁴³⁴ Reply, ¶ 732.

to reach the 1.5°C target. Switzerland cannot rely on the failure of a treaty of which Switzerland is a Contracting State.

544. Further, the obligations of the international community form part of the applicable law under Article 26(6) ECT. The Tribunal, therefore, cannot render an Award assuming that the international community would disregard its binding legal obligations.

545. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

546. Claimant's cornerstone, *i.e.* the FMV standard, by contrast is not a norm of the international law on damages. At best, it is a practice of valuation experts. However, the practice of experts cannot override binding norms of international law. It would be incompatible with the text, content and spirit of the extensive body of international law on climate action to render an award and compensate Claimant under the assumption that valuation experts and the market expect the States' obligations to be breached in that States would not even attempt to mitigate climate change.

547. In particular, it would be incompatible with international law to afford a value to expectations in illegality and unlawful conduct.

548. In this regard, it is also pivotal again that Claimant's claim is – as Claimant itself insists – not only a claim for the FMV but-for the 2020 Act (which is only EUR [REDACTED] in Claimant's own valuation) but a damages claim under customary international law. When applying the principle of full reparation, treaty tribunals must assume the applicability of other norms of international law. There is no norm of customary international law stipulating that alleged market practice would be more important than binding treaties.

549. On the facts, even assuming Claimant's argument that market expectations would override binding norms of international law such as the Paris Agreement would be considered by the Tribunal (*quod non*), Claimant did not establish sufficient evidence that the Paris Agreement would be ignored as drastically as assumed by Claimant and its experts.

550. To begin with, Claimant and its experts seek to misrepresent two studies that Mr. Koenig from Aurora undertook 2019 and that Respondent produced voluntarily in document-

production. Claimant’s assertion that “*Claimant’s approach is consistent [...] specifically with the core belief’s Respondent’s expert Aurora adopted outside of these proceedings*”⁴³⁵ is false as Mr. Koenig addresses this in detail in his Second Report.⁴³⁶

551. Moreover, Claimant and its expert were unable to rebut to extensive market evidence analysed by Messrs. Delamer/Rozenberg concluding that hard-coal power plants already had, at best, a limited FMV already before the 2020 Act. In their Second Report, Messrs. Delamer/Rozenberg rebut in detail the criticism from Claimant and its experts in this regard. In the interest of avoiding duplication, Respondent refers to their Second Report in full.⁴³⁷

Interim conclusion

552. In conclusion, already under Article 26(6) ECT, the Tribunal cannot entertain a valuation that is based on alleged expectations in the violation of international law. Even if *arguendo* market expectations in treaty breaches would be relevant, Respondent refers in full to the Second Expert Reports of Messrs. Delamer/Rozenberg and Koenig concluding that the assertions of Claimant and its experts are incorrect.

5. Failure to present valuation appreciating the Coal Commission

553. Another reason why the valuation of Claimant and its experts must be dismissed in its entirety only became clear through the Second Reports of Claimant’s experts. Claimant’s experts asserted that certain evidence on the impeded value of hard-coal power plants already in 2019 should be ignored in the but-for scenario even though that evidence pre-dates January 2020. Claimant’s experts allege that this evidence would be ‘tainted’ by the Coal Commission:

“4.19 In any event, while the specifics of the Coal Ban Law were not known until January 2020, there was certainly significant uncertainty regarding a potential coal phase-out in 2019 when this transaction was completed. For example, Morgan Stanley authored an analyst report on German utilities in January 2019 (just prior to this transaction) nothing [sic]: ‘The coal commission has released its final report.’ [...]

4.20 Thus, at the time of the transaction in April 2019, there was considerable uncertainty surrounding the coal phase out as well as what compensation would be paid for plant closures. This uncertainty would have impacted the price Riverstone was willing to pay for the German

⁴³⁵ Reply, ¶ 733.

⁴³⁶ Aurora ER II, ¶¶ 76-84; 226-235.

⁴³⁷ Compass Lexecon ER II, sect. II., IV.

plants. However, as discussed in subsection A above, it would not be appropriate to consider this uncertainty in the But-For Value of Claimant's investment in this case, since this uncertainty represents an anticipation of the alleged breaches themselves."⁴³⁸

554. The argument of Claimant's valuation experts reveals a deficiency in their valuation not previously disclosed. Apparently, Claimant's experts follow the purpose to value the Lünen Plant not only but-for the 2020 Act, but also but-for the Coal Commission. This is an impermissible approach of Claimant's experts. They cannot ignore pertinent factual information in the but-for scenario if this information pre-dates the valuation date chosen by Claimant itself and is not challenged as a measure.

555. The assumption may even be fundamental to the entire result of Claimant's experts. In the context of Trianel's failed negotiations ██████████ in 2018, Claimant itself asserts: "*Despite the fact that the Coal Commission had not yet proposed any specific shutdown path, the anticipation of restrictive State measures began sowing doubt in potential buyers.*"⁴³⁹ Assuming *arguendo* Claimant's assertion were correct, Claimant's experts failed to present a valuation reflecting this doubt.

556. The doubts, if any, must be reflected for the following reasons:

557. *First*, Claimant did not challenge the Coal Commission's establishment or the Coal Commission's recommendations as measures in this arbitration. Respondent has highlighted this in the Counter-Memorial and in document-production.⁴⁴⁰ Claimant has not amended its case in the Reply. Instead, in the Reply, just as in the Memorial, Claimant even sought to rely on the Coal Commission, arguing that the 2020 Act allegedly implemented the Coal Commission's recommendations incorrectly.⁴⁴¹ Claimant's experts cannot exclude factual information from the but-for scenario that Claimant itself seeks to rely on for its case on liability.

558. *Second*, Claimant and its experts have taken the deliberate decision to fix the valuation date in January 2020 instead of proposing that the valuation date should be earlier because the 2020 Act would have been anticipated since the Coal Commission.

⁴³⁸ Secretariat ER II, ¶¶ 4.19-4.20.

⁴³⁹ Reply, ¶ 117.

⁴⁴⁰ Counter-Memorial, ¶ 182; PO 5, Annex A, Claimant's Redfern Schedule, Request 2, Respondent's objection.

⁴⁴¹ Reply, ¶ 191; Memorial, ¶¶ 184-191.

559. *Third*, Claimant's core (and incorrect) case is that an alleged discrimination between newer hard-coal plants and older as well as lignite plants would trigger liability.⁴⁴² On quantum, AET's experts have never been specific how that alleged discrimination (if any) would justify to ignore the Coal Commission.

Interim conclusion

560. In conclusion, the Second Report of Claimant's valuation experts revealed that they present a valuation but-for the Coal Commission. Even though the Coal Commission's work pre-dates Claimant's chosen valuation date and is not challenged as a measure. Taking the assertion of Claimant's own experts that the Coal Commission affected negatively the value of hard-coal power plants, this effect must be reflected in the but-for scenario. Claimant's failure to do so should lead to a full dismissal of the claim.

6. Failure to explain inconsistency between claim and failure to divest 2011-2017

561. In the Counter-Memorial, Respondent objected to AET's approach to not even address (i) its obligation under the 2011 AET Law to divest its shares in the Lünen Plant as soon as possible without losses or (ii) AET's obligation under the 2011 AET Law not to hold any shares, let alone make profits from such holding after 2035. AET's approach should lead to a dismissal of the claim. In document-production, AET had to produce its documentation on its efforts to comply with this obligation. As set out in detail above, the information produced by Claimant suggests that AET either violated Swiss law knowingly or deemed its shares in the Lünen Plant worthless in 2011-2017. The evidence includes Trianel's own conclusion in 2012 that there was no interest from the market to buy the Lünen Plant.⁴⁴³

562. In the Reply, Claimant and its experts only address the attempts of Trianel to sell the Lünen Plant in 2018. However, they remain silent how their alleged EUR [REDACTED] claim could be reconcilable with the fact that AET was unable to even secure a single offer over many years. It is plainly implausible that AET's alleged Investment should be worth what Claimant's experts allege but AET was unable to comply with its duty under Swiss law 2011-2017, *i.e.* during a timeframe of more than six years.

⁴⁴² Reply, ¶¶ 201-227; 460-482.

⁴⁴³ See above, sect. II.B.

563. In its only statement on this pivotal issue, Claimant seeks, again, recourse to uncodified, alleged FMV rules: “*For a buyer, it is irrelevant whether Claimant needs to sell its investment by 2035. [...] The only relevant question from an economic perspective is what a hypothetical buyer would have paid*”.⁴⁴⁴ There are two flaws in Claimant’s arguments.

564. *First*, to reiterate, Claimant brings a damages claim, not an FMV compensation claim under Article 13(1) sentence 2 ECT. Damages must be assessed under customary international law and follow the full-reparation principle and a prohibition of overcompensation. This principle is violated through a valuation that does not even consider that (i) Claimant could not make any profits with its shares under Swiss law and (ii) was unable to divest its shares since 2011 even though Claimant was obligated to do so as soon as possible without losses.

565. *Second*, simply put, it would be unfair to allow Claimant to refer to a “*hypothetical*” buyer, when Claimant has undisputedly been unable to find a real buyer ever since 2011 even though Claimant had to under Swiss law. Instead, it would be speculative to assign a value to Claimant’s shares that no one made an offer for though Claimant had been obligated for many years to procure such offers.

566. *Third*, even assuming *arguendo* the perspective of a hypothetical buyer would be relevant, such buyer would identify the publicly available information that AET is under pressure to divest and has been unable to find any buyer since 2011. In negotiations, buyers therefore would have additional leverage pressuring AET to a low price. In the present situation such pressure needs to be reflected in the calculation, particularly as the pressure was a voluntary choice of Claimant’s sole shareholder, Ticino. The pressure results from a Referendum of the Ticino public.

Interim conclusion

567. In conclusion, Claimant’s and its experts’ refusal to appreciate Claimant’s obligation under Swiss law and Claimant’s non-divestment 2011-2017 should lead to a dismissal of the claim. It is implausible that Claimant’s shares should be worth [REDACTED] when Claimant had been obligated since 2011 (many years before the 2020 Act) to sell the shares as soon as possible without losses and did not do so.

⁴⁴⁴ Reply, ¶¶ 738, 741.

7. Failure to submit a reviewable power-market modelling

568. The final reason to dismiss Claimant's claim in its entirety is that Claimant continues to refuse to submit a fully-reviewable power-market model. In the Counter-Memorial, Respondent objected that an investor cannot claim damages based on undisclosed calculations and Respondent's requests in document-production.⁴⁴⁵ In document-production, Claimant resisted disclosure based on the formalistic objection that Respondent was unable to describe the nature of the documents (or programs) in which Frontier calculates. With the Reply, Claimant had a chance to submit more information but chose not to. Instead, Claimant alleges incorrectly that an investor could claim damages based on unknown calculations and unknown input data.

569. *First*, Claimant alleges that the differences between the results of Frontier's model and Aurora's attempts to reverse-engineer Frontier's model would be only minor. Claimant asserts: "*In the But-For scenario, the deviation in modelled gross profits compared to Frontier's results remain below 1 % in all years*"⁴⁴⁶. Claimant's assertion is misleading. Claimant does not quote its experts accurately. Claimant's experts only address their dispatch models,⁴⁴⁷ not their market models. As set out again in the Second Report by Mr. Koenig, Frontier's market model contains the fundamental intransparencies, flaws and inconsistencies.

570. *Second*, Claimant alleges that the fact that Mr. Koenig of Aurora was able to draw conclusions from Frontier's results and was able to express initial disagreements would show that Respondent had sufficient opportunity to review.⁴⁴⁸ This is incorrect. Indeed, the opposite holds true. That many disagreements were already revealed based on the mere results of Frontier's model underlines that Respondent should have further opportunity to review Frontier's model. It increases the likelihood that more disagreements would follow such review of the still undisclosed calculations and undisclosed input data.

571. *Third*, in the Counter-Memorial, Respondent, based on the opinion of Mr. Koenig, assumed that Frontier simply overlooked three topics for the market model – flexible demand (through *e.g.* electric vehicles and heat pumps), the impact of the Scandinavian and Baltic regions, and negative price hours.⁴⁴⁹ Therefore, Respondent objected that they would have to be included

⁴⁴⁵ Counter-Memorial, sect. V.A.5.

⁴⁴⁶ Reply, ¶ 749:

⁴⁴⁷ Frontier ER II, ¶ 201.

⁴⁴⁸ Reply, ¶ 748.

⁴⁴⁹ See Counter-Memorial, ¶¶ 676-678.

in any valuation. Claimant's and its experts' replies show that the relevance of these three topics is, indeed, undisputed. On all three topics Claimant's experts refer to their undisclosed model. This aggravates the non-disclosure of the same.

572. *Fourth*, as to the other specific indications of inconsistencies and flaws in Frontier's model, Frontier's brief additional comments in their Second Report are insufficient. To avoid repetition, Respondent refers in full to sect. 2 of Mr. Koenig's Second Report. He concludes that the issues about the lack of information behind Frontier's model persist.

573. *Finally*, Claimant disputes that sovereign States would have a right to review in full an investor's calculations on damages. Claimant asserts: "*Due process guarantees a fair opportunity to understand and to comment on the opposing party's case. It does not confer a right to the complete technical reconstruction of every individual data point or internal modelling step. The relevant standard is whether the case can be understood and meaningfully challenged.*"⁴⁵⁰

574. Claimant's assertion is incorrect. Due process does require a right for the respondent State to review every data based on which the investor claims a significant amount of funds from, in the end, taxpayer's money. Further, without a review of these modelling steps a meaningful challenge is not possible because it is simply unclear what Claimant's experts have done.

575. Claimant's approach to shield calculations from an arbitration is unheard of. Claimant was unable to refer to any precedent in which an investor had previously tried to argue that calculations and input data could be withheld from the respondent State and the tribunal. Since, with the Reply, Claimant had an opportunity to make the appropriate disclosures of its calculations but refused to do so, the claim should be dismissed in its entirety. Any damages award for the Claimant would be a violation of international law and Respondent's due-process rights under the ICSID Convention.

Conclusion

576. Claimant's claim should be dismissed in full because of Claimant's refusal to (i) comply with the international law on damages (which is distinct from compensation under Article 13 ECT), and Claimant's attempts to claim damages (ii) based on an alleged expectation that the

⁴⁵⁰ Reply, ¶ 744.

Paris Agreement would be breached, (iii) based on an alleged FMV ignoring the Coal Commission, (iv) without an reconciliation with AET's unwillingness and/or inability to comply with its duty to divest under the 2011 AET Law and (v) based on undisclosed calculations and input data of its experts from Frontier. Each of these flaws, on its own, necessitates dismissing Claimant's quantification in full.

B. FURTHER NECESSARY REDUCTIONS TO CLAIMANT'S VALUATION

577. Should the Tribunal nonetheless consider working with the valuation of Claimant's experts (*quod non*), a long list of inaccurate assumptions requires amendments. Since Claimant continues to withhold the underlying calculations of its experts from Frontier, Respondent remained unable to quantify the impact of some of these adjustments on the valuation.

578. Sub-sections 1. through 4. address issues with a legal emphasis. Therefore, they will be addressed in further detail.

579. Sub-sections 5. through 15. address issues of financials, economics, or technical matters. All of these issues are addressed in detail by the experts. To avoid repetition, the sub-sections below will therefore provide only a high-level summary of the positions set out in further detail by the experts.

580. For the sake of completeness, sub-sections 17. and 18. conclude on Claimant's claims for tax gross-up and pre-award interest.

1. Failure to mitigate losses: rejection of plant conversion

581. In its Memorial, Claimant conceded that converting the Lünen Plant into a gas-fired power plant through replacing only the hard-coal burner would be possible, cost Claimant between EUR [REDACTED] and [REDACTED] (Claimant's 15.84 % share of the total costs) and result in a net profit of at least EUR [REDACTED] for Claimant. Claimant already addressed the issue of mitigation in the Memorial.⁴⁵¹ In the Counter-Memorial, Respondent set out that this profitable conversion option must lead to a subtraction of at least EUR [REDACTED] from any damages. In summary, Claimant's allegations that the conversion would go beyond a mitigation measure are unfounded because, in the end, the conversion is a matter of replacing the hard-coal burner with a gas burner.

⁴⁵¹ Memorial, sect. F.IV.

582. In the Reply, Claimant spends the longest of all quantum sub-sections on this issue. However, Claimant’s numerous allegations can all be rebutted one-by-one:

583. To begin with, Claimant sought to supplement legal authorities and submitted the award in *Middle Eastern Cement v. Egypt*. In this case, the investor received 5 % of the claimed damages. The holding on which Claimant relies is the following: “*An investor who has been subjected to a revocation of the essential license for its investment activity, three years earlier, has good reason to decide that, after that experience, it should not continue with the investment activity, after the activity is again permitted.*”⁴⁵² However, the present fact-pattern is distinct. The present case is not about an individual license being revoked and restored three years later. The present case is about a regulatory decision to ultimately phase out one of the most CO₂-intensive forms of electricity production in order to comply with the Paris Agreement and other unchallenged obligations of international, EU and German law to mitigate climate change.

584. Regarding the facts of the present case, Claimant asserts: “*it becomes evident from Respondent’s produced documents in the document-production phase that gas conversions of New Plants are not wanted by the Federal Government.*”⁴⁵³ Claimant’s assertion is not supported by evidence. Claimant cites Exhibit C-184, an email from one unit in the Ministry of Economic Affairs, stating this unit’s view. Even this unit’s view only concerns time towards the end of the present decade (“*by the end of the 2020s*”), nothing earlier. Claimant then cites Exhibit C-185, a letter on the ongoing plans for hydrogen-ready power plants. It does not contain any statement that conversions of existing power plants should be prohibited. Claimant concludes by citing Exhibit C-186, an internal note of the Ministry for Economic Affairs. The note shows the simple reason why simple conversions such as replacing the hard-coal burner through a gas burner should not be subsidised: “*The minimum investment level of 70% serves to exclude the so-called “low-hanging fruits”, which would be converted even without subsidies on the market.*”⁴⁵⁴ That is, Claimant’s purported evidence establishes nothing more than that conversions such as the boiler conversion of the Lünen Plant are considered “*low-hanging fruits*” for which operators already have sufficient incentives.

⁴⁵² **CLA-0202**, *Middle Eastern Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 169; quoted at Reply, ¶ 804.

⁴⁵³ Reply, ¶ 322.

⁴⁵⁴ **C-0186**_EN, Ministry of Economic Affairs, Note, 8 October 2024, p. 2.

585. Claimant alleges: “*the investment costs needed range from around one third of the initial equity investment.*”⁴⁵⁵ Claimant’s attempt to compare its share in the conversion costs of EUR [REDACTED] with its original investment of EUR [REDACTED] is misleading. The EUR [REDACTED] are Claimant’s 15.84 % of the total conversion costs. The EUR [REDACTED] were only Claimant’s 15.84 % share of the equity of the Lünen Plant. The original construction costs of the Lünen Plant were much higher, but mostly born by banks.

586. Claimant then alleges: “*Respondent contends that banks would be willing to finance gas-fire [sic] power plants but provides no proof for this*”.⁴⁵⁶ This is incorrect. Respondent refers to para. 843 of the Counter-Memorial where Respondent submitted the EU Taxonomy Regulation under which gas power plants are sustainable. This gives a significant incentive for banks. In the Reply, Claimant stayed silent on the taxonomy regulation.⁴⁵⁷ It also remains implausible that banks would not finance gas-fired power plants.

587. Claimant’s next allegation is: “*An investor considering such a conversion would not only look at the bare economics but also consider any additional risks such an investment involved.*”⁴⁵⁸ This is misplaced. Mitigation issues are not about what a hypothetical buyer would do after a hypothetical purchase. Mitigation issues are about what the claimant should do.

588. Claimant then refers to its expert Dr. Krahnefeld who opines that a conversion would require another permit. Claimant does not assert that such permit would not be issued. Instead, Claimant comments: “*the permitting procedure would involve public participation and provide an opportunity for e.g. NGOs to file challenges against any permit issued.*”⁴⁵⁹ This statement is also contradictory. On liability, Claimant alleges at length that the fact that the Lünen Plant’s hard-coal permits was revoked in a first litigation and the second litigation still remained pending in 2020 would have been irrelevant. On quantum, Claimant refuses to lower the alleged value of the Lünen Plant in the but-for scenario by a cent.

⁴⁵⁵ Reply, ¶ 811.

⁴⁵⁶ Reply, ¶ 831.

⁴⁵⁷ **R-0170**, Official Journal of the European Union L 198/13, Regulation EU (2020/852) of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, 22 June 2020.

⁴⁵⁸ Reply, ¶ 815.

⁴⁵⁹ Reply, ¶ 815.i. first bullet.

589. Claimant then asserts: “*a conversion to gas [...] involves technical risks which could affect the success or profitability of the conversion.*”⁴⁶⁰ Claimant does not specify which risks it means. In any event, this assertion is also contradictory. Claimant’s experts opine at length that a EUR █████ incident of the Lünen Plant’s generator in 2019 would be irrelevant for the plant’s value. If Claimant dismisses the relevance of real technical incidents even on the generator, it cannot refer vaguely to unspecified other technical risks of replacing the burner.

590. Claimant alleges afterwards: “*Respondent tries to make Claimant responsible [...] for any decision of the co-shareholders’ [sic] not to convert the plant.*”⁴⁶¹ Claimant is correct. Claimant must bear the consequences of the decision of its co-shareholders in the Lünen Plant, not Respondent. Claimant chose these shareholders voluntarily. Therefore, they are in Claimant’s sphere. Further, Claimant never substantiated that there would have been any dispute amongst the shareholders and Claimant undertook reasonable efforts to advocate for a conversion.

591. Claimant then alleges: “*Respondent’s contention that ‘gas power plants are being built from scratch in Germany’ is plainly wrong.*”⁴⁶² Claimant’s absolute statement is false. Respondent has already submitted documentary evidence on ongoing construction (Exhibit R-193).⁴⁶³ Claimant does not comment on this evidence in the Reply.

592. At the end, Claimant attempts to revise its concessions on the financials of the conversion option.⁴⁶⁴ Claimant’s experts mention in passing that the net benefit of at least EUR █████ would no longer exist due to a revised calculation.⁴⁶⁵ It is remarkable that, allegedly, a correction of such magnitude would have been necessary in light of a mere oversight in Frontier’s First Report.

593. On substance, Claimant’s revision must be rejected because Claimant’s experts assert to have changed the gas prices but have not explained how they calculated the gas prices. Given that Frontier’s model remains undisclosed, Respondent’s experts are unable to review what Frontier did.⁴⁶⁶ Claimant’s experts cannot be permitted to fully turnaround their economic

⁴⁶⁰ Reply, ¶ 815.ii.

⁴⁶¹ Reply, ¶ 828.

⁴⁶² Reply, ¶ 832.

⁴⁶³ R-0193-ENG/GER, EnBW, Press Release, Implementation – Project Phases.

⁴⁶⁴ Cf. Reply, ¶¶ 818-822.

⁴⁶⁵ Secretariat ER II, ¶ 6.17; Frontier ER II, ¶¶ 375-376.

⁴⁶⁶ Aurora ER II, ¶¶ 71-74; Prognos ER II, ¶¶ 88-89.

conclusions on the financial consequences of a plant conversion without disclosing the bases for their calculations.

594. Finally, Claimant did not address how much the other, larger conversion options assessed by Respondent’s experts would increase the profitability. Notably, Claimant did not disagree on the technical assessments of Respondent’s experts. Respondent cannot make this calculation in Claimant’s model because Claimant withholds the model. Therefore, the Tribunal should draw an adverse inference against Claimant.

Interim conclusion

595. In conclusion, at least EUR [REDACTED] must be subtracted from the net damages claim because the Lünen Plant can replace its hard-coal burner through a gas burner and operate as a gas power plant. The undisclosed calculations underlying the attempt of Claimant’s experts to withdraw earlier concessions must be rejected. Claimant’s silence on other conversion options coupled with its resistance to enable Respondent to implement them in Claimant’s model should lead to an adverse inference.

2. [REDACTED]

596. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

597. In the Counter-Memorial, Respondent set out that Claimant cannot rely on its liability agreed in the 2023 restructuring because Claimant failed to demonstrate that it negotiated with

467 [REDACTED]
468 [REDACTED]
469 [REDACTED]

the necessary prudence.⁴⁷⁰ The documents obtained through document-production show that the conclusion is much simpler. [REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Interim conclusion

600. The documents obtained in document-production establish that, in reality, Claimant will not be liable for [REDACTED] at the date on which Claimant insists that a Coal-Firing Stop would take effect [REDACTED]. Therefore, Claimant cannot claim EUR [REDACTED] for the [REDACTED]. The instruction given to its experts contradicts the 2023 PPA.

3. Failure to account for benefits through portfolio effect

601. In the Memorial, Claimant and its experts conceded that the 2020 Act caused an increase in electricity prices. In the Counter-Memorial, Respondent set out that the resulting benefit for AET's remaining power-plant portfolio outside of Germany must be deducted from any hypothetical damages claim.⁴⁷⁴

⁴⁷⁰ Counter-Memorial, ¶¶ 262-266, 647-648.

⁴⁷¹ See in detail above, sect. II.C.

⁴⁷² C-0179-DE/EN, TKL, *Protocol of the extraordinary shareholder's meeting of TKL on 16 May 2023*, 25 May 2023 (redacted), adobe p. 4.

⁴⁷³ See in detail above, sect. II.D.

⁴⁷⁴ Counter-Memorial, sect. V.B.3.

602. In the Reply, Claimant does not dispute its concession in the Memorial that the electricity prices increased as a result of the 2020 Act. Nor does Claimant dispute Mr. Koenig’s conclusion in the First Report that this increase applies not only to electricity prices in Germany but also other European countries. Further, Claimant does not assert that the increased electricity prices would leave the turnover of Claimant’s production portfolio unaffected.

603. Claimant’s remaining legal (see below, at a.) and factual (at b.) assertions why the increase in sales prices for Claimant’s other power plants should be ignored are unfounded.

a. Legal standard

604. Claimant begins by alleging: “*in accordance with ECT Article 13(1), compensation does not reflect the value of a company’s wider portfolio*”.⁴⁷⁵ Claimant’s allegation is already misplaced. As addressed in detail above,⁴⁷⁶ Article 13(1) ECT is the wrong legal basis because it allows only to claim the FMV of an investment but-for the measures, not further consequences. In reply, Claimant itself confirmed numerous times that its claim is a “*damages*” claim. Damages and compensation under Article 13(1) ECT are two separate topics. Damages result from treaty breaches. Compensation is a requirement of a lawful expropriation. Expropriation *per se* are not treaty breaches.⁴⁷⁷ Since the by-far largest part of Claimant’s alleged claim does not concern the alleged FMV but-for the 2020 Act but other alleged losses, Claimant brings in essence a damages claim. Article 13(1) ECT is irrelevant for the application of the portfolio effect.

605. Claimant then alleges that the *Chorzów Factory* case would state that “[n]ot all assets of an injured person are to be taken into account but only the value of the specifically affected asset.”⁴⁷⁸ Already the *verbatim* quote offered by Claimant shows that the assessment has to go beyond the asset that was taken and take into account the affected rights: “*only the value of property, rights and interests which have been affected*”.⁴⁷⁹ The interests at issue in the present case is that Claimant participated in the Lünen Plant to have more baseload capacities for trading.⁴⁸⁰ Notably, in *Chorzów*, the Court applied a narrower understanding of the protected

⁴⁷⁵ Reply, ¶ 843.

⁴⁷⁶ See above, sect. V.A.1.

⁴⁷⁷ See above, sect. V.A.1.

⁴⁷⁸ Reply, ¶ 846.

⁴⁷⁹ CLA-0106, *Factory at Chorzow*, p. 31, quoted at Reply, ¶ 846.

⁴⁸⁰ C-0084-IT/EN, Department of Finance and Economic Affairs of the Canton of Ticino, *Special Energy Commission: Majority Report on AETs Message No. 6091 concerning its Participation in TKL*, 23 February 2010, p. 5.

property (narrower than today's understanding of investment). In any event, as Respondent set out in the Counter-Memorial, the relevance of the PCIJ's jurisprudence does not go beyond the crucial role of the principles of full compensation and the prohibition of over-compensation. Benefits for other assets were not at issue in *Chorzów Factory*.

606. Claimant then quotes Professor Crawford's 2002 commentary on then-Draft ILC Articles: "*Not even the ILC's own commentary speaks of it. On the contrary, Professor Crawford speaks notes therein that: 'Compensation reflecting the capital value of property taken or destroyed as a result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property law.'*"⁴⁸¹ However, the passage quoted addresses a distinct situation, *i.e.* claims only for the value of destroyed property. In the present case, the largest part of Claimant's claim is not for property and not for the alleged value but-for the 2020 Act, but for the alleged further losses caused by the 2020 Act that go beyond the allegedly destroyed value of the plant. The bulk of Claimant's claim is for an allegedly negative value in the actual scenario.

607. For the sake of completeness, Respondent also notes that in the submitted Exhibit CLA-165, Claimant cut-off the ILC commentary on Article 36 ILC Article immediately after the quoted passage. Four paragraphs afterwards, the commentary notes even on these claims: "*The method [DCF] analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome. This has led tribunals to adopt a cautious approach to the use of the method.*"⁴⁸² Hence, Claimant's submissions must be approached with caution.

608. Claimant then alleges that beneficial effects for Claimant's portfolio outside of Germany would be irrelevant because Article 26(1) ECT concerns a dispute "*relating to an Investment in the Area of*" Germany.⁴⁸³ This is incorrect. The portfolio effect relates to Claimant's alleged investment in Germany because of Claimant's claims regarding the 2020 Act which – undisputedly – increased electricity prices. It would be unfair and arbitrary to limit the relevant benefits to those enjoyed by Claimant in Germany. It would also contradict the integrated nature of electricity markets in Europe.

609. Claimant then relies on *ADM v. Mexico* in which the arbitral tribunal rejected the investor's claim for loss of profit outside of Mexico.⁴⁸⁴ The holding is irrelevant. In *ADM*, the

⁴⁸¹ Reply, ¶ 848.

⁴⁸² **RL-0145**, Draft Articles on State Responsibility with Commentaries, General commentary, Article 36 ¶ 26.

⁴⁸³ Reply, ¶ 855.

⁴⁸⁴ Reply, ¶ 858.

tribunal held that the investor cannot invoke a tax imposed by Mexico to claim an alleged reduction in value of its assets in the U.S.⁴⁸⁵ This holding should be uncontroversial as much as it is irrelevant for the present issue. The present issue is about alleged losses incurred in Germany (not in Switzerland). Further, taxes apply by definition only in the territory of one sovereign State. By contrast, the electricity market and its prices in Europe are inter-connected. Indeed, Claimant's own case is that it allegedly invested in the Lünen Plant to increase baseload capacities, trade the produced electricity and buy back the same amount of baseload capacities in Switzerland.

610. Claimant's last allegation is: "*International practice excludes the deduction of indirect or third-party benefits that are causally separate from the wrongful act, even if they exist, because these benefits are not a source of over-compensation. [footnote 858: CLA-206, C. Tietje E. Sipiorski, Offset of Benefits in Damages Calculation]*".⁴⁸⁶ As a preliminary observation, one academic publication from two authors without recognition in treaty jurisprudence is insufficient authority for Claimant's assertion about "*international practice*". In any event, the very conclusion of the journal article cited by Claimant is: "*Offset of benefits is applied to damages where there is a direct causal chain or the benefit arises out of the same contract, transaction or occurrence.*"⁴⁸⁷ This is exactly the case in the present issue. Claimant enjoys benefit as a direct consequence of the 2020 Act. There is no issue of causation or remoteness because it stands undisputed that the 2020 Act increased electricity prices.

611. Before concluding, Respondent would like to highlight a final pivotal fact underlining why applying the portfolio effect is appropriate in the present case. Claimant's case is that it invested in the Lünen Plant because it needed the baseload capacities.⁴⁸⁸ As the documentation submitted with the Memorial shows, the interest is not about 'transporting' electricity from Northwestern Germany to Switzerland. Instead, Claimant's interests were portfolio interests: "*AET would have the option of selling the energy from the coal-fired power plant in Germany and buying back the same quantity sold in Germany on the Swiss market.*"⁴⁸⁹ If Claimant's entire

⁴⁸⁵ **CLA-0204**, *Archer Daniels Midland Company and Tate and Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF) 04/5, Award, 21 November 2007, ¶¶ 273-274.

⁴⁸⁶ Reply, ¶ 860.

⁴⁸⁷ **CLA-0206**, C. Tietje and E. Sipiorski, *Offset of Benefits in Damages Calculation in International Investment Arbitration*, JIA 2012, 545, at 7.

⁴⁸⁸ Memorial, p. 27 (heading 3.): "Claimant needed access to baseload capacity outside of Switzerland."

⁴⁸⁹ **C-0084-IT/EN**, Department of Finance and Economic Affairs of the Canton of Ticino, *Special Energy Commission: Majority Report on AETs Message No. 6091 concerning its Participation in TKL*, 23 February 2010, p. 5.

reason to invest was making trades, then the benefits for its trades with its remaining portfolio must be accounted for.

Interim conclusion

612. In conclusion, Claimant's assertion that international law would allow Claimant to claim the losses allegedly incurred through the 2020 Act in Germany and at the same time keep the benefits enjoyed through higher electricity prices driven by the 2020 Act must be rejected. Claimant is not entitled to stand better than it would have stood but-for the 2020 Act.

b. Application

613. Apart from the undisputed increase of electricity prices through the 2020 Act, Claimant's Reply also provides clarity on another matter. Claimant does not allege that the turnover made by its remaining portfolio would be unaffected by the 2020 Act. Therefore, the Tribunal can treat it comfortably as undisputed that the 2020 Act creates benefit for Claimant's remaining portfolio.

614. As to the extent of this portfolio effect, Respondent has done its utmost to work with the limited information publicly available and multiplied the differential of electricity prices with the published production data of Claimant's remaining portfolio.⁴⁹⁰ To reiterate, Respondent was unable to work in Claimant's model because Claimant withholds the latter.

615. While not disputing the core of the issue that its remaining portfolio incurs some benefit through the 2020 Act, Claimant makes a number of factual assertions which may be intended to distract from the core issue. This core issue is how much this benefit is.

616. Claimant asserts: "*the alleged benefits exit [sic] for all operators in the market, including those receiving compensation for their lignite-fired power plants.*"⁴⁹¹ The allegation is irrelevant. Amongst the many companies affected by the 2020 Act, Claimant was the only one to bring an investment treaty claim concerning this measure of climate action. No other company brought a claim claiming damages under international law.

⁴⁹⁰ Counter-Memorial, ¶¶ 668-673.

⁴⁹¹ Reply, ¶ 865.

617. Claimant then asserts: “*if additional revenues from other investments would be benefits to be offset, Germany would also have to take this into account when determining the compensation due to the lignite-fired power plants.*”⁴⁹² This sentence has numerous inaccuracies. The compensation for the lignite operators was not determined under international law. It does not concern only lignite-fired power plants, but most importantly lignite mines and rehabilitation costs. It also has a large social dimension regarding employee costs (60,000 employees estimated by the Coal Commission), pension costs and the capacities to employ personnel longer.

618. Claimant asserts afterwards: “*Respondent is effectively claiming repayment of this alleged benefit. Yet, it does not reclaim this benefit from any other market participant.*”⁴⁹³ This sentence is inaccurate, too. Respondent does not claim repayment. Respondent’s position is that the – undisputedly existing – benefits AET enjoys through the 2020 Act must be deducted from any damages claim under the full-reparation principle under international law. Claimant has not substantiated against which other market participant Respondent should invoke these considerations of international law. No other market participant except AET brought a treaty claim for the 2020 Act.

619. Claimant then asserts: “*the ‘benefit’ at issue is not a ‘benefit’ at all but simply a general market effect, applicable to all market participants.*”⁴⁹⁴ Claimant apparently seeks to distract from beneficial financial consequences through semantics. Claimant’s remaining portfolio generates more turnover because of the 2020 Act. The benefit does not decrease only because other market participants enjoy a benefit, too.

620. Claimant’s next allegation is: “*A hypothetical buyer valuing Lünen at the Valuation Date would look at Lünen’s own expected cash flows and risks.*”⁴⁹⁵ This argument is misplaced because it concerns the incorrect legal standard (Article 13 ECT instead of the full-reparation principle). Moreover, the issue is about the customary-international-law standard on damages. The investor cannot stand better than the investor would have but-for the 2020 Act.

621. Claimant alleges afterwards: “*Respondent’s expert Compass assumes that electricity generation of Claimant’s assets would remain unchanged at 2019 levels until 2053. That, evident,*

⁴⁹² Reply, ¶ 866.

⁴⁹³ Reply, ¶ 867.

⁴⁹⁴ Reply, ¶ 869.

⁴⁹⁵ Reply, ¶ 870.

is entirely unrealistic.”⁴⁹⁶ Indeed, the capacity of electricity generation of Claimant’s assets may be much higher in 2053. Respondent’s assumption may therefore be conservative. If Claimant has any evidence of plans to decrease its generation capacities, Claimant had the opportunity to file such evidence with the Reply but chose not to. Therefore, Claimant’s allegation that the capacities would decrease is unsubstantiated.

622. Claimant then asserts: “AET only generated [REDACTED] of electricity in 2019 while purchasing [REDACTED] and selling [REDACTED] of electricity on the market, showing that it was involved in significant trading activities.”⁴⁹⁷ Claimant’s comment is misleading because Respondent did not invoke the benefits also for AET’s *trading* segment. This may include further benefits. If the trading activities would somehow absorb the benefits for the *production* segment, it was on Claimant to provide evidence and Claimant chose not to. Instead, Claimant insisting on its trading activity makes Respondent’s case.

623. Claimant’s final allegation is: “a large share of these assets [AET’s remaining production portfolio] supply electricity based on ‘cost plus’ contracts and, thus independent of market prices.”⁴⁹⁸ Claimant remained unspecified about the size of the share. As the evidence submitted by Claimant’s experts confirm, [REDACTED] of the produced electricity is sold under such PPAs. Claimant and its experts did not dispute in any meaningful manner that the remaining [REDACTED] is sold on the wholesale market.

624. Respondent has already anticipated in the Counter-Memorial that PPAs may be relevant and confirmed that it stood ready to calculate the impact of the PPAs.⁴⁹⁹ Following the new information on Claimant’s PPAs, Mr. Koenig and Messrs. Delamer/Rozenberg have updated their calculations on the portfolio effect. Based on the updated input data from Mr. Koenig,⁵⁰⁰ Messrs. Delamer/Rozenberg conclude that the benefit created for Claimant’s remaining portfolio through the 2020 Act as of January 2020 is EUR [REDACTED].⁵⁰¹ To reiterate, for these remaining

⁴⁹⁶ Reply, ¶ 873 (exclamation mark in original).

⁴⁹⁷ Reply, ¶ 875.

⁴⁹⁸ Reply, ¶ 876.

⁴⁹⁹ Counter-Memorial, ¶ 672: “Respondent stands ready to update the portfolio effect analysis regarding the 15% non-wholesale electricity sales of Claimant’s portfolio once Claimant produced the PPAs or other revenue documents for these plants. Depending on whether e.g. the PPAs work with cap-and-floor mechanisms, the effect may be the same even after disclosure of the PPA.”

⁵⁰⁰ See Aurora ER II, sect. 7.

⁵⁰¹ Compass Lexecon ER II, ¶¶ 190-202.

██████ of the portfolio, Claimant had the opportunity to submit evidence why the increased wholesale prices would not translate into higher turnovers and profits but chose not to.

Interim conclusion

625. In conclusion, the increase in electricity prices through the 2020 Act and the resulting increase in prices AET's remaining portfolio can charge for the produced electricity must be subtracted from any damages claim. Claimant's own case is that the purpose of the investment was to trade the electricity produced in Germany. If the benefits for other transactions would be ignored, AET would be in a better financial position than it would be but-for the 2020 Act.

4. Failure to account for Ticino hard-coal levy

626. In the Counter-Memorial, Respondent informed the Tribunal that Claimant did not disclose its obligation under Swiss law to pay a climate-action levy of ██████ for its share of electricity produced by the Lünen Plant.⁵⁰² Multiplied by Claimant's share of the additional production until 2035 in the but-for scenario, this results in a nominal sum of EUR ██████.⁵⁰³

627. In the Reply, Claimant complains that Respondent calculated explicitly the net sum and that the levy paid after 2020 must be discounted back to the valuation date. Claimant has not made the respective calculation. Respondent does. Applying Claimant's own discount rate, the discounted value as of Claimant's valuation date is EUR ██████⁵⁰⁴

628. On substance, Claimant's only allegation goes, again, to uncodified, alleged FMV rules: *"under the fair market value standard, the asset is valued based on a transaction between hypothetical, willing, and informed market participants. Owner-specific burdens are not priced unless they are inherent to the asset and bind any owner."*⁵⁰⁵ Claimant's allegation has several deficiencies:

629. *First*, since the bulk of Claimant's claim concerns an allegedly negative value in the but-for scenario, the legal standard is the standard of damages under customary international law,

⁵⁰² The levy is charged in Swiss Francs and has been compared to EUR for ease of reference.

⁵⁰³ Counter-Memorial, ¶ 675: "in Claimant's own valuation, but-for the 2020 Act, Claimant would have been required to pay EUR ██████ in nominal terms for the levy under Ticino law. This sum must be subtracted from any claim."

⁵⁰⁴ R-231, Calculation of Ticino Hard-Coal Levy based on data from Exhibits FE-35 and Secretariat Appendices, cell D15.

⁵⁰⁵ Reply, ¶ 879.

not Article 13 ECT as set out above.⁵⁰⁶ Customary international law is about assessing in full the financial effects of an alleged measure on the investor, not only about valuing the investment.

630. *Second*, there is no rule under customary international law, that the damages perspective must always be a perspective of an investor selling its investment, rather than the investor continuing to hold the investment. The latter perspective is more natural. In the present case, this perspective must include the Ticino Hard-Coal Levy.

631. *Third*, further evidence that the perspective of AET continuing to hold its shares in the Lünen Plant and paying the Ticino Hard-Coal Levy is appropriate, is that since 1 August 2011, AET had been obligated to divest as soon as possible without losses, but failed to do so. Since AET held its shares since 1 August 2011, it can be presumed to hold its shares also after January 2020 for purposes of the damages calculation.

632. *Fourth*, Claimant’s assertion that a buyer would ignore the Ticino Hard-Coal Levy in full remains unsubstantiated. Claimant’s additional costs for producing electricity as a shareholder of the Lünen Plant lower the price that Claimant would be willing to expect from a buyer. Buyers will be aware of this – publicly available – information and may exploit it.

Interim conclusion

633. In conclusion, the discounted sum of EUR [REDACTED] in Ticino Hard-Coal Levies that Claimant saves as a result of the 2020 Act must be subtracted from any damages claim. Claimant’s main reply that a hypothetical buyer would not pay this levy is misplaced. Claimant failed to divest its shares in 2011-2017. The only appropriate assessment is to assume that Claimant would have continued failing to divest also but-for the 2020 Act.

5. Timing of annual maintenance

634. In the Counter-Memorial, Respondent, based on the expert opinions of Mr. Koenig as well as Messrs. Wünsch and Dambeck, objected to Claimant’s assumption that but-for the 2020 Act, the Lünen Plant could always schedule annual maintenance in the exact timeframe with the lowest electricity prices.⁵⁰⁷ On substance, the reply of Claimant’s experts remains vague asserting: “operators generally have information at least one year in advance to identify broadly cost-

⁵⁰⁶ See above, sect. V.A.1.

⁵⁰⁷ Counter-Memorial, ¶¶ 679-685.

efficient maintenance windows.”⁵⁰⁸ Therefore, Mr. Koenig in his Second Report maintains that the assumption remains implausible.⁵⁰⁹ In addition, Messrs. Wunsch and Dambeck reiterate their opinion from their First Report that one of the practical issues that it cannot be assumed that all power plants manage to select the ideal annual revision window because the number of contractors who can undertake these revisions is limited.⁵¹⁰

635. Respondent also notes that neither Claimant nor its experts commented on the following argument from the Counter-Memorial:

“Claimant would have to show that the Lünen Plant not only had sufficient, but *better* foresight than the other power plants on the market. Switching off a power plant for annual maintenance requires regulatory permission. If all power plants applied to undergo annual maintenance during the same time, the regulator might not give these permissions. The permission requires that the grid stability is secured.”⁵¹¹

636. In conclusion, Claimant’s assumptions that it could always schedule annual maintenance during the period of the lowest prices remains implausible.

6. Increase of fixed OPEX after 2019

637. Claimant and its experts continue to assume unreasonably low fixed OPEX (*i.e.* those OPEX that do not increase with electricity production). As set out in the Counter-Memorial, Claimant’s and its experts’ assumption that the maintenance costs would remain stable after 2019, *i.e.* not increase until the 2050s, is implausible.⁵¹² In reply, Claimant alleges: “*it is not true that maintenance costs increase with age by a rate higher than inflation.*”⁵¹³ The only evidence Claimant offers is the Second Report from its valuation experts from Secretariat who, in turn, mainly refer to their experience. Messrs. Wunsch and Dambeck reiterate their expert opinion that maintenance costs increase during more than four decades of operation as assumed in Claimant’s but-for scenario. In particular, they reject Secretariat’s unsubstantiated assertion that the

⁵⁰⁸ Frontier ER II, ¶ 231.

⁵⁰⁹ Aurora ER II, ¶¶ 40-44.

⁵¹⁰ Prognos ER II, sect. 3.4.

⁵¹¹ Counter-Memorial, ¶ 684 (emphasis in original).

⁵¹² Counter-Memorial, ¶¶ 686-688.

⁵¹³ Reply, ¶ 771.

development of maintenance costs during the first decade of operation could establish stability well into the fifth decade of operation.⁵¹⁴

7. Variable OPEX

638. In the Counter-Memorial, Respondent, based on the expert opinion of Messrs. Wunsch and Dambeck, objected that the variable OPEX assumed by Claimant and its experts were below industry standards. In the Reply, Claimant and its experts complain about the amount of sources cited by Messrs. Wunsch and Dambeck and rely on new calculations done by the Lünen Plant itself (Exhibit FE-98). These allegations do not justify Claimant's variable OPEX.

639. As set out in detail in the Second Report of Messrs. Wunsch and Dambeck, Claimant's own calculations (Exhibit FE-98) show that higher variable OPEX are needed. They also submit further studies on variable OPEX validating the OPEX assumed by them in their First Report.⁵¹⁵

8. Unavailability

640. In the Counter-Memorial, Respondent, based on the expert opinion of Messrs. Wunsch and Dambeck, objected to the unavailability of only 10 % assumed by Claimant's experts. The observed historical unavailability of the Lünen Plant had been significantly higher, *i.e.* 21 %.⁵¹⁶ For context, while Respondent does not have the full model of Claimant available as reiterated above, Respondent's valuation experts Messrs. Delamer and Rozenberg estimate that this issue has an impact of up to EUR [REDACTED] on damages.⁵¹⁷

641. In the Reply and the accompanying expert reports, Claimant and its experts first take issue that 4 % points of the historical unavailability included in historical *planned* unavailability data concerns issues of *unplanned* unavailability.⁵¹⁸ The data was marked as planned unavailability in the data of the European Network of Transmission Operators for Electricity (ENTSO-E) based on data submitted by the Lünen Plant itself. However, Respondent sees no benefit in occupying the Tribunal's time with categorizations. In the interest of efficiency, Respondent addresses the categories of planned and unplanned unavailability together.

⁵¹⁴ Prognos ER II, sect. 3.1.

⁵¹⁵ Prognos ER II, sect. 3.2.

⁵¹⁶ Counter-Memorial, ¶¶ 690-692.

⁵¹⁷ Cf. Compass Lexecon ER II, footnote 216.

⁵¹⁸ Frontier ER II, ¶¶ 215, 217.

642. On substance, the first, pivotal conclusion after the Reply is that it is undisputed that the Lünen Plant, in reality, had an unavailability of 21 %.

643. Claimant’s and its experts’ allegations as to why the damages should be calculate with an unavailability of the Lünen Plant of only 10 % are unfounded. They can be grouped as follows:

644. *First*, Claimant’s experts remark that the difference between the 10 % and 21 % unavailability is driven mainly by four large unavailability incidents of the Lünen Plant in 2015, 2017, 2020, and 2022. This is in agreement. Claimant’s experts then allege that such incidents should be excluded from a damages valuation because they are “*exceptional*”, “*outliers*” or “*infancy problems*” as Claimant’s experts put it.⁵¹⁹ This allegation must be rejected. A tribunal deciding under international law cannot ignore past events that reduced the profitability of an investment based on the assertion that these events are ‘too bad to be repeated’, to put it bluntly. Major events in four separate operating years are too important to be ignored. Instead, the historical average must be the outset of the assessment.

645. *Second*, Claimant and its experts seek to exclude the incidents from 2015 and 2017 because they were insured. Claimant’s experts opine that insured events would be “*not indicative of expected future revenue potential*.”⁵²⁰ This reply stays unsubstantiated. Their key issue is whether such unplanned unavailability would be (i) fully compensated through insurance payments, (ii) insurance payments are so certain that a buyer would not even care about the (in practice, regularly considerable) efforts associated with claiming the insurance payments from the insurer. Claimant substantiated neither that the Lünen Plant is insured for the future nor that insurance payments were made in the past, let alone without considerable efforts. Therefore, the frequency of incidents would be a factor that any buyer would consider.⁵²¹

646. *Third*, Claimant’s experts seek to exclude a further 4 % points of unavailability relating to the two incidents from 2020 and 2022 because they post-date their *ex ante* valuation date.⁵²² This allegation is irrelevant in an *ex post* valuation (which Claimant refused to provide). If anything, it shows that Claimant’s choice of an *ex ante* methodology, that is wilfully-blind to real developments, is purpose-driven.

⁵¹⁹ Frontier ER II, ¶¶ 215-216, 223.

⁵²⁰ Frontier ER II, ¶ 225.

⁵²¹ Compass Lexecon ER II, ¶ 160.

⁵²² Frontier ER II, ¶ 215.

647. Moreover, Respondent's experts from Prognos have included these events because of a conceptional issue of the approach of Claimant's experts. The latter assume a flat unavailability throughout the entire life of the Lünen Plant. This is unrealistic. Age increases unavailability as Messrs. Wunsch and Dambeck (both of them, engineers) set out in detail. Therefore, the past historically observed unavailability can only be the starting point for the unavailability. The final unavailability will be higher. Messrs. Wunsch and Dambeck conclude that adding the 4 % points based on the incidents from 2020 and 2022 remains still optimistic for the Lünen Plant. The additional unavailability once the Lünen Plant ages, is likely to be higher.⁵²³

Interim conclusion

648. In conclusion, there is no basis to disregard the undisputed fact that, in reality, the unavailability of the Lünen Plant was 21 %. The historical track-record should equal the assumptions for the future operation. Assuming a mere unavailability of 10 %, as assumed by Claimant for the future, is speculative.

9. Load ramp time

649. In the Counter-Memorial, Respondent objected that Claimant's experts assumed a load-ramp time of less than half of the actual time observed for the Lünen Plant. For context, the load-ramp time means the time the power plant needs to increase electricity production. The lower the time, the higher the profitability (to take advantage of *e.g.* time periods with high prices and lower renewables generation).⁵²⁴

650. After the Reply, it is undisputed that the load-ramp time observed was as high as set out by Respondent. Claimant and its experts allege that this observation should be disregarded because the turbine manufacturer (Siemens) gave specifications that the load-ramp time can hypothetically be lower. Even if *arguendo* this were relevant, it is incorrect as set out in Messrs. Wunsch's and Dambeck's Second Report. Claimant's experts from Frontier interpret the indications from Siemens incorrectly.⁵²⁵

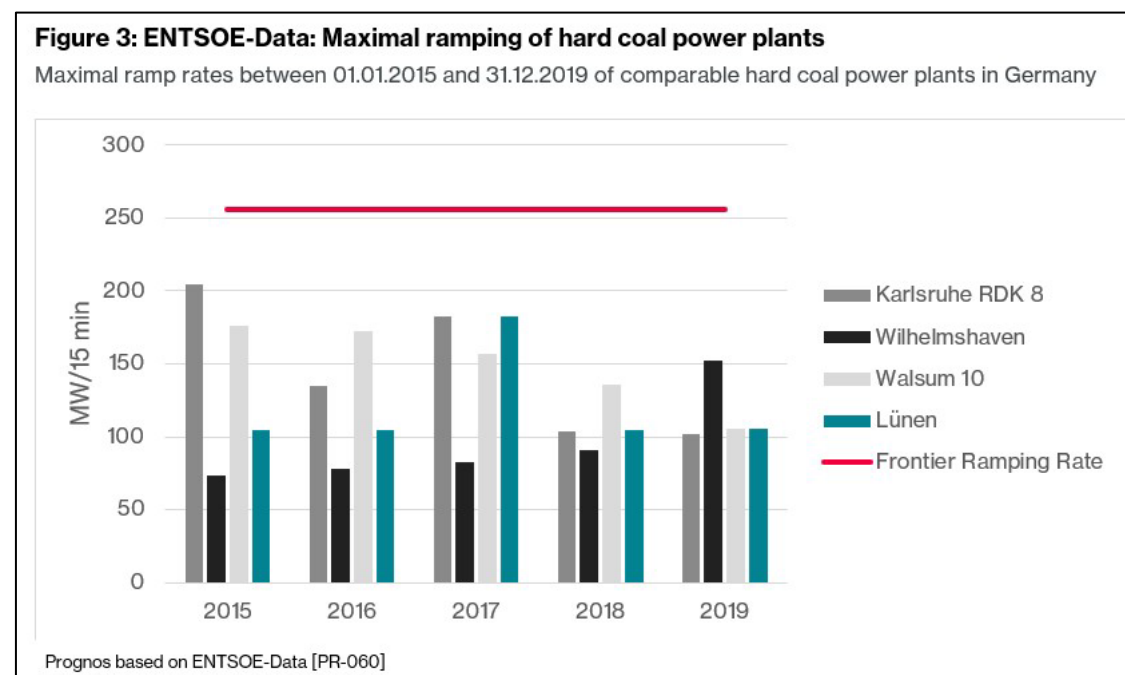
651. In addition, Messrs. Wunsch and Dambeck show that Claimant's assumptions not only contradict the real data for the Lünen Plant but also for three other hard-coal power plants of

⁵²³ Prognos ER II, sect. 3.3.

⁵²⁴ Counter-Memorial, ¶¶693-694.

⁵²⁵ Prognos ER II, sect. 3.5.

a comparable age and size. The following illustration shows that Frontier assumes a much higher ramping speed than established in real data:



Source: Prognos ER II, Figure 3.

652. In conclusion, disregarding the real data on the load-ramp time and assuming a much higher ramping speed (and, thus, a higher profitability), is speculative.

10. Cold start costs

653. In the Counter-Memorial, Respondent objected that Claimant and its experts do not appropriately include the additional costs for cold starts, *i.e.* re-starting the Lünen Plant after unplanned downtime. The additional costs are caused particularly by the costs for the fuel needed to heat-up the power plant quickly.

654. The issue is limited to cold starts after unplanned downtime. Claimant's experts assume only one cold-start for unplanned downtime per year. However, the observed historical data showed more than four cold starts for unplanned downtime per year.

655. In Claimant's Reply and Frontier's Second Report, it remained undisputed that the Lünen Plant had more than four cold starts per year due to unplanned downtimes. Claimant and its experts allege in essence that the – still undisclosed – dispatch model of Frontier would account

for more cold starts.⁵²⁶ Respondent objects to such allegations about the model made without making the model available to Respondent for review.

656. On substance, Messrs. Wunsch and Dambeck respond that the comments are also irrelevant because the issue is only about the additional cold starts necessary after unplanned downtime. They add that dispatch models do normally not include unplanned downtime, but only planned downtime (this is, *inter alia*, why unplanned downtime is treated as variable OPEX after the modelling). Frontier itself appears to confirm this through adding one additional cold start after their dispatch model. This one additional cold start needs to be increased to four to reflect the observed reality.⁵²⁷

11. Degeneration

657. In the Counter-Memorial, Respondent objected that Claimant did not foresee any degeneration of the Lünen Plant towards the end of its lifetime.⁵²⁸ In the Reply, Claimant and its experts dispute the existence of degeneration and rely in essence on the observation that degeneration has not been observed so far.⁵²⁹ This is misplaced. As Messrs. Wunsch and Dambeck reply in detail in their Second Report, the absence of degeneration during the first 15 years of operation is not indicative for degeneration towards the end of the power plant's lifetime. They also provide abundant references for the existence of degeneration.⁵³⁰ Therefore, it must be included in any valuation.

12. Discount factor of future cash-flows

658. In the Counter-Memorial, Respondent, in reliance on the expert opinion of Messrs. Delamer and Rozenberg, set out that Claimant's discount rate was understated and must be increased. For context, a higher discount rate leads to lower damages because of the reduced value of future cash-flow expectations.

⁵²⁶ Reply, ¶ 788; Frontier ER II, ¶ 246.a.

⁵²⁷ Prognos ER II, sect. 3.6.

⁵²⁸ Counter-Memorial, ¶ 697.

⁵²⁹ Reply, ¶¶ 790-792; Frontier ER II, ¶¶ 253-258.

⁵³⁰ Prognos ER II, sect. 3.7.

659. Claimant’s experts from Secretariat did not adjust their discount rate in their Second Report. As set out in detail in Messrs. Delamer’s and Rozenberg’s Second Report, they maintain that Secretariat’s discounted rate is understated because:

- Claimant’s experts are backward-looking, ignoring forward-looking risk,
- Claimant’s discount rates are below contemporaneous benchmarks, and
- a premium reflecting the increasing energy transition risks faced by coal-fired plants is warranted.⁵³¹

13. Minority Discount

660. Respondent, in reliance on the expert opinion of Messrs. Delamer and Rozenberg, maintains that a valuation of Claimant’s shares in the Lünen Plant must reflect Claimant’s status as a non-controlling minority shareholder. In their Second Report, Messrs. Delamer and Rozenberg reinforce their opinion and reject the reply of Claimant’s experts. Messrs. Delamer and Rozenberg reject the assertions of Claimant’s experts that minority discounts would not conform to best practice and that the early proponents of minority discounts would have changed their view. Messrs. Delamer and Rozenberg refer to extensive authorities in this regard.⁵³²

661. In addition to the Second Report of Messrs. Delamer and Rozenberg, Respondent also takes the opportunity to note that Claimant’s allegations that its shares should not be subject to a minority discount contradict Claimant’s allegations on mitigation that Claimant, as a minority shareholder, could not decide on conversion options on its own.

14. Uncertainty regarding legality of the 2013 Preliminary Permit in 2020

662. In addition, in line with the documentation on Project Mozart that AET had to disclose, Messrs. Delamer and Rozenberg set out in their Second Report that the uncertainty about the legality of the 2013 Preliminary Permit should reflect also negatively on any fair market value as of January 2020.⁵³³ To recall, in 2020, the litigation regarding the legality was still pending.

⁵³¹ Compass Lexecon ER II, sect. III.1.

⁵³² Compass Lexecon ER II, ¶¶ 169-176.

⁵³³ Compass Lexecon ER II, ¶¶ 177-180.

15. Illiquidity Discount

663. A further issue was only revealed through document-production. Through document-production, Respondent became aware that Trianel considered the shareholder agreements to establish that the shares in Trianel could only be owned by companies ultimately owned by municipalities. A memorandum from 2013 states: “*only companies directly or indirectly linked to public capital are allowed to participate in the shareholding.*”⁵³⁴ As a matter of German law and the Partnership Agreement (C-80) and Consortium Agreement (C-81) on record, Respondent’s conclusion is that this absolute statement is incorrect. Instead, only a sale of the majority of shares may create a conflict. A sale of a minority should not. Evidence in this regard is the following:

664. Under sect. 16 of the Partnership Agreement, any transfer of shares already requires the approval of the majority of shareholders.

665. Especially sect. 4 of the Consortium Agreement is important evidence. To recall, this is the provision foreseeing AET’s partial exemption from this requirement in case the Ticino Parliament refused to approve AET’s participation. The provision states:

“In deviation from § 16 of the Partnership Agreement of TPK, the approval for the sale and transfer of the company shares of AET Azienda Elettrica Ticinese mentioned in § 3 (2) no. 1 of the Partnership Agreement to one or more third parties may only be refused by the shareholders' meeting for good cause. Good cause exists in particular if the sale would jeopardise the project financing of the power plant, or if the purchaser is not majority-owned by the municipality.”

666. That fact that sect. 4 of the Consortium Agreement states that the other shareholders “*may*” prevent a sale of AET’s shares to a privately owned company evidences *e contrario* that public ownership of a purchaser of minority shares is not an absolute requirement.

667. Should AET dispute its ability to sell its shares to any privately owned company, Messrs. Delamer and Rozenberg conclude that AET’s shares would then have to be subject to a significant illiquidity discount.⁵³⁵

⁵³⁴ C-0141, AET, Promemory - AET stake in TKL, status of sale negotiations, 29 January 2014, p. 2.

⁵³⁵ Compass Lexecon ER II, ¶¶ 181-185.

16. Trade tax

668. In their First Report, Claimant's experts mentioned in passing that they assumed Trianel not to pay any trade tax in the but-for scenario. Claimant's experts have not been clear whether this was an instruction ("*we assume*"; "*we understand*").⁵³⁶ In the Counter-Memorial, Respondent objected to this assumption because once the loan is repaid, the price Trianel receives until the expiry of the PPA will be below market level and, in any case, the PPA expires in 2035.

669. In the Reply, Claimant's experts have first of all clarified that this issue of German trade tax is an instruction to them: "*We are also instructed that, even if the price under the PPA (or a substantially similar agreement) were below the market price of electricity, TKL would still not be liable to pay trade tax because the price under the PPA is an arm's length price*".⁵³⁷ Claimant, in turn, has made its first case on record on matters of German trade tax in paras. 898-904 of the Reply.

670. In response, Respondent instructed Professor Götz Wiese, former Head of Tax Germany with Latham Watkins, to review whether trade tax becomes due. In his accompanying Expert Report, Professor Wiese concludes that this is the case.

671. In summary, the decisive rules are set forth in the Foreign Tax Act. The Foreign Tax Act applies because of the special situation of a transaction between Trianel and a foreign party (here: AET). Hence, it would apply also to foreign buyers of AET's shares in Trianel. The reasonable rationale behind the Foreign Tax Act is that whereas in case of domestic contracting partners, the issue is not *whether* but only *where* trade tax becomes due, in case of foreign parties, the issue is whether the German fiscus ultimately loses the tax.

672. The decisive criterion on substance under the Foreign Tax Act is whether the electricity price below market levels which AET pays Trianel is resulting out of external circumstances. Professor Wiese concludes that the electricity price below market levels is resulting out of external circumstances.

673. *First*, the timeframe between repayment of the loan and 30 June 2035 is governed by the original PPA. This PPA was not the result of a free negotiation between Trianel and AET.

⁵³⁶ Memorial, ¶ 570; Secretariat ER I, ¶¶ 5.25, 5.26.

⁵³⁷ Secretariat ER II, ¶ 5.31.

Instead, the shareholders and consortium agreements established that the Trianel had to conclude such PPA with its shareholders.

674. *Second*, for the timeframe beyond 1 July 2035 in the but-for scenario, Claimant's case is that "*the general concept of the project does not change*" as Claimant puts it. In other words, Claimant assumes that Trianel's shareholders would make Trianel extend its PPAs with its shareholders so that the shareholders could continue to buy electricity only at costs.⁵³⁸ Even if *arguendo* Claimant's assumption were accepted (which Respondent, for the avoidance of doubt, disputes for lack of evidence), it will be an assumption based on all shareholders exercising their influence over Trianel, not the shareholders negotiating freely with Trianel. Claimant's assertions, that Claimant, on its own, could not decide on the pricing must be rejected. Claimant joins the other shareholders in exercising their corporate influence over Trianel. For the further details, Claimant refers to Professor Wiese's Expert Report in full.

Conclusion

675. The instruction to Claimant's experts that no trade tax would become due in the but-for scenario is false. Trianel's shortfall in income within the framework of the PPA between Trianel and Claimant is subject to trade tax.

676. Debtor of the trade tax towards the German fiscal authorities is Trianel itself. However, it must be expected that Trianel will raise claims against AET (or any foreign successor of AET) for compensation of these taxes under, *inter alia*, sect. 12(2) sentence 1 of the Partnership Agreement (C-80) and AET's general obligations as a member of the partnership under German corporate law.⁵³⁹ Otherwise, AET's co-shareholders would bear their shares for a trade tax that is only caused by AET (or its foreign successor). Therefore, Respondent continued to instruct Compass Lexecon to provide a sensitivity for trade tax becoming due on AET's share.

⁵³⁸ Reply, ¶ 900.

⁵³⁹ Wording: "Trade-tax charges and benefits of the Company, which arise out of a shareholder's special business expenses or income, special or supplementary balance sheets of a shareholder for tax purposes, or additions under sect. 15(1) no. 2 Income Tax Law, shall, as far as the internal relationship between the Company and its shareholders is concerned, be borne exclusively by the shareholder who caused these charges or benefits." / "*Gewerbesteuerliche Be- und Entlastungen der Gesellschaft, welche auf Sonderbetriebseinnahmen oder Sonderbetriebsausgaben eines Gesellschafters oder auf steuerlichen Sonder- und/oder Ergänzungsbilanzen eines Gesellschafters oder auf Zurechnungen nach § 15 Abs. 1 Nr. 2 EStG beruhen, treffen im Innenverhältnis der Gesellschaft allein denjenigen Gesellschafter, welcher solche Be- bzw. Entlastungen verursacht hat.*"

17. Tax-gross up

677. Claimant's tax-gross up claim continues to be unsubstantiated for lack of any evidence. In the Counter-Memorial, Respondent referred to abundant legal authority rejecting tax gross-up claims for lack of evidence *that* or *how* a hypothetical award would be taxed.⁵⁴⁰ In the Reply, Claimant does not comment on this jurisprudence and instead alleges: "*If there was no risk of taxation of any award by Germany's own authorities, it could simply say so. Otherwise, Germany's silence confirms that a taxation risks [sic] exist.*"⁵⁴¹

678. Hence, Claimant is essentially asserting that the burden of proof regarding a tax-gross up claim would be on the respondent State. This is false. The jurisprudence submitted with the Counter-Memorial, that shall not be repeated in the interest of efficiency, confirms otherwise.

679. Claimant's attempt to reverse the burden of proof by making a declaratory request must be rejected. Claimant was unable to refer to any authority that the burden of proof be reversed by substituting a financial for a declaratory request. The burden is not reversed. Respondent has already incurred very considerable costs in rebutting the many inaccurate statements in Claimant's pleadings. Respondent is not under any duty to incur further costs on an issue on which Claimant does not make even the smallest step of providing any evidence. Claimant's fully unsubstantiated tax gross-up claim must be rejected.

18. Pre-award interest

680. In the Counter-Memorial, Respondent referred to a dozen legal authorities from recent years all confirming that pre-award interest should not exceed the respondent's cost of borrowing.⁵⁴² In the Reply, Claimant does not comment on any of these cases. Above all, Claimant was unable to cite any cases to the contrary. Pre-award interest equalling the respondent's cost of borrowing has been standard practice of treaty tribunals in the last decade. Therefore, Claimant's pre-award interest is exaggerated.

⁵⁴⁰ Counter-Memorial, ¶¶ 706-711.

⁵⁴¹ Reply, ¶ 906.

⁵⁴² Counter-Memorial, ¶ 712.

VI. REQUEST FOR RELIEF

681. Respondent requests that the Tribunal render an Award:

- (i) declaring that the Tribunal has no jurisdiction of the claims raised by Claimant and, therefore, dismissing these claims with prejudice;
- (ii) in the event that the Tribunal accepts jurisdiction (*quod non*) dismissing all of Claimant's claims with prejudice;
- (iii) ordering Claimant to reimburse Respondent for the costs of this arbitration, including its legal fees, inhouse-cost and expenses, the fees and expenses of the Tribunal as well as the ICSID Secretariat, and interest on these costs.

Respectfully submitted,

Frankfurt am Main, 18 May 2026

[signed]

Dr. Sabine Konrad

Dr. Maximilian Pika