

PCA CASE N° 2014-19

IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE AGREEMENT BETWEEN THE GOVERNMENT OF THE CYPRUS REPUBLIC
AND THE GOVERNMENT OF THE CZECH REPUBLIC FOR THE PROMOTION AND
RECIPROCAL PROTECTION OF INVESTMENTS OF 15 JUNE 2001

AND

THE ENERGY CHARTER TREATY OF 16 APRIL 1998

- before -

A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE ARBITRATION RULES OF
THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW OF 1976

- between -

WA INVESTMENTS-EUROPA NOVA LIMITED (CYPRUS)
("Claimant")

- and -

THE GOVERNMENT OF THE CZECH REPUBLIC
("Respondent", and together with the Claimant, the "Parties")

AWARD

Arbitral Tribunal

Professor Dr. Hans van Houtte
Mr. John Beechey CBE
Mr. Toby Landau QC

15 May 2019

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LIST OF DEFINED TERMS

AA	Appointing Authority
<i>Achmea</i> judgment	Judgment of the Grand Chamber of the Court of Justice of the European Union in the matter of <i>Slovak Republic v. Achmea BV</i> dated 6 March 2018
2010 Action Plan	National Renewable Energy Action Plan 2010 of the Czech Ministry of Industry and Trade of July 2010
Act on Income Tax	Act No. 586/1992
Act on Promotion	Act No. 180/2005
BIT	Agreement Between The Government Of The Cyprus Republic And The Government Of The Czech Republic For The Promotion And Reciprocal Protection Of Investments Of 15 June 2001
Call Option	10% call option in SolarOne
Charter	The Czech Republic's Charter of Fundamental Rights and Freedoms
Claimant or WA Investments or WAIEN	WA Investments-Europa Nova Limited
Claimant's Submission on Costs	Claimant's Submission on Costs dated 16 June 2017
CJEU or ECJ	Court of Justice of the European Union
Claimant's Application	Claimant's Application for Leave to Submit a Rejoinder on Jurisdiction and a Supplemental Report on Quantum, submitted by letter dated 11 November 2016
Claimant's Comments on <i>Achmea</i>	Claimant's Comments on the impact of the <i>Achmea</i> judgment on the Tribunal's jurisdiction submitted on 9 June 2018
Claimant's Reply on <i>Achmea</i>	Claimant's Reply on the impact of <i>Achmea</i> on the Tribunal's jurisdiction submitted on 17 December 2018
Claimant's Supplemental Submission on Costs	Claimant's supplemental submission on costs dated 11 January 2019
Counter-Memorial	Respondent's Counter-Memorial dated 14 October 2015

CSR-Netherlands BIT	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 1 October 1992
2001 Directive	Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market
2009 Directive	Directive 2009/28/EC of the European Parliament and the Council of 23 April 2009 on the promotion of the use of energy from renewable sources amending and subsequently repealing Directives 2001/77/EC and 2003/30/E
EC	European Commission
EC's Decision	European Commission's decision in case "SA.40171 (2015/NN) — Czech Republic Promotion of electricity production from renewable energy sources" of 28 November 2016
ECT	Energy Charter Treaty of 16 April 1998
Environmental Aid Guidelines	Guidelines of the EC on environmental aid that are meant to facilitate the assessment of situations in which environmental State measures meet the requirements of the exemption
ERO	Czech Energy Regulatory Office
EUROSOLAR	European Association for Renewable Energy
Explanatory Report	Explanatory Report on the Act on Promotion issued by the Czech Parliament on 12 November 2003
FET	Fair and Equitable Treatment
First Notification	Notification of the Czech Republic concerning the enactment of Act No. 165/2012, submitted to the European Commission on 8 January 2013
FiT	Fixed purchase prices or Feed-in-Tariffs
Government or Respondent	Government of the Czech Republic
Green Bonuses	Green Bonuses
2001 Guidelines	2001 Community Guidelines on State aid for environmental protection

2008 Guidelines	2008 Guidelines on State aid for environmental protection
2014 Guidelines	Guidelines on State aid for environmental protection and energy 2014–2020
Indicative 2010 Target	The Czech Republic’s national target for the contribution of electricity produced from RES to the gross electricity consumption by 2010
ILC Draft Articles	International Law Commission Draft Articles on State Responsibility
Incentive Regime	Incentives for RES producers introduced through a combination of tariff and non-tariff mechanisms
27 July 2004 Letter	Commission’s letter to EUROSOLAR of 27 July 2004
July 2014 Judgment	Decision of the Supreme Administrative Court, Case No. 9 Afs 13/2013, 10 July 2014
May 2012 Constitutional Court Judgment	Judgment, Czech Constitutional Court, Case No. Pl. ÚS 17/11, 15 May 2012
Memorial	Claimant’s Memorial (including Response on Jurisdiction) dated 29 June 2015
New Act on Promotion	Act No. 165/2012 Coll., which amended certain arrangements under the Act on Promotion and entered into force partly on 1 January 2013 and partly upon its publication on 30 May 2012
NoA	Claimant’s Notice of Arbitration dated 22 April 2014
Non-Impairment Standard	Prohibition of arbitrary and discriminatory treatment
PCA or Registry	Permanent Court of Arbitration
Petitioners	Group of Czech senators who brought a challenge to the Czech Constitutional Court, seeking the annulment of the measures at issue
Pricing Regulation	ERO Regulation No. 140/2009 Coll.
Rejoinder	Respondent’s Rejoinder dated 6 October 2016
Rejoinder on Jurisdiction	Claimant’s Rejoinder on Jurisdiction dated 5 January 2017

Reply	Claimant's Reply Submission (including Rejoinder on Jurisdiction) dated 6 April 2016
RES	Renewable energy sources, including photovoltaic plants
RES Regime	The Czech Republic's regime for renewable energy sources
Respondent's Comments on <i>Achmea</i>	Respondent's Comments on the impact of the <i>Achmea</i> judgment on the Tribunal's jurisdiction submitted on 17 May 2018
Respondent's Reply on <i>Achmea</i>	Respondent's Reply on the impact of <i>Achmea</i> on the Tribunal's jurisdiction submitted on 3 December 2018
Respondent's Submission on Costs	Respondent's Submission on Costs dated 17 June 2017
Respondent's Targeted Requests	Respondent's Application for Leave to Make Further Targeted Requests for Production of Documents submitted on 17 July 2015
Respondent's Updated Submission on Costs	Respondent's Updated Submission on Costs dated 11 January 2019
Response	Respondent's Response to the Notice of Arbitration dated 23 May 2014
5% rule or 5% limitation	Rule under Article 6(4) of the Act on Promotion pursuant to which the ERO was not allowed to decrease the FiT in any given year by more than 5% of the value of the FiT in the previous year
Second Notification	Second notification of the RES support mechanisms in respect of RES plants commissioned before 1 January 2013 filed by the Czech Republic with the European Commission on 11 December 2014
Sluneční	Sluneční park Dubí
SolarOne	SolarOne s.r.o. (formerly Lambreti Estates s.r.o.)
90% stake	The Claimant's 90% stake in SolarOne
Subsidies or Tariffs	FiT and Green Bonuses
TAL	Tax Administration Law
2020 Target	The Czech Republic's Target for the contribution of electricity produced from RES by 2020

Tax Holiday	Exemption of RES producers from corporate income tax for the year in which the respective facility was put into operation and the following five calendar years pursuant to the Act on Income Tax
Technical Regulation	ERO Regulation No. 475/2005 Coll.
TFEU	Treaty on the Functioning of the European Union
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law of 1976
UNCLOS	United Nations Convention on the Law of the Sea
WACC	Weighted average cost of capital
1995 White Paper	White Paper on the “Energy Policy for the European Union” of December 1995

DRAMATIS PERSONAE

Ms. Kelyn Bacon QC	Respondent's expert witness on EU State aid issues, barrister at Brick Court Chambers.
Mr. Jiří Chroustovský	Claimant's fact witness, one of three founding shareholders and member of the Investment Committee of WA Investments-Europa Nova Limited.
Mr. David Borkovec	Claimant's expert witness on the issue of whether the Solar Levy is a tax under Czech law, Lead Tax Partner at PricewaterhouseCoopers Česká republika, s.r.o.
Mr. Josef Fiřt	Respondent's fact witness, Chairman of the Czech Republic's ERO from September 2004 to July 2011.
Mr. Libor Frýzek	Claimant's expert witness on the issue of whether the Solar Levy is a tax under Czech law, Head of Tax, Ernst & Young, s.r.o.
Dr. Antón García	Claimant's expert witness on the EU RES support framework and issues pertaining to industry economic regulation, Vice President in Compass Lexecon's European energy practice.
Mr. Radek Halíček	Respondent's expert witness on the issue of whether the Solar Levy is a tax under Czech law, Senior Tax Partner, KPMG, who withdrew from engagement with the Respondent, and did not participate in the hearing.
Mr. Wynne Jones	Respondent's expert witness on the EU RES support framework and issues pertaining to industry economic regulation, Director of Frontier Economics.
Dr. Petr Kotáb	Respondent's expert witness on the issue of whether the Solar Levy is a tax under Czech law, Assistant Professor at the Charles University Law School, and practicing attorney at Dentons.
Mr. Ladislav Minčíč	Respondent's fact witness, First Deputy Minister of Finance of the Czech Republic from 2010 to 2014.
Mr. Michael Peer	Respondent's expert witness on the calculation of damages, accountant and partner at KPMG.
Mr. Conor Quigley QC	Claimant's expert witness on EU State aid issues, barrister at Serle Court.
Mr. Geoffrey Senogles	Claimant's expert witness on the calculation of damages, chartered accountant and Vice President at Charles River Associates.
Dr. Pablo T. Spiller	Claimant's expert witness on the EU RES support framework and issues pertaining to industry economic regulation, Senior Consultant at Compass Lexecon.

I. INTRODUCTION

A. THE PARTIES

1. The Claimant in the present arbitration is WA Investments-Europa Nova Limited (“**WA Investments**”, “**WAIEN**”, or the “**Claimant**”), a company incorporated under the laws of Cyprus, with its registered address in Diomidous Street, 10, Alphamega-Akropolis Building, 3rd floor, Flat/Office 401, 2024 Nicosia, Cyprus. The Claimant is represented in the proceedings by Prof. Luca G. Radicati di Brozolo, Avv. Michele Sabatini, Mr. Emilio Bettoni, and Mr. Flavio Ponzano of ARBLIT- Radicati di Brozolo Sabatini Benedettelli, Via Alberto da Giussano, 15, 20145 Milan, Italy.
2. The Respondent is the Government of the Czech Republic, a sovereign State (the “**Government**”, or the “**Respondent**”, and together with the Claimant, the “**Parties**”). The Respondent is represented in these proceedings by Mr. Paolo Di Rosa of Arnold & Porter LLP, 601 Massachusetts Avenue NQ, Washington, D.C. 20001-3743, United States; Mr. Dimitri Evseev of Arnold & Porter LLP, Tower 42, 25 Old Broad Street, London EC2N 1HQ, United Kingdom; Ms. Karolína Horáková and Libor Morávek of Skils s.r.o. advokátní kancelár, Křižovnické nam. 193/2 110 00 Prague 1, Czech Republic; and by Ms. Marie Talašová, Ministry of Finance of the Czech Republic.

B. BACKGROUND TO THE DISPUTE

3. The proceedings arise out of an investment made by the Claimant in the photovoltaic sector in the Czech Republic. A dispute has arisen between WAIEN and the Government in respect of the alleged cancellation of the legal, tax, and regulatory incentive regime that had previously been established by the Czech Government in the photovoltaic sector.
4. The Claimant has commenced arbitration pursuant to the Agreement between the Government of the Cyprus Republic and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments of 15 June 2001 (the “**BIT**”), and the Energy Charter Treaty of 16 April 1998 (the “**ECT**”).

II. PROCEDURAL HISTORY

A. INITIATION OF THE ARBITRATIONS

5. On 8 May 2013, the Claimant, together with nine other investors, jointly filed a single Notice of Arbitration for a multi-party arbitration.
6. The Claimant designated Prof. Luca Radicati di Brozolo and Mr. Michele Sabatini of Bonelli Erede Pappalardo Studio Legale (Milan) as its lead counsel. While these attorneys left Bonelli

Erede Pappalardo Studio Legale and established ARBLIT in October 2013, they have been serving as counsel for the Claimant throughout the proceedings.

7. The Respondent initially designated Professor Zachary Douglas (Matrix Chambers), Mr. David W. Alexander (Squire Sanders (US) LLP, Columbus), Mr. Stephen P. Anway (Squire Sanders (US) LLP, New York) and Ms. Karolina Horáková (Weil, Gotshal & Manges LLP, Prague) as its counsel. At a later stage of the proceedings, Professor Zachary Douglas withdrew from the representation, and Mr. David W. Alexander and Mr. Stephen P. Anway were replaced by Mr. Paolo Di Rosa (Arnold & Porter LLP, Washington DC) and Mr. Dimitri Evseev (Arnold & Porter (UK) LLP, London) (*see* paragraphs 59 and 61). Ms. Horáková's law firm changed its business name to Skils s.r.o. advokátní kancelář.
8. On 10 June 2013, the Respondent replied to the Claimant, noting that they understood the Notice of Arbitration to be an invitation to consent to the consolidation of the claims. The Respondent proceeded to split the proceedings into six different arbitrations, and appointed Judge Peter Tomka, Mr. J. Christopher Thomas QC, and Mr. Toby Landau QC as its party-nominated arbitrators.
9. On 24 June 2013, the Claimant wrote to the Respondent stating that this was a multi-party arbitration and not a case of consolidation.
10. On 27 June 2013, the Respondent wrote to the Claimant, challenging this classification, stating that there is "no single arbitration agreement in existence that is capable of extending to all the different claims based upon different treaty obligations in different international instruments."
11. On 5 July 2013, the Claimant requested the Secretary-General of the Permanent Court of Arbitration (the "PCA" or "**Registry**") to designate an appointing authority ("**AA**") pursuant to Article 6(2) of the United Nations Commission on International Trade Law Arbitration Rules as revised in 2010, to complete the constitution of a single arbitral tribunal and to proceed to take a decision on the competence of the tribunal, in light of the lack of agreement between the Parties.
12. On 9 July 2013, by a letter to the PCA Secretary-General, the Respondent challenged the Claimant's request to designate an AA, alleging that in the present case, no power had been conferred on the Secretary-General under the Rules to make arbitral appointments. The Respondent further argued that the Notice of Arbitration was invalid, because it invoked the 2010 UNCITRAL Arbitration Rules instead of the 1976 UNCITRAL Arbitration Rules. The Respondent stressed that "there is no single arbitration agreement in existence that could possibly give a single arbitral tribunal authority over all the 10 claimants, their alleged investments, and their claims under the distinct international instruments."

13. By the Respondent's letter of 9 July 2013 and the Claimant's letter of 22 July 2013, the Parties agreed that the present arbitration shall be governed by the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (the "**UNCITRAL Rules**").
14. On 13 August 2013, the Secretary-General declined to act upon the Claimant's request, owing to the lack of a basis under the UNCITRAL Rules justifying the Secretary-General's intervention. This was because first, appointing authorities had been agreed in advance in some of the instruments invoked by the Claimant, and secondly, because the Respondent had actively participated in the proceedings and responded to the Notice of Arbitration in a timely manner by appointing the second arbitrator.

B. CONSTITUTION OF THE TRIBUNAL

15. On 8 May 2013, the Claimant appointed Mr. Raymond Doak Bishop as the first arbitrator.
16. On 10 June 2013, the Respondent appointed Mr. Toby Landau QC as the second arbitrator.
17. On 17 March 2014, the co-arbitrators appointed Professor Hans van Houtte as the President of the Tribunal, thereby duly constituting the Tribunal.
18. On 1 August 2014, having learned that his firm had been recently engaged in other matters that potentially involved issues similar to those in this arbitration, and citing grounds of a perception of bias, Mr. Doak Bishop tendered his resignation from the Tribunal.
19. On 5 August 2014, the Claimant was requested to appoint a new arbitrator to replace Mr. Bishop as a Tribunal member, pursuant to Articles 7(1) and 13(1) of the UNCITRAL Rules. The Tribunal suspended the proceedings until the appointment of a new co-arbitrator.
20. On 24 September 2014, the Claimant appointed Mr. Gary Born as its party-nominated arbitrator.

C. COMMENCEMENT OF THE PROCEEDINGS AND PLACE OF ARBITRATION

21. On 22 April 2014, the Claimant submitted its individual Notice of Arbitration to the Respondent. This date is deemed as the formal date for the commencement of the present proceedings pursuant to Article 3(2) of the UNCITRAL Rules. In its Notice of Arbitration, the Claimant proposed Geneva, Switzerland as the legal seat of the present arbitration, but indicated that it would also accept Paris, France as the legal seat of arbitration in the event that the Tribunal selected a seat of arbitration within the European Union.
22. On 23 May 2014, the Respondent submitted a **Response to Claimant's Notice of Arbitration** by which it raised its objections to jurisdiction, and set out its version of the factual background to the dispute. In addition, the Respondent proposed Paris, France as the legal seat of the present

arbitration.

23. On 15 July 2014, by **Procedural Order No. 1**, the Tribunal established that the place of arbitration would be Paris, France.
24. On 20 October 2014, the Claimant submitted its **Motion to Transfer the Seat of Arbitration**, from Paris to Geneva, citing the request of the European Commission for leave to intervene, as well as actions taken by it and EU courts in other unrelated arbitrations as presenting grounds for transferring the seat of arbitration to a non-EU country.
25. On 12 November 2014, the Respondent submitted its objections to the Claimant's Motion to Transfer the Seat of Arbitration, raising the absence of reasons compelling a change of the seat.
26. On 27 February 2015, in its **Procedural Order No. 2**, the Tribunal ordered that the place of arbitration shall be Geneva, Switzerland.

D. EUROPEAN COMMISSION INTERVENTION, AND CONFIDENTIALITY

27. On 11 July 2014, the European Commission (the "EC") submitted an Application for Leave to Intervene as a Non-Disputing Party.
28. On 15 July 2014, in its **Procedural Order No. 1**, the Tribunal, with the agreement of the Parties, appointed the Permanent Court of Arbitration as the administering authority in the proceedings. By the same order, the Tribunal set out the procedural timetable applicable to the proceedings.
29. Procedural Order No. 1 contained the following provision on confidentiality:

"Either Party may publicly disclose submissions made in these proceedings unless there has been a decision by the Tribunal to the contrary. Requests for confidential treatment of any item communicated in these proceedings may be submitted by either Party to the Tribunal for a decision, in which case no item which is the subject of such request may be publicly disclosed unless and until the Tribunal has decided upon such application."

30. On 17 July 2014, the Claimant submitted its comments on Procedural Order No. 1, including an objection to the confidentiality provisions, on the grounds that "the issue of confidentiality ha[d] not been discussed or agreed upon by the Parties", nor had there been any agreement on the applicability of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitrations. The Claimant also raised the point regarding the choice of seat of arbitration in a European country, highlighting that the Respondent had waived the "Intra-European Union BIT objection", and stating that the Commission's objection on this ground raised "serious doubts as to the transparency of the Respondent's behaviour."
31. On 30 July 2014, the Tribunal invited the Respondent to address by 8 August 2014 the Claimant's

letter of 17 July 2014, asking it to “specifically elaborate[e] on the possible inconsistency with confidentiality obligations in related matters and on its possible public law obligations of transparency that may be applicable.” The Tribunal also invited the Claimant to submit its response, by 18 August 2014, to the Respondent’s submission and to the Respondent’s letter of 29 July 2014. The Tribunal stressed that confidentiality should be maintained until the Tribunal decided on the matter.

32. On 8 August 2014, the Respondent stated that due to the suspension of proceedings by virtue of Mr. Doak Bishop’s resignation from the Tribunal, it would submit its response to the Claimant’s letter of 17 July 2014, as soon as the proceedings were reinstated.
33. On 11 August 2014, the President of the Tribunal advised that the Respondent’s response should be submitted within one week of the appointment of the new arbitrator.
34. On 26 September 2014, following the appointment of Mr. Gary Born as the Claimant-appointed arbitrator, the Tribunal notified the Parties of the resumption of proceedings, and set the new date for submissions on the request from the EC for Leave to Intervene as 3 October 2014.
35. On 3 October 2014, the Respondent provided its response to the Claimant’s letter of 17 July 2014.
36. On 7 October 2014, the Tribunal invited the Claimant to submit its comments on the EC’s Application for Leave to Intervene by 20 October 2014. The Tribunal also ordered that the “Simultaneous Cross-Requests for Production of Documents”, which were originally due by 20 August 2014, would now be due by 27 October 2014.
37. On 20 October 2014, the Claimant submitted its **Comments on the EC's Intervention**.
38. By **Procedural Order No. 2**, dated 27 February 2015, and pursuant to Article 15(1) of the UNCITRAL Rules, the Tribunal (with a Concurring Opinion from Mr. Gary Born) granted the EC leave to intervene as *amicus curiae*, subject to the condition that the Commission undertake, prior to consideration of its submissions, to pay in full the reasonable costs of all Parties resulting from the submissions.
39. On 6 March 2015, the Registry communicated Mr. Gary Born’s Concurring Opinion to the Tribunal’s Procedural Order No. 2. Mr. Gary Born expressed serious reservations, stating that it is “exceedingly difficult [...] fairly to conclude that the Tribunal has the authority, over one party’s objections, to permit a non-party to participate in the arbitral process.” However, he added that bearing in mind the interest of consistency and predictability in arbitral decisions, he was persuaded to grant the EC leave to intervene, subject to appropriate conditions.

40. On 8 April 2015, the EC submitted a Written *Amicus Curiae* Submission.
41. On 8 April 2015, the EC also submitted an application to vary Procedural Order No. 2, to reconsider the condition concerning the undertakings on costs.
42. On 9 April 2015, the Tribunal dismissed the EC's application to vary Procedural Order No. 2. The Commission was granted a further opportunity to make the required undertaking on costs by Wednesday, 15 April 2015, and notified that, if the required undertaking was not provided by that date, the EC's *amicus curiae* submission would be disallowed.
43. On 14 April 2015, the EC stated that it was not in a position to provide the undertaking as required by the Tribunal. Accordingly, its *amicus curiae* submissions were disallowed.

E. DISCLOSURE BETWEEN TRIBUNALS

44. On 8 December 2014, the Tribunal enquired whether the Parties would be willing to accept that the Tribunal should be informed of rulings made in the parallel proceedings involving the Respondent (PCA Case Nos. 2013-35 and 2014-1), on issues which also arise in one or more of the four proceedings before the Tribunal.
45. On 10 December 2014, the Respondent responded to the Tribunal's enquiry, stating that, subject to appropriate undertakings from the Tribunal, it would be prepared to agree to the Tribunal's suggestion.
46. On 12 December 2014, the Claimant expressed its agreement that the Tribunal may have access to the decisions in the parallel proceedings. The Claimant added that a simple agreement of the Parties was sufficient in the circumstances, and that no further agreements were required.
47. On 17 December 2014, the Respondent proposed that the Parties in the present proceedings, as well as the nine other claimants in the parallel cases, sign a written agreement "regulating the process of disclosure of the Rulings and the scope of waiver of confidentiality in the other proceedings".
48. On 27 December 2014, the Claimant sent a draft proposal for a Disclosure Agreement in the parallel proceedings, to the Respondent.
49. On 6 January 2015, the Respondent submitted its comments on the Claimant's proposal.
50. On 15 January 2015, the Respondent notified the Tribunal of the Parties' agreed procedures for disclosure regarding the Rulings in PCA Cases Nos. 2013-35, 2014-1, 2014-19, 2014-20, 2014-21 and 2014-22, contained in the Disclosure Agreement.

51. On 16 January 2015, the Tribunal communicated its general consent to the disclosure of its Rulings in the parallel proceedings on the conditions specified in the Disclosure Agreement.
52. On 26 January 2015, the arbitral tribunal in PCA Case No. 2013-35 communicated electronic copies of Procedural Order No. 4 of 24 November 2014 and the Concurring Opinion of Mr. Born, to the Tribunal in the present proceedings.
53. On 27 March 2015, the Parties jointly proposed an amended procedural calendar to the Tribunal, which was approved by the Tribunal on 30 March 2015.

F. DOCUMENT PRODUCTION REQUESTS

54. On 5 May 2015, the Claimant submitted its Request for Document Production, and related documents. It additionally addressed earlier requests for documents that had been opposed by the Respondent, and asked the Tribunal to decide on the Claimant's requests.
55. On the same date, the Respondent submitted its Application Regarding Document Production, and related documents.
56. On 19 May 2015, by **Procedural Order No. 3**, the Tribunal issued rulings with respect to each contested document request. The Tribunal reserved the right to review and change any of its decisions concerning the Parties' present requests at a later stage of the proceedings, if it considered that the documents concerned were relevant and material to its determinations.
57. On 12 June 2015, the Parties agreed to a revision of the procedural calendar, and submitted it to the Tribunal.
58. On 29 June 2015, the Claimant submitted its **Memorial (including Response on Jurisdiction)** (the "**Memorial**") and accompanying documents.¹
59. By e-mail dated 1 July 2015, the Respondent gave notice that Professor Zachary Douglas had withdrawn as counsel from the proceedings.
60. On 17 July 2015, the Respondent submitted its Application for Leave to Make Further Targeted Requests for Production of Documents ("**Respondent's Targeted Request**").
61. By letter dated 17 July 2015, which was received on 18 July 2015, the Respondent notified the Tribunal of its change of lead counsel, appointing Paolo Di Rosa (Arnold & Porter LLP, Washington DC) and Dimitri Evseev (Arnold & Porter (UK) LLP, London) to represent the

¹ Memorial, Exhibits **C-75** to **C-124**, Legal Authorities **CLA-1** to **CLA-51**.

Respondent in the present proceedings.

62. On 5 August 2015, the Tribunal approved the Parties' request of 12 June 2015 to revise the procedural calendar.
63. On 10 August 2015, the Respondent submitted its Application Regarding Document Production, addressing the disputed issues related to the Respondent's Targeted Requests of 17 July 2015.
64. On 6 October 2015, the Tribunal granted the Parties' requested extension to submit the Counter-Memorial on 14 October instead of 12 October 2015.
65. On 14 October 2015, pursuant to the procedural calendar, the Respondent submitted its **Counter-Memorial** and accompanying documents.²
66. On 15 October 2015, the President acknowledged receipt of the Respondent's submission, and made a disclosure relating to Ms. Bridey McAsey, a member of the Respondent's counsel team. The President suggested the removal of Ms. McAsey from the Respondent's legal team in order to confirm the independence of the Tribunal.
67. On 16 October 2015, Counsel for the Respondent confirmed that Ms. McAsey had been removed from the Respondent's legal team for the present proceedings.
68. On 2 November 2015, the Parties communicated a revised procedural calendar to the Tribunal.
69. On 25 November 2015, the Claimant submitted its further document requests in the form of a completed Redfern Schedule, and sought a decision from the Tribunal on the disputed requests raised by the Respondent's objections of 4 November 2015.
70. On 2 December 2015, the Claimant submitted an "unsolicited submission", in order to draw the Tribunal's attention to Price Decision No. 5/2015 of the Czech Energy Regulatory Authority, stating that this decision "has direct and fundamental consequences for the cases before this Arbitral Tribunal in terms of cause of action, jurisdiction, damages and relief sought". Accordingly, the Claimant sought an extension to the dates for filing of submissions.
71. On 3 December 2015, by **Procedural Order No. 4**, the Tribunal issued its decision on the Claimant's further targeted requests for the production of documents. The Tribunal set out its rulings with respect to each contested request in the "Tribunal's Comments" column of the

² Counter-Memorial, Exhibits **R-44 to R-63, R-65, R-68 to R-158, R-164 to R-169, R-183, R-188, R-190 to R-219, R-221 to R-226, R-228 to R-229, R-231 to R-234, R-244, R-253, R-256, R-258**, Legal Authorities **RLA-1 to RLA-243**.

Redfern Schedule, attached as Annex I to Procedural Order No. 4.

72. On 8 December 2015, the Respondent challenged the Claimant's submission of 2 December 2015, alleging that the submission was "calculated to prejudice the Tribunal against Respondent's position on document disclosure issues".
73. On 9 December 2015, the Respondent submitted documents pursuant to Procedural Order No. 4. It also asked the Tribunal to confirm the Claimant's obligations to maintain the confidentiality of the documents and "not disclose them publicly or to parties in other proceedings."
74. On 10 December 2015, the Claimant informed the Tribunal of the Parties' agreements to vary the existing procedural calendar which would inevitably affect the agreed hearing date, and requested the Tribunal to indicate its availability for new hearing dates.
75. On the same date, the Claimant communicated its agreement with the Respondent that documents received in the course of the parallel arbitrations were strictly confidential and must not be publicly disclosed, but made the point that "both Parties must be in the position to use specific documents obtained in these arbitration proceedings also in the parallel cases, if they are relevant and material to the outcome of those cases."
76. On 15 December 2015, the Tribunal stressed that documents submitted in the present proceedings:

"cannot be disclosed publicly and can neither be referred to and/or be submitted in proceedings other than the [present] four arbitration proceedings [...] unless such reference and/or submission is authorized by the proper authorities in those other proceedings, by the law or by common agreement of the Parties involved in those other proceedings."
77. On 17 December 2015, the Tribunal set the new dates for the hearing as 26 February 2017 to 5 March 2017.

G. FURTHER SUBMISSION BY THE PARTIES

78. On 30 December 2015, the Parties jointly agreed on a postponement of the deadline for the submission of the Claimant's Reply Submissions until 4 April 2016 and on an equivalent extension of the deadline for the Respondent's Rejoinder until 23 September 2016.
79. On 6 April 2016, the Claimant submitted its **Reply Submission (including Rejoinder on Jurisdiction)** (the "**Reply**"), and accompanying documents.³

³ Reply, Exhibits C-201 to C-253, Legal Authorities CLA-101 to CLA-169.

80. On 19 September 2016, the Parties jointly agreed on a postponement of the deadline for the submission of the Respondent's Rejoinder Submissions until 6 October 2015.
81. On 6 October 2016, the Respondent submitted the **Respondent's Rejoinder** (the "**Rejoinder**") and accompanying documents.⁴
82. By letter dated 11 November 2016, the Claimant applied to the Tribunal for leave to submit a rejoinder on jurisdiction and a supplemental report on quantum. By letter dated 18 November 2016, the Respondent submitted its comments on the Claimant's Application, arguing that it should be denied, except for limited supplemental jurisdictional submissions.
83. By **Procedural Order No. 5**, circulated on 29 November 2016, the Tribunal issued its decision on the Claimant's Application, granting the Claimant leave to submit a rejoinder on jurisdiction and a supplemental report on quantum. The Tribunal also granted the Respondent leave to submit a supplemental expert report in response to the Claimant's supplemental expert report.
84. On 5 January 2017, the Claimant submitted its **Rejoinder on Jurisdiction** and accompanying documents,⁵ as well as a supplemental expert report on quantum by Mr. Geoffrey Senogles.
85. On 31 January 2017, the Respondent submitted a supplemental expert report by Mr. Michael Peer in response to the Claimant's supplemental expert report on quantum.
86. By letter dated 1 February 2017, the Parties jointly requested the Tribunal's leave to submit further exhibits into the factual record of this case, including the EC's decision in case "SA.40171 (2015/NN) — Czech Republic Promotion of electricity production from renewable energy sources" of 28 November 2016 (the "**EC's Decision**").⁶ By letter dated 8 February 2017, the Tribunal acknowledged and confirmed the Parties' agreement.
87. On 15 February 2017, the Claimant submitted its Comments on the EC's decision in case SA.40171 (2015/NN) – Czech Republic, and an accompanying document.⁷ On the same date, the Respondent submitted Respondent's Comments on the European Commission's State Aid Decision SA.40171 (2015/NN) of 28 November 2016.
88. By e-mail dated 16 February 2017, the Respondent notified the Tribunal that it had agreed with

⁴ Rejoinder, Exhibits **R-61a**, **R-115a**, **R-63** to **R-364**, **R-366** to **R-368**, **R-381** to **R-400**, **R-403**, **R-408**, Legal Authorities **RLA-72a**, **RLA-244** to **RLA-322**, **RLA-325**, **RLA-330** to **RLA-346**.

⁵ Claimant's Rejoinder, Exhibits **C-1**, **C-256** to **C-282**, Legal Authorities **CLA-170** to **CLA-193**.

⁶ Exhibits **R-411** to **R-416**; **C-284** to **C-288**.

⁷ Exhibit **C-289**.

the Claimant to submit seven further exhibits into the factual record as exhibits R-417 to R-422, which the Tribunal acknowledged and confirmed.

89. By e-mail dated 26 February 2017, the Respondent notified the Tribunal that it had agreed with the Claimant to submit the award in *WNC Factoring Ltd v. The Czech Republic*, PCA Case No. 2013-34, dated 22 February 2017, into the record of the present case as legal authority RLA-348. By e-mail of the same date, the Claimant notified the Tribunal that they had agreed with the Respondent to submit Sections 23, 24 and 25 of the Act No. 586/1992 (the “**Act on Income Tax**”) into the record of the present case as exhibit C-290. By e-mail of the same date, the Respondent notified the Tribunal that it had agreed with the Claimant to submit two further exhibits into the factual record of the present proceedings as exhibits R-423 and R-424.
90. By e-mail dated 27 February 2017, the Claimant notified the Tribunal that it had agreed with the Respondent to submit two further exhibits into the factual record of the present proceedings as exhibits C-291 and C-292.
91. By e-mail dated 2 March 2017, the Respondent notified the Tribunal that it had agreed with the Claimant to submit two further exhibits into the factual record of the present proceedings as exhibits R-425 and R-426. By e-mail of the same date, the Claimant notified the Tribunal that it had agreed with the Respondent to submit one additional exhibit into the factual record as exhibit C-293.

H. HEARING

92. Given that there were no contested issues between the Parties and considering the fact that neither insisted on holding the pre-hearing teleconference, the Tribunal cancelled the pre-hearing call.
93. From 27 February to 3 March 2017, a hearing was held in The Hague. The following individuals were in attendance:

Tribunal:

Prof. Dr. Hans van Houtte (presiding)
Mr. Gary Born
Mr. Toby Landau, QC

The Claimant:

Prof. Luca G. Radicati di Brozolo
Mr. Michele Sabatini
Mr. Flavio Ponzano
Mr. Emilio Bettoni
Ms. Vanessa Zanetti
(*ArbLit – Radicati di Brozolo Sabatini*)

Mr. Nico Leslie

(Fountain Court Chambers)

Mr. Michal Hrabovský
(Bpv Braun Partners)

Fact Witnesses:

Mr. Jiří Chroustovský

Expert Witnesses:

Mr. Libor Frýzek
(Ernst & Young (CZ))

Mr. Geoffrey Senogles
Mr. Trevor Slack (not testifying)
(Charles River Associates)

Mr. Pablo T. Spiller
Mr. Antón García
Mr. Daniel George (not testifying)
(Compass Lexecon)

The Respondent:

Ms. Anna Bilanová
Mr. Martin Pospíšil
(Ministry of Finance of the Czech Republic)

Mr. Paolo Di Rosa
Mr. Dmitri Evseev
Ms. Mallory Silberman
Mr. Peter Nikitin
Mr. Bart Wasiak
Mr. John Muse-Fisher
Ms. Aimee Kneiss
Mr. Eugenio Cruz Araujo
(Arnold & Porter Kaye Scholer (UK) LLP)

Ms. Karolína Horáková
Mr. Libor Morávek
Mr. Pavel Kinnert
(Weil, Gotshal & Manges s.r.o. Advokátní Kancelář)

Fact Witnesses:

Mr. Josef Fiřt
Mr. Ladislav Minčíč

Expert Witnesses:

Mr. Wynne Jones
(Frontier Economics Ltd.)

Mr. Petr Kotáb
(Dentons Europe CS LLP)

Mr. Michael Peer
Mr. Jiří Urban (not testifying)

(KMPG Česká republika, s.r.o.)

Permanent Court of Arbitration:

Mr. Levent Sabanogullari

Ms. Maria Kiskachi

Mr. Shigeki Obi

Ms. Camille Dadure

Court Reporter:

Mr. Trevor McGowan

Interpreters:

Ms. Simona Sternova

Dr. Dominika Winterová

Ms. Manuela Degenkolb

Ms. Birte Priebe

I. POST-HEARING PROCEEDINGS

94. By separate e-mails dated 6 March 2017, pursuant to the Tribunal's authorization at the hearing,⁸ the Respondent submitted two further exhibits into the factual record of the present proceedings as R-427 and R-428.
95. By e-mails dated 7 June 2017, the Parties requested "a one-week extension of time to provide submissions on costs". The President granted the extension by e-mail of the same date.
96. On 16 June 2017, the Claimant submitted the Claimant's Submission on Costs (the "**Claimant's Submission on Costs**") to the Registry. On the same date, the Respondent filed its Cost Submission (the "**Respondent's Cost Submission**") with the Registry. On 17 June 2017, by agreement of the Parties, the Registry circulated the Parties' respective cost submissions to the other side and to the Tribunal.
97. By e-mail of 9 November 2017, the Respondent inquired whether the Tribunal had already completed its deliberations on the key issues before it, indicating that it might apply for the introduction of recent arbitral awards on subjects related to those currently pending before this Tribunal.
98. On 14 November 2017, the Tribunal informed the Parties that it had "reached an advanced stage in its deliberations on key issues [...] and therefore considers that there is no need for a supplemental briefing."
99. By e-mail dated 5 December 2017, the Tribunal requested the Parties to confirm "whether exhibit

⁸ Hearing Transcript (3 March 2017), 70:21 to 71:23 and Hearing Transcript (3 March 2017), 75:18 to 76:12.

C-26 is a reproduction of the official publication of the Act on Promotion in the Czech Official State Journal” or, alternatively, to submit the official publication of the Act on Promotion to the Tribunal.

100. By separate e-mails of 15 December 2017, each Party confirmed that exhibit C-26 is a *verbatim* reproduction of the Act on Promotion as published in the Czech Official State Journal.
101. By letter dated 13 March 2018, the Respondent requested the Tribunal to admit into the record of the present arbitration, and invite comments on, the judgment of the Grand Chamber of the Court of Justice of the European Union in the matter of *Slovak Republic v. Achmea BV* dated 6 March 2018 (the “**Achmea judgment**”).
102. Upon the Tribunal’s invitation, by letter dated 23 March 2018, the Claimant provided its comments, opposing the Respondent’s aforementioned requests.
103. Following a further round of comments received from the Respondent on 6 April 2018 and from the Claimant on 13 April 2018, the Tribunal decided on 18 April 2018 to grant the Respondent’s requests and invite further submissions from the Parties on the impact of the *Achmea* judgment on this Tribunal’s jurisdiction. In particular, the Tribunal invited submissions from the Parties on the following issues:
 1. Whether the *Achmea* judgment is dependent on the specific wording of the BIT that was at issue in the case before the ECJ and how it relates to the BITs at issue in the present proceedings;
 2. Whether and how the *Achmea* judgment applies in arbitrations where the arbitral seat is outside of the EU, including in particular the impact, if any, of Article 344 TFEU on the validity of an intra-EU BIT jurisdiction clause for an arbitral tribunal sitting outside of the EU;
 3. Whether and how the *Achmea* judgment applies to the Energy Charter Treaty;
 4. Whether and how the *Achmea* judgment actually impacts upon the jurisdiction of an arbitral tribunal sitting outside of the EU, as distinct from the enforceability of awards within the EU;
 5. How the *Achmea* judgment fits in, if at all, with Articles 59 and 30 of the Vienna Convention on the Law of Treaties;
 6. The relevance of Articles 27 and 46 of the Vienna Convention on the Law of Treaties for the present arbitrations;
 7. How Swiss courts and Swiss scholarship have considered the position of EU law in a legal universe consisting of international law and domestic law;
 8. The impact, if any, of Article 177(2) of the Swiss Federal Code on Private International Law; and
 9. The role of waiver / estoppel, including in light of Article 186(2) of the Swiss Federal Code on Private International Law, in this context.⁹

⁹ Letter of the Tribunal, 18 April 2018, p. 2.

104. Following three extensions of the deadline requested by the Parties by e-mails dated 20 April 2018, 10 May 2018, and 8 June 2018, all of which were granted by the Tribunal, on 14 May 2018 and 9 June 2018 respectively, each Party submitted its comments on the impact of the *Achmea* judgment on this Tribunal's jurisdiction (the "**Respondent's Comments on Achmea**" and "**Claimant's Comments on Achmea**"), accompanied by legal authorities.¹⁰
105. By letter to the Parties dated 24 June 2018, Mr. Born stated as follows:
- I am writing to inform you that, due to recent, unforeseen developments in another proceeding, I have concluded that it is prudent for me to resign as co-arbitrator in the captioned matters. Regrettably, obligations of confidentiality prevent me from providing further details.
106. By letter dated 25 June 2018, the PCA, under instructions of the Presiding Arbitrator, invited the Parties to provide their comments on Mr. Born's letter of 24 June 2018, "tak[ing] into account Swiss law as the law of the seat of the arbitration, with reference to the treatise of Bernhard Berger & Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd edition 2015, pp. 331-335.
107. On 9 July 2018, each Party provided its comments on Mr. Born's letter.
108. By letter of 11 July 2018, the Presiding Arbitrator and Mr. Landau sent a letter to the Parties, stating as follows:
- Given the advanced stage that these proceedings have already reached, the Parties are invited to provide, by **Wednesday, 18 July 2018**, their comments on the possibility that the Presiding Arbitrator and Mr. Landau complete these arbitrations as a two-person tribunal, assuming that they are able to agree on all matters in dispute, it being understood that, failing agreement on any matter in dispute, the Presiding Arbitrator and Mr. Landau would invite the Claimants to make a substitute appointment.
109. On 18 July 2018, the Claimant informed the Tribunal that it wished to proceed with the appointment of a substitute arbitrator.
110. By letter dated 20 August 2018, pursuant to Articles 13(1) and 7(1) of the UNCITRAL Rules, the Claimant appointed Mr. John Beechey, CBE as its party-appointed arbitrator.
111. At the request of the Chairman, on 21 August 2018, the Registry circulated Mr. Beechey's Declaration of Acceptance and Statement of Impartiality and Independence, together with his disclosure pursuant to Article 9 of the UNCITRAL Rules.

¹⁰ Respectively, for the Respondent, Legal Authorities **RLA-349** to **RLA-418**; for the Claimant, Legal Authorities **CLA-199** to **CLA-294**.

112. By letter of 28 August 2018, the Respondent expressed concerns pertaining to Mr. Beechey's appointment and requested Mr. Beechey's resignation in the present matter.
113. By e-mail dated 3 September 2018, Mr. Beechey advised the Parties that he would "leave it to the appointing authority to consider the matter on its merits."
114. On 4 September 2018, the Respondent submitted its Notice of Challenge of Mr. Beechey in accordance with Articles 11(1) and 11(2) of the UNCITRAL Rules.
115. By e-mail dated 19 September 2018, the Claimant advised the Tribunal that it did not agree to the challenge of Mr. Beechey, and that the Parties had agreed that the challenge be decided by the Arbitration Institute of the Stockholm Chamber of Commerce.
116. On 26 October 2018, the Arbitration Institute of the Stockholm Chamber of Commerce dismissed the challenge to Mr. Beechey.
117. By letter dated 8 November 2018, the Claimant *inter alia* requested the Tribunal "to inform the Parties on the next steps" of the arbitration and sought leave to submit brief supplemental costs submissions. On the same date, the Tribunal provided an update on the status of its deliberations to the Parties.
118. On 16 November 2018 the Respondent requested the Tribunal "to allow the Parties to provide supplementary briefing on recently issued and highly relevant arbitral awards", to schedule a "brief oral hearing, to permit counsel to address issues arising out of the *Achmea* Judgment", and commented on the Claimant's request for updated costs submissions.
119. By letter of 19 November 2018, the Tribunal rejected the Respondent's request for a briefing on recently issued awards, citing the advanced stage of its deliberations. By the same letter, the Tribunal granted leave to the Respondent to submit a "short written submission on any genuinely new points regarding the *Achmea* Judgment that it considers it has not had an opportunity to address". The Claimant was afforded an opportunity to submit a "brief written reply" thereto. The Tribunal further invited the Parties to provide a comprehensive update of their position on costs. Finally, the Tribunal informed the Parties that, upon receipt of the aforementioned submissions, it intended to declare the hearings closed in accordance with Article 29(1) of the UNCITRAL Rules.
120. On 3 December 2018 the Respondent submitted a Reply on the Impact on the Tribunal's Jurisdiction of the ECJ's Judgment in *Slovakia v Achmea* (the "**Respondent's Reply on Achmea**"), accompanied by legal authorities **RLA-419** through **RLA-436**.

121. On 17 December 2018 the Claimant submitted its Reply on the Impact of *Achmea* on the Tribunal's jurisdiction (the "**Claimant's Reply on Achmea**"), accompanied by legal authorities **CLA-295** through **CLA-301**.
122. On 11 January 2019, the Claimant submitted the **Claimant's Supplemental Submission on Costs** to the Registry and the Respondent filed the **Respondent's Updated Submission on Costs** with the Registry. On the same day, by agreement of the Parties, the Registry circulated the Parties' respective costs submissions to the other side and to the Tribunal.
123. By letter dated 28 January 2019, the Tribunal acknowledged receipt of the Parties' respective costs submissions and declared the hearings closed pursuant to Article 29(1) of the UNCITRAL Rules.

III. THE PARTIES' REQUESTS FOR RELIEF

A. THE CLAIMANT'S REQUESTS

125. In its Memorial (including Response on Jurisdiction), the Claimant requests the Tribunal to:

- (a) Declare that the Respondent's actions:
 - (i) constitute unfair and inequitable treatment and violate the obligation to provide full protection and security in breach of the ECT and the BIT;
 - (ii) were implemented through unreasonable and arbitrary measures which impaired the maintenance, use, enjoyment and disposal of the Claimant's investment in violation of the ECT and the BIT;
- (b) Order the Czech Republic to:
 - (i) compensate the Claimant for all losses caused to it by the Czech Republic's breaches, in an amount of not less than CZK 76.6 million (inclusive of pre-award interest);
 - (ii) pay to the Claimant post-award interest on any amount of damages awarded, from the date of the final award until its full payment; and
 - (iii) reimburse the Claimant for all costs and expenses of this arbitration, including legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and all other costs of the arbitration, including any expenses arising from the participation of third parties.¹¹

126. In its Reply Submission (including Rejoinder on Jurisdiction), the Claimant requests the Tribunal to:

- (a) Dismiss the jurisdictional objections raised by the Respondent;
- (b) Declare that the Respondent's actions:
 - (i) constitute unfair and inequitable treatment and violate the obligation to provide full protection and security in breach of the ECT and the BIT;
 - (ii) were implemented through unreasonable and arbitrary measures which impaired the maintenance, use, enjoyment and disposal of the Claimant's investment in violation of the ECT and the BIT;
- (c) Order the Czech Republic to:
 - (i) compensate the Claimant for all losses caused to it by the Czech Republic's breaches, in an amount of not less than CZK 72.5 million (inclusive of pre-award interest);

¹¹ Memorial, para. 514.

- (ii) pay to the Claimant post-award interest on any amount of damages awarded, from the date of the final award until its full payment; and
- (iii) reimburse the Claimant for all costs and expenses of this arbitration, including legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and all other costs of the arbitration, including any expenses arising from the participation of third parties.¹²

127. In its Rejoinder on Jurisdiction, the Claimant requests the Tribunal to:

- (a) Dismiss the jurisdictional objections raised by the Respondent;
- (b) Declare that the Respondent's actions:
 - (i) constitute unfair and inequitable treatment and violate the obligation to provide full protection and security in breach of the ECT and the BIT;
 - (ii) were implemented through unreasonable and arbitrary measures which impaired the maintenance, use, enjoyment and disposal of the Claimant's investment in violation of the ECT and the BIT;
- (c) Order the Czech Republic to:
 - (i) compensate the Claimant for all losses caused to it by the Czech Republic's breaches, in an amount of not less than CZK 68 million (inclusive of pre-award interest);
 - (ii) pay to the Claimant post-award interest on any amount of damages awarded, from the date of the final award until its full payment; and
 - (iii) reimburse the Claimant for all costs and expenses of this arbitration, including legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and all other costs of the arbitration, including any expenses arising from the participation of third parties.¹³

B. THE RESPONDENT'S REQUESTS

128. In its Respondent's Counter Memorial, the Respondent requests that the Tribunal:

- (a) Declare WAIEN's claims barred for lack of jurisdiction;
- (b) In the event it exercises jurisdiction over any of WAIEN's claims, declare that the Czech Republic did not breach any of its obligations under either the ECT or the BIT;
- (c) In the event that it exercises jurisdiction over any of WAIEN's claims and finds the Czech Republic liable, declare that WAIEN is not entitled to any damages;
- (d) Order WAIEN to pay all costs of the arbitration, including the totality of the Czech

¹² Reply, para. 946.

¹³ Rejoinder on Jurisdiction, para. 213.

Republic's legal and expert fees and expenses and the fees and expenses of the Tribunal, as well as the costs charged by the PCA; and

- (e) Award to the Czech Republic any such additional relief as it may consider just and appropriate.¹⁴

129. In its Respondent's Rejoinder, the Respondent requests that the Tribunal:

- (a) Declare all of WAIEN's claims barred for lack of jurisdiction;
- (b) In the event it exercises jurisdiction over any of WAIEN's claims, declare that the Czech Republic did not breach any of its obligations under either the ECT or the BIT;
- (c) In the event that it exercises jurisdiction over any of WAIEN's claims and finds the Czech Republic liable, declare that WAIEN is not entitled to any damages;
- (d) Order WAIEN to pay all costs of the arbitration, including the totality of the Czech Republic's legal and expert fees and expenses and the fees and expenses of the Tribunal, as well as the costs charged by the PCA; and
- (e) Award to the Czech Republic any such additional relief as it may consider just and appropriate.¹⁵

¹⁴ Counter-Memorial, para. 551.

¹⁵ Rejoinder, para. 650.

IV. STATEMENT OF FACTS

A. THE INTRODUCTION OF THE INCENTIVE REGIME FOR RENEWABLE ENERGY SOURCES (“RES REGIME”)

130. In 1992, the Czech Republic adopted Act No. 586/1992 on Income Tax (“**Act on Income Tax**”), which, according to the Claimant, was the first legislative step encouraging the use of renewable energy sources (“**RES**”), including photovoltaic plants. Through the Act on Income Tax, the Czech Republic implemented two relevant tax incentives. The first exempted RES producers from corporate income tax for the year in which the respective solar facility was put into operation and the following five calendar years (“**Tax Holiday**”).¹⁶ The second incentive introduced an accelerated depreciation period for tax purposes for certain components of, *inter alia*, photovoltaic installations.¹⁷
131. In December 1995, the EC (then called “the Commission of the European Communities”) published a white paper on the “Energy Policy for the European Union”, which aimed at encouraging the promotion of RES through tax benefits and other measures.¹⁸ In November 1997, the EC published another white paper entitled “Energy for the Future: Renewable Sources of Energy” stating that “[a] long-term stable framework for the development of renewable sources of energy, covering political, legislative, administrative, economic and marketing aspects is in fact the top priority for the economic operators involved in their development.”¹⁹
132. On 27 September 2001, following the publication of the two white papers, the European Parliament and the Council of the European Union adopted Directive 2001/77/EC on the promotion of electricity produced by RES in the internal electricity market (“**2001 Directive**”), aiming “to promote an increase in the contribution of [RES] to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof.”²⁰ In light of this objective, EU Member States were required to “take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with

¹⁶ Article 19(1)(d), Act No. 586/1992 (**Ex. C-18/R-1**). The English translations of the original sources in Czech submitted by the Parties differ. Where they differ, the Tribunal quoted from the English translation that is the most clear and comprehensive.

¹⁷ Act No. 586/1992, Section 30 and Annex 1 (**Ex. R-61a**).

¹⁸ White Paper: An Energy Policy for the European Union, COM (95) 682, December 1995 (**Ex. C-19**).

¹⁹ White Paper for a Community Strategy and Action Plan COM (97) 599, November 1997 (**Ex. C-203**).

²⁰ Article 1, Directive 2001/77/EC of the European Parliament and of the Council, 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (**Ex. C-20**).

[...] national indicative targets”²¹ and to “adopt and publish a report setting national indicative targets for future consumption of electricity produced from renewable energy sources in terms of percentage of electricity consumption for the next ten years.”²² The 2001 Directive also obliged Member States to “outline the measures taken or planned, at the national level, to achieve these national indicative targets” and to publish their success in meeting the targets.²³ The Annex to the 2001 Directive set out “[r]eference values for Member States’ national indicative targets for the contribution of electricity produced from renewable energy sources to gross electricity consumption by 2010.”²⁴

133. In late 2003, the Czech Republic prepared draft legislation that was aimed at increasing the support provided to RES producers.²⁵ An explanatory report on the draft legislation was dated 12 November 2003 (“**Explanatory Report**”).²⁶ The draft legislation was eventually adopted in March 2005 as Act No. 180/2005 Coll. (“**Act on Promotion**”). While not yet an EU Member State, the Czech Republic was already under an obligation to comply with EU law, including rules on State aid. On 16 December 2003, the Czech Society for Wind Energy and the Czech national section of the European Association for Renewable Energy (“**EUROSOLAR**”) filed a complaint with the EC in respect of the 2003 draft of the Act on Promotion in view of its alleged incompatibility with EU State aid law.²⁷
134. On 27 July 2004, having examined the complaint, the EC informed EUROSOLAR that the 2003 draft of the Act on Promotion, as it then was, “does not fall under the definition of State aid within the meaning of Article 87 (1) of the EC Treaty”.²⁸ The last paragraph of the letter read: “Should you learn of any new particulars that might demonstrate the existence of an infringement of the State aid rules, I would be grateful if you would inform my department as soon as possible”.²⁹
135. Upon its accession to the EU, on 1 May 2004, the Czech Republic assumed all obligations

²¹ Article 3(1), 2001 Directive (**Ex. C-20**).

²² Article 3(2), 2001 Directive (**Ex. C-20**).

²³ Article 3(3), 2001 Directive (**Ex. C-20**).

²⁴ Annex, 2001 Directive (**Ex. C-20**).

²⁵ Memorial, para. 37; Counter-Memorial, para. 13.

²⁶ Explanatory Report on the bill of the Act on Promotion, 12 November 2003 (extended version) (**Ex. C-78**).

²⁷ Memorial, para. 40, *referring to* Letters from the Czech Society of Wind Energy EUROSOLAR respectively to Mr. Monti and Mr. Loyola de Palacio, 16 December 2003 (**Ex. C-75**).

²⁸ Memorial, para. 42, *referring to* Letter from the EC to EUROSOLAR, 27 July 2004 (**Ex. C-77**).

²⁹ Letter from the EC to EUROSOLAR, 27 July 2004 (**Ex. C-77**).

deriving from EU legal instruments, including the 2001 Directive. In particular, Annex II – Energy, Part A of the 2003 EU Accession Treaty set the Czech Republic’s national target for the contribution of electricity produced from RES to the gross electricity consumption by 2010 at 8% (“**Indicative 2010 Target**”).³⁰

136. On 31 March 2005, the Czech Republic adopted the Act on Promotion, which entered into force on 1 August 2005.³¹ Section 1(2) of the Act on Promotion defined its objectives as follows:

Section 1
Subject Matter of Regulation

[...]

(2) The aim of this Act is to, in the interest of climate protection and environmental protection,

- a) promote the exploitation of renewable energy sources (“Renewable Sources”),
- b) ensure that the share of Renewable Sources in the consumption of primary energy sources continually increases,
- c) contribute to conservation in the exploitation of natural resources and to the sustainable development of society,
- d) put in place the conditions for achieving the indicative target so that the share of electricity produced from Renewable Sources accounts for 8% of gross electricity consumption in the Czech Republic in 2010 and to put in place the conditions for further increasing such share after 2010.

137. The Act on Promotion introduced new incentives for RES producers through a combination of tariff and non-tariff mechanisms including: (1) preferential treatment of RES producers in the distribution or transmission of electricity, (2) fixed purchase prices or Feed-in-Tariffs (“**FiT**”) and, alternatively, (3) Green Bonuses (“**Green Bonuses**”, and together with the FiT, “**Subsidies**” or “**Tariffs**”).³²

138. The preferential treatment of RES producers in the distribution or transmission of electricity enshrined in Section 4 of the Act on Promotion, provided, *inter alia*, for the obligation of the transmission grid operator and distribution system operators “to connect the facilities [...] to the transmission grid or distribution systems on a priority basis for the purpose of transmission or distribution of electricity from [RES]”, if a RES producer requests them to do so.³³

139. The FiT system obliged grid operators to purchase all electricity produced from RES on a priority basis and at a price annually determined by the Czech Energy Regulatory Office (“**ERO**”).³⁴

³⁰ Annex II – Energy, Part A of the 2003 EU Accession Treaty (**Ex. C-22**).

³¹ Counter-Memorial, para. 21, *referring to* Act on Promotion (**Ex. R-5**).

³² Memorial, para. 63, *referring to* Act No. 180/2005 Coll., 31 March 2005, on the promotion of electricity produced from renewable energy sources and amending certain acts (**Ex. C-26**).

³³ Section 4(1), Act on Promotion (**Ex. R-5**).

³⁴ Memorial, para. 65; Counter-Memorial, para. 21.

140. These tariff incentives were established by Section 6 of the Act on Promotion, which reads:

Section 6
Amounts of Prices for Electricity from Renewable Sources and
Amounts of Green Bonuses

- (1) The Office sets, one calendar year in advance, the purchasing prices for electricity from Renewable Sources (the “Purchasing Prices”), separately for individual kinds of Renewable Sources, and sets green bonuses, so that
 - a) the conditions are created for the achievement of the indicative target so that the share of electricity produced from Renewable Sources accounts for 8% of gross electricity consumption in 2010 and
 - b) for facilities commissioned
 1. after the effective date of this Act, there is attained, with the Support consisting of the Purchasing Prices, a fifteen year payback period on capital expenditures, provided technical and economic parameters are met, such parameters consisting of, in particular, cost per unit of installed capacity, exploitation efficiency of the primary energy content in the Renewable Source, and the period of use of the facility, such parameters being stipulated in an implementing legal regulation,
 2. after the effective date of this Act, the amount of revenues per unit of electricity from Renewable Sources, assuming Support in the form of Purchasing Prices, is maintained as the minimum [amount of revenues], for a period of 15 years from the commissioning year of the facility, taking into account the industrial producer price index; the commissioning of a facility is also deemed to include cases involving the completion of a rebuild of the technological part of existing equipment, a change of fuel, or the completion of modernization that raises the technical and ecological standard of an existing facility,
 3. prior to the effective date of this Act, there is maintained for a period of 15 years the minimum amount of Purchasing Prices set for the year 2005 in accordance with the legal regulations to date and taking into account the industrial producer price index.
- (2) When setting the amounts of green bonuses, the Office also takes into account a heightened degree of risk associated with off-taking electricity from Renewable Sources in the electricity market.
- (3) When setting Purchasing Prices and green bonuses, the Office proceeds on the basis of differing costs for the acquisition, connection and operation of individual types of facilities, including the development thereof [the development of such costs] over time.
- (4) Purchasing Prices set by the Office for the following calendar year shall not be less than 95% of the Purchasing Prices in effect in the year for which the setting decision is made. The provision of the first sentence shall not be used for setting the Purchasing Prices for the following calendar year for those types of Renewable Sources where the payback period on capital expenditures is shorter than 11 years in the calendar year in which the Office decides on the setting of the new Purchase Prices; When setting Purchase Prices, the Office proceeds in accordance with subsections 1 through 3.

141. Thus, pursuant to Article 6(1)(b)(1) of the Act on Promotion, RES producers were projected to recover their investment in RES plants within 15 years, provided that the installations met certain “technical and economic parameters”, including “cost per unit of installed capacity, exploitation efficiency of the primary energy content in the Renewable Source, and the period of use of the facility.” Article 6 of the Act on Promotion also introduced two restrictions on the ability of the ERO to change the tariffs. First, Article 6(1)(b)(2) provided that the established FiT would remain

the same for a period of 15 years subject to the industrial producer price index.³⁵ Second, under Article 6(4) of the Act on Promotion, the FiT set by the ERO in any given year was not allowed to be decreased by more than 5% of the value of the FiT in the previous year (“**5% rule**”).³⁶

142. In the same year in which the Act on Promotion entered into force, various governmental officials and entities of the Czech Republic promoted the Incentive Regime for RES producers and emphasised the importance of the guaranteed electricity purchase price on several occasions.³⁷ In particular, Mr. Martin Bursík, one of the co-authors of the Act on Promotion, who became Minister of Environment from 2007 to 2009, stated in his article dated 1 June 2005 that the most important principle of the Act on Promotion was “the guarantee of a stable feed-in tariff for a 15-year period following the launch of the power station into operation.”³⁸
143. According to Article 6(1)(b)(1) of the Act on Promotion, the indicative technical and economic parameters for the fixing of the FiT were to be established by implementing regulations issued by the ERO.
144. By Regulation No. 475/2005 Coll. (“**Technical Regulation**”) dated 30 November 2005 and amended in 2007 and 2009, the ERO set out the general technical and economic parameters in order for newly installed plants to achieve the 15-year payback period provided by Article 6(1)(b)(1) of the Act on Promotion.³⁹ Section 4 of the Technical Regulation stated that:

In order for the 15-year pay-back period to be assured through the support by Purchase Prices [*FiT*] of electricity produced from renewable sources, technical and economic parameters of an installation producing electricity from renewable sources must be satisfied, where the producer of electricity from renewable sources shall achieve, with the given level of Purchasing Prices

- a) an adequate return on invested capital during the total life of the installation, such return to be determined by the weighted average cost of capital (WACC), and

³⁵ Hearing Transcript (27 February 2017), 21:4-6, 197:19-24.

³⁶ Memorial, paras. 67-68; Counter-Memorial, para. 28.

³⁷ Memorial, paras. 89-99, *referring to* The State will support renewable energy, 23 February 2005 (**Ex. C-25**); Fourth National Communication of the Czech Republic on the UN Framework Convention on Climate Change of 2005 (**Ex. C-68**); “National Renewable Energy Action Plan” (**Ex. C-69**); and Comments by the Ministry of Finance to the draft Act No. 310/2013 Coll. (**Ex. C-86**).

³⁸ Hearing Transcript (27 February 2017), 21:7-11, *Claimants’ counsel referring to* Bursik M., *Obnovitelne zdroje: Novy zakon je príležitosťi pro moderni obec*, 1 June 2005 (**Ex. C-32**).

³⁹ Technical Regulation (**Ex. R-6**); ERO Regulation No. 475/2005 Coll. (**Ex. C-28**); ERO Regulation No. 364/2007 Coll. (**Ex. C-29**); ERO Regulation No. 409/2009 Coll. (**Ex. C-30**); Hearing Transcript (27 February 2017), 22:18-22.

- b) the net present value of the cash flows after tax over the total life of the installation, using a discount rate equal to WACC, at least equal to zero.⁴⁰
145. In 2007 and until the end of 2010, ERO set the weighted average cost of capital (“**WACC**”) level used to calculate the FiT at 7%.⁴¹ It moreover applied the maximum 5% annual Tariffs reduction required by Section 6(4) of the Act on Promotion.⁴² Furthermore, it amended the Technical Regulation in 2007, confirmed in 2009, to fix the estimated lifetime of new photovoltaic plants at 20 years.⁴³ The period during which the FiT would apply was correspondingly extended from 15 to 20 years.⁴⁴
146. In 2009, the ERO issued Regulation No. 140/2009 Coll. (“**Pricing Regulation**”), Article 2(9) of which provided for an annual increase of the FiT:
- Feed-in tariffs and Green bonuses stipulated by the Act on Promotion are applied throughout the estimated lifetime of plants determined by the regulation implementing some provisions of the Act on Promotion. The Feed-in tariffs increase annually throughout the lifetime of the plant classified in the respective category depending on the type of the renewable resource used and the date of launch into operation with respect to the industrial producers’ price index by a minimum of 2% and maximum of 4%, with the exception of biomass and bio gas burning plants.⁴⁵
147. The above regulation thus established that payment of the FiT and Green Bonuses was guaranteed throughout the estimated lifetime of photovoltaic power plants and the FiT was to increase annually by a minimum of 2% and a maximum of 4% “taking into account the inflation price index for industrial producers over the lifetime of the plant.”⁴⁶
148. According to the Claimant, the ERO was still promoting the Incentive Regime at the beginning of 2008. On 27 February 2008, Mr. Rostislav Krejcar, the ERO’s head of department for RES, made a presentation on the Incentive Regime, which was attended by Mr. Pavel Čapek, who was

⁴⁰ Technical Regulation (**Ex. R-6**).

⁴¹ Memorial, para. 69; Counter-Memorial, para. 34, *referring to* Methodology for Determination of Purchasing Prices and Green Bonuses (**Ex. C-218/R-62**).

⁴² Counter-Memorial, para. 66, *referring to* FiT Statement, para. 11.

⁴³ Memorial, para. 81 *and* Respondent’s Counter-Memorial, para. 36 *both referring to* ERO Regulation No. 364/2007 Coll. (**Ex. C-29**); Explanatory note to the draft ERO Regulation No. 364/2007 (**Ex. C-83**). The Claimant also refers to ERO Regulation No. 409/2009 Coll. (**Ex. C-30**).

⁴⁴ Counter-Memorial, para. 37.

⁴⁵ ERO Regulation No. 149/2009 Coll., Article 2(9) (**Ex. C-31**).

⁴⁶ Memorial, paras. 82-83, *referring to* ERO Regulation No. 140/2009 Coll., Article 2(9) (**Ex. C-31**).

employed by the Claimant as Chief Technology Officer in charge of the solar projects.⁴⁷ The presentation stated, *inter alia*, that “purchase prices and green bonuses are applied throughout the life time of electricity producers [...] photovoltaic power [*plants*] 20 years (since 1.1.2008)” and that “[d]uring the life time of electricity production plant the purchase prices shall be increased with regards to increasing the Industrial Producers’ Price Index at least by 2% and a maximum of 4%, with the exception of biomass and biogas”.⁴⁸

149. According to the Claimant, the Act on Promotion, the relevant ERO regulations and the Act on Income Tax jointly established the incentive regime, which offered investments in the photovoltaic sector the FiT or alternatively Green Bonuses, the Income Tax Exemption and the Shortened Depreciation Period (the “**Incentive Regime**”).⁴⁹ The Respondent has a different understanding, namely that the regime provided by the Czech Republic was not photovoltaic-focused. According to this view, while the Act on Promotion and the relevant ERO regulations provided an incentive scheme as to the entire RES by granting either the FiT or the Green Bonuses, the Income Tax Exemption and the Shortened Depreciation Period did not constitute part of it.
150. On 15 October 2009, Mr. Krejcar delivered another presentation concerning the Incentive Regime. Although it is unclear whether this presentation was attended by any of the Claimant’s representatives or employees, the information contained therein was made available to the Claimant.⁵⁰ That presentation is depicted by the Respondent as a warning to the investors regarding the upcoming changes in the Incentive Regime.⁵¹ In particular, the presentation stated that “the economic return [...] at the current prices is in conflict with the guaranteed return pursuant to the law and is almost half” of the 15-year period.⁵² At the same time, as noted by the Claimant, the presentation provided that “[p]urchase prices and green bonuses are applied for the

⁴⁷ First Witness Statement of Mr. Jiří Chroustovský, dated 15 June 2015 (“**First Chroustovský Statement**”), paras. 13, 34, *referring to* ERO Presentation by Mr. Rostislav Krejcar, 27 February 2008 (**Annex XIII to First Chroustovský Statement**).

⁴⁸ ERO Presentation by Mr. Rostislav Krejcar, 27 February 2008, slide 7 (**Annex XIII to First Chroustovský Statement**).

⁴⁹ Reply, paras. 6-10.

⁵⁰ Second Witness Statement of Mr. Jiří Chroustovský, dated 30 March June 2016 (“**Second Chroustovský Statement**”), para. 10.

⁵¹ Counter-Memorial, para. 102.

⁵² “Legislative Environment and the Promotion of the Electricity Produced from Photovoltaic Power Plants in 2009,” ERO Presentation, 15 October 2009 (**Ex. R-156**); Hearing Transcript (28 February 2017), 93:15-22.

entire estimated useful life of power plants”, similarly to the abovementioned ERO presentation in February 2008.⁵³

151. In late 2008, as explained by the Claimant, the Czech solar energy sector became particularly attractive for foreign investors, due to the decrease in prices of photovoltaic components.⁵⁴

B. THE CLAIMANT’S INVESTMENT IN THE CZECH REPUBLIC

152. The Claimant was incorporated in Cyprus at the beginning of 2007.⁵⁵ It was founded and owned at all times by Czech nationals.⁵⁶

153. On 29 October 2008, the Claimant decided to invest in the Czech solar business through the acquisition of, and equity contributions in, a Czech limited liability company, Lambreti Estates s.r.o., which was renamed SolarOne s.r.o. (“**SolarOne**”) upon its acquisition.⁵⁷ In particular, on 1 December 2008, the Claimant purchased from Corporate Consulting a.s. the entire share capital of SolarOne for EUR 9,643.⁵⁸ On 21 January 2009, the Claimant made an equity contribution of EUR 390,000 to SolarOne.⁵⁹ In August 2009, the Claimant provided a further EUR 2,708,000 equity contribution to SolarOne, which was finally paid by 14 September 2009.⁶⁰ On 3 November 2009, Mr. Chroustovský acquired a 10% stake in SolarOne for CZK 20,000.⁶¹

154. In 2009, SolarOne acquired two Czech special purpose vehicles (the “**SPVs**”) with a view to constructing two solar plants.⁶² On 27 August 2009, SolarOne purchased from Mr. Szolony 90%

⁵³ “Legislative Environment and the Promotion of the Electricity Produced from Photovoltaic Power Plants in 2009,” ERO Presentation, 15 October 2009 (**Ex. R-156**); Hearing Transcript (28 February 2017), 93:15-22.

⁵⁴ Hearing Transcript (27 February 2017), 24:22-24. *See also* Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009 (**Ex. C-106**), in which Mr. Fiřt stated: “photovoltaic plants have seen a sharp decline in specific investment costs by approx. 30%.”

⁵⁵ WAIEN’s commercial register (**Ex. C-16**).

⁵⁶ Hearing Transcript (28 February 2017), 68:8-12.

⁵⁷ Memorial, paras. 108-109, *referring to* Decision of the Claimant’s Investment Committee, 29 October 2008 (**Annex XI to First Chroustovský Statement**) Annex XI and SolarOne’s commercial register (**Ex. C-50**).

⁵⁸ Memorial, para. 114, *referring to* Agreement on transfer of business shares between Corporate Consulting a.a., as seller, and the Claimant, as buyer, 1 December 2008 (**Ex. C-89**).

⁵⁹ Memorial, para. 114, *referring to* Resolution of the general meeting of SolarOne in the form of notarial deed, 15 January 2009 (**Ex. C-90**).

⁶⁰ Memorial, para. 115, *referring to* Resolution of the general meeting of SolarOne in the form of a notarial deed, 5 August 2009 (**Ex. C-91**).

⁶¹ Memorial, para. 108, *referring to* Agreement on transfer of business shares between the Claimant, as seller, and Mr. Chroustovský, as buyer, 3 November 2009 (**Ex. C-92**); Counter-Memorial, para. 144.

⁶² Memorial, paras. 110, 118.

of the share capital of Tomsan s.r.o. (“**Tomsan**”) for CZK 74,350.⁶³ On the same day, Mr. Chroustovský purchased the remaining 10% from Mr. Szolony for CZK 1;⁶⁴ the Claimant was given a call option upon these remaining shares to be exercised within 20 years.⁶⁵ This transaction was concluded because the Czech Commercial Code prevented a sole shareholder from holding 100% in a limited liability company until 1 January 2014 when this rule was abolished.⁶⁶

155. The shareholdings in Tomsan were rebalanced on the day of the share purchase, *i.e.* 27 August 2009, so that 1% was assigned to Mr. Chroustovský and 99% to SolarOne.⁶⁷ On 3 November 2009, SolarOne purchased Mr. Chroustovský’s 1% stake in Tomsan for CZK 1.⁶⁸ Consequently, Tomsan is entirely controlled by SolarOne. On 29 December 2009, SolarOne purchased from Union Lesní Brána a.s. the entire share capital of Sluneční park Dubí (“**Sluneční**”) for CZK 2,200,000.⁶⁹ In the meantime, *i.e.* in November 2009, Mr. Chroustovský had acquired 10% of the SolarOne shares, which he continues to own but upon which the Claimant has a call option.⁷⁰ On 25 May 2016 the Claimant sold its 90% interest in Solar One shares to Mr. Jan Černý.⁷¹
156. According to the Claimant the investment is “sunk” when the SPV is acquired and when the Engineering, Procurement and Construction contract is concluded “so that the Claimant puts the money in the project”.⁷² Tomsan entered into the contract on 4 September 2009, whereas Sluneční signed the contract on 8 April 2010.⁷³ The solar panels for Tomsan were purchased on

⁶³ Memorial, para. 119, *referring to* Agreement on transfer of a part of business share between Mr. Szolony, as seller, and SolarOne, as buyer, 27 August 2009 (**Ex. C-94**); Counter-Memorial, para. 143.

⁶⁴ Memorial, para. 120, *referring to* Agreement on transfer of a part of business share between Mr. Szolony, as seller, and Mr. Chroustovský, as buyer, 27 August 2009 (**Ex. C-95**).

⁶⁵ Memorial, para. 116; Reply, para. 353, *referring to* Agreement on transfer of business shares between the Claimant, as seller, and Mr. Chroustovský, as buyer, 3 November 2009 (**Ex. C-92**).

⁶⁶ Reply, para. 353.

⁶⁷ Memorial, para. 120, *referring to* Resolution of the general meeting of Tomsan, 27 August 2009 (**Ex. C-96**).

⁶⁸ Memorial, para. 120, *referring to* Agreement on transfer of business share between Mr. Chroustovský, as seller, and SolarOne, as buyer, 3 November 2009 (**Ex. C-97**).

⁶⁹ Memorial, para. 121, *referring to* Agreement on transfer of business share between Union Lesní Brána, as seller, and SolarOne, as buyer, 3 November 2009 (**Ex. C-98**); Counter-Memorial, paras. 143, 160.

⁷⁰ Rejoinder, paras. 485-486.

⁷¹ Share transfer agreement between WAIEN and Mr. Černý, 25 May 2016 (**Ex. R-399**); Price agreement between WAIEN and Mr. Černý, 25 May 2016 (**Ex. R-397**).

⁷² Hearing Transcript (27 February 2017), 41:8-11 (Claimant’s opening statement).

⁷³ Novy Jičín – EPC Contract, 4 September 2009 (**Ex. C-101**); Dubí – EPC contract, 8 April 2010 (**Ex. C-106**).

7 September 2009, whereas the solar panels for Sluneční were obtained on 2 June 2010.⁷⁴

157. The licensing process to build and operate the solar power plants comprised the following steps:

- a) application to a regional grid operator for connection to the grid;
- b) issuance by the grid operator of a binding statement contained in a preliminary contract, confirming that the grid could sustain a given electricity input and that a grid connection agreement would be concluded within 180 days;
- c) entry into a grid connection agreement with the grid operator;
- d) application to the ERO for the energy production license; and
- e) entry into a power purchase agreement with the grid operator.⁷⁵

C. AMENDMENTS TO THE RES REGIME THAT RESULTED IN THE ALLEGED VIOLATIONS OF THE CLAIMANT’S RIGHTS UNDER THE BIT AND/OR THE ECT

158. The events described below unfolded in the following political context in the Czech Republic. In March 2009, the government of the then-incumbent Prime Minister Mr. Mirek Topolánek resigned after a vote of no confidence.⁷⁶ In May 2009, a temporary government led by the new Prime Minister Jan Fischer was sworn in.⁷⁷ This temporary government was in power for more than a year. During that period, it undertook not to “open any politically contentious, polarising issues during its term in office” and not to “submit to the Chamber of Deputies any politically or ideologically polarising legislative proposals”.⁷⁸ Only in July 2010 was the new government finally formed, following the elections that were scheduled for October 2009, but were postponed by the Czech Constitutional Court until May 2010.⁷⁹

159. In June 2009, while the temporary government was still in power, the Czech media reported about “the ongoing solar boom” in the Czech solar energy sector and quoted Mr. Josef Fiřt, the then head of the ERO, according to whom “[t]he solar electricity feed-in tariff has gone in some instances economically beyond the limit as the distributors are forced to enhance power lines,

⁷⁴ Agreement for the purchase of PV modules between ROAD International Co. Ltd. and TOMSAN s.r.o., 7 September 2009 (**Ex. R-231**); Purchase Agreement for PV Panels between Sluneční park Dubí s.r.o. and ETL-Ekotherm a.s., 2 June 2010 (**Ex. R-232**).

⁷⁵ Memorial, paras. 123-128.

⁷⁶ Hearing Transcript (27 February 2017), 156:19-21.

⁷⁷ Hearing Transcript (27 February 2017), 156:19-21.

⁷⁸ Fischer Government Policy Statement (2009) (**Ex. R-130**).

⁷⁹ Hearing Transcript (27 February 2017), 156:21-157:3.

which makes electricity more expensive for consumers.”⁸⁰ Therefore, as further reported by the Czech media, the ERO was “seeking ways to reduce the solar energy feed-in tariff dramatically.”⁸¹ However, as reported, under the existing laws, the ERO was not allowed to “lower the RES electricity feed-in tariff by more than 5% per year. This is why it [was] trying to agree an amendment to the rules with the government and members of parliament.”⁸²

160. On 25 June 2009, a new EU directive 2009/28/EC dated 23 April 2009 replaced the 2001 Directive with the aim of establishing a common framework for the promotion of energy from RES (“**2009 Directive**”).⁸³ The 2009 Directive fixed the Czech Republic’s new target for the contribution of electricity produced from RES at 13% by 2020 (“**2020 target**”).⁸⁴ Its preamble furthermore stated that “[o]ne important means to achieve the aim of this Directive is to guarantee the proper functioning of national support schemes, as under Directive 2001/77/EC, in order to maintain investor confidence and allow Member States to design effective national measures for target compliance”.⁸⁵
161. Between July 2008 and August 2009, the ERO sent several letters to the Ministry of Industry and Trade regarding the situation in the Czech solar energy sector.⁸⁶ On 4 July 2008, Mr. Fiřt sent a letter to the Deputy Minister of Industry and Trade emphasizing that grid operators would have to make significant investments into infrastructure in view of the increased number of requests for connection to the grid.⁸⁷ By letter dated 1 July 2009, Mr. Fiřt informed the Minister of Industry and Trade that investors in the photovoltaic energy were put at “an unprecedented advantage over investors and producers of other types of renewable resources” due to the decreased cost of investment.⁸⁸ Mr. Fiřt also stressed that the on-going growth in the photovoltaic

⁸⁰ “State wants to stop solar power plants boom” (e15.cz), 19 June 2009 (**Ex. R-310**). See also Hearing Transcript (27 February 2017), 150:4-22.

⁸¹ “State wants to stop solar power plants boom” (e15.cz), 19 June 2009 (**Ex. R-310**).

⁸² “State wants to stop solar power plants boom” (e15.cz), 19 June 2009 (**Ex. R-310**).

⁸³ Directive 2009/28/EC of the European Parliament and the Council of 23 April 2009 on the promotion of the use of energy from renewable sources amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (**Ex. C-23**).

⁸⁴ Memorial, para. 33.

⁸⁵ Memorial, para. 32, referring to 2009 Directive, Preamble, para. 25 (**Ex. C-23**).

⁸⁶ Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009 (**Ex. C-115**); Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Hüner (Deputy Minister of Industry and Trade), 4 July 2008 (**Ex. C-114**); Letter from B. Němeček to R. Portužak, 10 August 2009 (**Ex. R-136**).

⁸⁷ Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Hüner (Deputy Minister of Industry and Trade), 4 July 2008 (**Ex. C-114**).

⁸⁸ Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009 (**Ex. C-115**).

sector “leads to a speculative block of connection capacities at the level of the distribution systems” and ultimately would result in a significant financial burden on Czech customers.⁸⁹ In view of these considerations, Mr. Fiřt proposed to repeal the 5% rule so that the ERO would be allowed to adjust the FiT.⁹⁰ By letter dated 10 August 2009, Mr. Blahoslav Němeček, vice-chairman and director of the regulatory section of the ERO, informed Mr. Roman Portužák, acting director of the electric power department at the Ministry of Industry and Trade, that Mr. Fiřt “had already approached the minister of industry and trade [...] and [...] received a positive response expressing readiness of the MIT to cooperate” on the amendments to the Act on Promotion.⁹¹

162. On 24 August 2009, the Ministry of Industry and Trade issued a press release communicating its intention to abolish the 5% rule starting from 1 January 2010 since “the grant policy from the part of the state [in the photovoltaic sector] has ceased to fulfil its primary function, because support for solar power stations has shifted from an area of necessary state support for its existence to the position of a branch where profit is guaranteed regardless of the situation on the market.”⁹²
163. On 28 August 2009, Mr. Portužák (MIT) sent to Mr. Němeček (ERO) a letter acknowledging the “huge” growth in the solar energy sector and the future unsustainability of the existing regulatory regime.⁹³ At the same time, Mr. Portužák noted “the goal of section 6(4) [of the Act on Promotion] was to ensure the investors in renewable sources certainty of payback of their investments, transparency, and predictability. A simple cancellation could thus entail a risk of suits filed by investors against the Czech Republic on grounds of lost investment.”⁹⁴ Mr. Portužák further stated that the MIT “is preparing the implementation of the 2009 Directive into the Czech legislation” meaning that amendments to the existing regulatory regime would “require longer

⁸⁹ Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009 (**Ex. C-115**).

⁹⁰ Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009 (**Ex. C-115**).

⁹¹ Letter from B. Němeček to R. Portužák, 10 August 2009 (**Ex. R-136**).

⁹² “Ministry of Industry and Trade will Equalize the Support of Renewable Energy Sources,” Ministry of Industry and Trade Press release, 24 August 2009 (**Ex. R-138**). *See also* “Ministry of Industry and Trade wants to reduce support of solar power plants,” *Pravo*, 25 August 2009 (**Ex. R-139**); P. Gabal, “Is there any danger of reduction of support for solar power plants?” *Radio Praha–Ekonomika*, 3 September 2009 (**Ex. R-140**); “Photovoltaic Power Plants – Installed Capacity in 2009, Preliminary Estimate,” Czech RE Agency, 2009, p. 2 of the English translation (**Ex. R-141**).

⁹³ Letter from R. Portužák (MIT) to B. Němeček (ERO), 28 August 2009 (**Ex. R-145**).

⁹⁴ Letter from R. Portužák (MIT) to B. Němeček (ERO), 28 August 2009 (**Ex. R-145**).

- time” and would “exceed the time limit for ERO’s obligation to set purchasing prices for RES to be commissioned in 2010”.⁹⁵
164. By letter dated 8 September 2009, Mr. Fiřt informed Mr. Vojř, Chairman of the Economic Committee of the Chamber of Deputies, that the 5% rule needed to be amended.⁹⁶ The same letter enclosed a legislative draft enabling the ERO to disregard the 5% rule when setting the purchase prices for 2011 and thereafter “for those types of renewable resources, for which an investment return of less than eleven years is achieved in the year, in which a decision is made on the new purchase prices”.⁹⁷ Mr. Fiřt also noted that “[i]nvestors will be able to prepare sufficiently in advance for the change in the conditions for investing which should eliminate entirely the risk of possible lawsuits in the Czech Republic regarding protection of investments.”⁹⁸
165. On 16 November 2009, the Government introduced to Parliament an explanatory report on draft Act No. 137/2010 essentially reflecting the legislative draft and the explanations provided by Mr. Fiřt to Mr. Vojř in the aforementioned letter dated 8 September 2009.⁹⁹
166. On the same day, during the Government’s press conference, Mr. Vladimř Tořovskř (Minister of Industry and Trade) clarified that the Incentive Regime would remain unchanged for 2010. Mr. Tořovskř further explained that draft Act No. 137/2010 would reduce the incentive only from 2011, because some investors had already invested in on-going projects and the change of “the terms and conditions under which they invested in the course of the development [...] could pose a threat to their investment.”¹⁰⁰
167. In February 2010, the Czech national transmission system operator put a national moratorium on further reservation of capacity of the grid for future connections.¹⁰¹
168. By open letter to Parliament dated 12 March 2010, distribution companies, namely ČEZ, a.s., E. ON Czech Holding AG and PRE., a.s. urged the Chamber of Deputies to take a decision on

⁹⁵ Letter from R. Portuřak (MIT) to B. Nřmeřek (ERO), 28 August 2009 (**Ex. R-145**).

⁹⁶ Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Vojř (Chairman of the Economic Committee of the Chamber of Deputies), 8 September 2009 (**Ex. C-116**).

⁹⁷ Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Vojř (Chairman of the Economic Committee of the Chamber of Deputies), 8 September 2009 (**Ex. C-116**).

⁹⁸ Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Vojř (Chairman of the Economic Committee of the Chamber of Deputies), 8 September 2009 (**Ex. C-116**).

⁹⁹ Explanatory Report to Draft Act No. 137/2010 Coll. 16 November 2009 (**Ex. R-147**).

¹⁰⁰ Czech Government’s press conference, 16 November 2009 (**Ex. C-111**).

¹⁰¹ Counter-Memorial, paras. 78-80, *referring to* Letter from Mr. Fiřt to Mr. Tořovskř, 1 July 2009 (**Ex. C-115**); and Fiřt Statement, para. 21.

the proposed amendments to the Act on Promotion during its March session, noting that the RES support “should be set fairly, to guarantee a long-term return on investment, not excessive profits.”¹⁰²

169. On 17 March 2010, Parliament adopted Act No. 137/2010, amending the Act on Promotion by abolishing from 1 January 2011 the 5% rule “for those types of renewable resources, which, in the year in which the new feed-in tariffs are being determined, achieve the investment return shorter than 11 years.”¹⁰³ According to the Claimant, this amendment concerned only those plants that were connected to the grid after 2011.¹⁰⁴
170. In July 2010, in accordance with Article 4 of the 2009 Directive, the Czech Ministry of Industry and Trade published a “National Renewable Energy Action Plan”, providing a roadmap of how the Czech Republic planned to attain its 2020 target for the contribution of renewable energies to its energy consumption (“**2010 Action Plan**”).¹⁰⁵ The 2010 Action Plan, *inter alia*, mentioned tax exemptions as part of the incentive scheme.¹⁰⁶ It also confirmed the FiT level for plants connected in 2010 and its 20-year duration of the guaranteed FiT.¹⁰⁷ Furthermore, the 2010 Action Plan approved an increase in PV generation capacity for 2010 and stated that there were no caps on either the total volume of electricity produced per year or of installed capacity that was entitled to the FiT.¹⁰⁸
171. Also in July 2010, the Prime Minister and the Minister of Environment of the Czech Republic announced to the press their intentions to cope with the solar boom by altering the existing fiscal

¹⁰² Letter from electricity companies (ČEZ, E.ON and PRE) to the Chamber of Deputies, 12 March 2010 (**Ex. R-152**).

¹⁰³ Act No. 137/2010 Coll. (**Ex. C-36**).

¹⁰⁴ Memorial, para. 135.

¹⁰⁵ National Renewable Energy Action Plan, published by the Ministry of Industry and Trade, July 2010 (**Ex. C-69**). *See also* Hearing Transcript (27 February 2017), 30:15-25, 31:1-25, 162:16-25, 163:1-2.

¹⁰⁶ National Renewable Energy Action Plan, published by the Ministry of Industry and Trade, July 2010, pp. 50-51 (**Ex. C-69**); Hearing Transcript (27 February 2017), 30:15-25, 31:1-25.

¹⁰⁷ National Renewable Energy Action Plan, published by the Ministry of Industry and Trade, July 2010, pp. 58-59 (**Ex. C-69**).

¹⁰⁸ National Renewable Energy Action Plan, published by the Ministry of Industry and Trade, July 2010, pp. 58, 77 (**Ex. C-69**). The Czech Ministry of Finance subsequently noted the following with respect to the 2010 Action Plan in its comments to the draft Act. No. 310/2013 Coll. (Comments by the Ministry of Finance to draft Act No. 310/2013 Coll. (**Ex. C-86**): “Given the Importance of the National Action Plan and its relevance for investors doing business in the sectors concerned, and in view of the litigation strategy for any potential disputes, please be advised that the values defined in the Plan have to be met.”

regime.¹⁰⁹

172. On 15 September 2010, the Government submitted to Parliament draft Act No. 330/2010 in which it proposed to withdraw subsidies from all but the smallest solar installations.¹¹⁰ The draft Act provided, *inter alia*, that “[p]hotovoltaic power plants already connected to the electric power system will have their right to claim support preserved under existing conditions”.¹¹¹ A week later, the Government instructed the Minister of Industry and Trade and the Minister of Environment to create a coordination committee in order to prepare “an analysis of the impacts of support for renewable resources on energy prices and potential proposals for resolution of the matter”.¹¹²
173. In the course of October 2010, the Government submitted to Parliament draft legislation amending the Act on Income Tax and the Act on Promotion to introduce a subsidy to be provided by the Czech Republic to the grid operators.¹¹³ The draft legislation contained, *inter alia*, the following provision: “[t]he right to receive Support for the production of electricity from sources using energy from solar radiation that are connected to the transmission grid or distribution system, as such right arises under existing legal regulations, shall be maintained”.¹¹⁴
174. On 20 October 2010, the Government stated on its website that the discussion regarding measures preventing an increase of electricity prices had been closed and one of the measures “will be represented by the introduction of a levy at the rate of 26% from electricity produced from solar radiation in facilities put into operation in 2009 and 2010”.¹¹⁵
175. On 2 November 2010, the Economic Committee of the Chamber of Deputies of the Parliament of the Czech Republic adopted a resolution recommending the Chamber of Deputies to adopt

¹⁰⁹ “Commentary: Solar Boom Will Cost us Dearly. There is Still Time for Changes” (IDNES.cz), 22 July 2010 (**Ex. R-205**); P. Novotný, “The Minister of Environment Wants to Tax Solar Power Plants,” *Mlada Fronta Dnes*, 23 July 2010 (**Ex. R-206**).

¹¹⁰ Explanatory Report to Draft Act No. 330/2010 Coll., 15 September 2010 (**Ex. R-193**).

¹¹¹ Explanatory Report to Draft Act No. 330/2010 Coll., 15 September 2010 (**Ex. R-193**).

¹¹² Resolution of the Government of the Czech Republic from 22 September 2010 No. 681, with Submission Report (**Ex. R-212**).

¹¹³ Government Document No. 145/10, Government proposal of an act amending the Act on Promotion (**Ex. R-317**); Explanatory Report on Act No. 402/2010 Coll. (**Ex. R-14**); Explanatory Report to Draft Act No. 346/2010 Coll. (**Ex. R-114**).

¹¹⁴ Article II, Government Document No. 145/10, Government proposal of an act amending the Act on Promotion (**Ex. R-317**).

¹¹⁵ Government of the Czech Republic, “Electricity prices will increase by 5.5% at maximum” (vlada.cz), 20 October 2010 (**Ex. R-219**).

draft legislation amending the Act on Promotion. The resolution enclosed draft legislation which, in addition to the subsidies to the grid operators proposed by the Government, envisaged the introduction of a levy on “electricity produced from solar radiation during the period from 1 January 2011 to 31 December 2013 in facilities commissioned during the period from 1 January 2009 to 31 December 2010”.¹¹⁶

176. In November-December 2010, the Czech Parliament adopted Act No. 330/2010 Coll., Act No. 346/2010 Coll., and Act No. 402/2010 Coll., which amended the Act on Promotion and the Act on Income Tax and implemented the following changes to the RES regime with effect from 1 January 2011:

- a) Act No. 330/2010 Coll. amended Article 3(5) of the Act on Promotion and abolished any incentives for photovoltaic plants with installed output exceeding 30 kWp that were commissioned after 1 March 2011.¹¹⁷ This Act is not one of the measures challenged in this arbitration as it did not affect the installations put into operation before March 2011;
- b) Act No. 346/2010 Coll. repealed the Tax Holiday and the accelerated depreciation period guaranteed by the Act on Income Tax;¹¹⁸
- c) Act No. 402/2010 Coll. introduced the levy on “electricity produced from solar radiation during the period from 1 January 2011 to 31 December 2013 in facilities commissioned during the period from 1 January 2009 to 31 December 2010” (“**Solar Levy**”).¹¹⁹ The Solar Levy was imposed on RES producers. However, transmission grid operators or regional distribution system operators were responsible for making the payment of the Solar Levy.¹²⁰ The rate of the Solar Levy was set at 26% and 28% for payments to solar energy producers respectively under the FiT system and under the Green Bonuses system respectively.¹²¹

177. In 2012-2013 the RES regime was further amended by Act No. 165/2012 Coll. and Act No. 310/2013 Coll.

¹¹⁶ Chamber of Deputies of the Parliament of the Czech Republic, Chamber Material No. 145/1 of 2010 (**Ex. R-352**).

¹¹⁷ Explanatory Report to Draft Act No. 330/2010 Coll., 15 September 2010, p. 8 (**Ex. R-193**).

¹¹⁸ Act 346/2010, 12 November 2010 (**Ex. R-28**).

¹¹⁹ Section 7(a), Act No. 402/2010 Coll., amending the Act on Promotion, by introducing the Solar Levy and Government subsidies for partial financing of the RES Scheme, 14 December 2010 (**Ex. R-268**).

¹²⁰ Section 7(b), Act No. 402/2010 Coll., amending the Act on Promotion, by introducing the Solar Levy and Government subsidies for partial financing of the RES Scheme, 14 December 2010 (**Ex. R-268**).

¹²¹ Section 7(e), Act No. 402/2010 Coll., amending the Act on Promotion, by introducing the Solar Levy and Government subsidies for partial financing of the RES Scheme, 14 December 2010 (**Ex. R-268**).

178. Act No. 165/2012 Coll., which entered into force partly upon its publication on 30 May 2012, and partly thereafter on 1 January 2013, replaced the Act on Promotion (“**New Act on Promotion**”).¹²² First, the New Act on Promotion terminated all existing contracts between RES producers and the grid operators that provided for the payment of FiT or Green Bonuses as of 31 December 2012. RES producers that intended to maintain entitlement to the FiT were compelled to enter into new non-negotiable supply contracts with “Mandatory Purchasers” chosen by the Czech Ministry of Industry and Trade.¹²³ These Mandatory Purchasers were affiliates of the three distribution system operators.¹²⁴ Second, Act No. 165/2012 introduced an obligation to pay the “negative electricity hourly price”, which was designed to be paid to the Mandatory Purchasers by RES operators entitled to the FiT or to be deducted from the payable FiT by the Mandatory Purchasers, if the price of electricity on the daily market had a negative value, *i.e.*, when the grid was experiencing a surplus, causing the market price to turn negative.¹²⁵ Third, Act No. 165/2012 introduced certain recycling fees for the disposal of photovoltaic panels.¹²⁶ At the same time, the New Act on Promotion did not affect the tariffs guaranteed to the existing installations under the Act on Promotion.¹²⁷
179. On 13 September 2013, Act No. 310/2013 Coll. entered into force. This Act extended the Solar Levy’s application after 31 December 2013 and reduced the Solar Levy to 10% for payments received under the FiT system and to 11% for payments received under the Green Bonuses system.¹²⁸
180. On 5 November 2013, the Czech Deputy Minister of Industry and Trade, Mr. Pavel Šolc, announced that the Czech Republic planned to amend Act No. 165/2012 Coll., stating that there would be introduced:

[...] a new testing mechanism. For bigger power plants, where the volume of the promotion exceeds the amount of EUR 200,000 in 3 years, after a certain time period we will examine whether the beneficiaries of the promotion make unreasonable profit or not,

¹²² Act No. 165/2012 Coll. (**Ex. C-39**).

¹²³ Memorial, para. 155.

¹²⁴ Counter-Memorial, para. 230.

¹²⁵ Memorial, para. 155; Counter-Memorial, para. 155.

¹²⁶ Memorial, para. 156; Counter-Memorial, paras. 233-235.

¹²⁷ Memorial, para. 153; Counter-Memorial, para. 228.

¹²⁸ Article 1(9), Act No. 310/2013 Coll. (**Ex. C-113**).

which would have an adverse effect on the market.¹²⁹

181. On 14 February 2014, the new Czech government announced its plans to “review the renewable energy sources promotion system in order to decrease its impacts on the competitiveness of the Czech industry and to support all the efforts leading to rigorous investigation of the promotion payable to the existing photovoltaic power plants.”¹³⁰
182. In accordance with Article 6(1) of the Act on Promotion and Article 4(7) of Act No. 165/2012 Coll., the ERO, by virtue of an annual “Price Decision”, sets the level of FiT and Green Bonuses applicable to RES plants to be connected in the following year and the 2% to 4% yearly FiT increase applicable to plants connected in the previous years.¹³¹ On 19 November 2015, the ERO issued Price Decision No. 5/2015, which set the FiT applicable as of 1 January 2016 only to plants commissioned from 2013 to 2015, but not to plants put into operation from 2006 to 2012, including the plant of the Claimant, thereby effectively repealing the FiT altogether.¹³²
183. On 28 December 2015, the Czech Government adopted Regulation No. 402/2015, which overruled ERO Price Decision No. 5/2015 and provided that the incentives to RES plants commissioned before 2013 must be paid, pending any decision by the EC on their compliance with EU state aid law.¹³³ In response, on 29 December 2015, the ERO issued Price Decision No. 9/2015, setting FiT and Green Bonuses for RES plants commissioned since 2006, including the Claimant’s plant.¹³⁴

D. REVIEW OF THE RESPONDENT’S AMENDMENTS TO THE RES REGIME BY THE CZECH COURTS

184. Following the introduction of the Solar Levy and the abolition of the Income Tax Provisions, a group of Czech senators (“**Petitioners**”) brought a challenge to the Czech Constitutional Court, seeking the annulment of these measures.¹³⁵
185. The Petitioners asserted that these measures violated a number of Czech and international legal

¹²⁹ Memorial, para. 165 *referring to* announcement of 5 November 2013 by the then Czech Deputy Minister of Industry and Trade Mr. Pavel Šolc (**Ex. C-72**).

¹³⁰ Memorial, para. 166 *referring to* Policy Statement, 14 February 2014 (**Ex. C-73**).

¹³¹ Reply, para. 245, *referring to* various ERO Price Decisions.

¹³² Reply, para. 246, *referring to* ERO Price Decision No. 5/2015 of 19 November 2015 (**Ex. C-230**).

¹³³ Reply, para. 253, *referring to* Government Regulation No. 402/2015 Coll., 21 December 2015 (**Ex. C-239**).

¹³⁴ Reply, para. 253, *referring to* ERO Price Decision No. 9/2015, 29 December 2015 (**Ex. C-241**).

¹³⁵ Czech Constitutional Court, Case No. Pl. ÚS 17/11, 15 May 2012, paras. 88-89 (**Ex. CLA-12/R-110**) (“**May 2012 Constitutional Court Judgment**”).

norms, including the right to property, the right to engage in an enterprise and conduct a business, the principle of the rule of law, and the principle of equality before the law.¹³⁶ With respect to the Solar Levy, the Petitioners argued that solar investors:

received very significant assurances from state authorities that they could expect [...] revenues from the production of energy under the framework of the regime stipulated by such Act, and such Act did not stipulate that certain of such producers would face a levy obligation [...] Such expectations constituted legitimate expectations.¹³⁷

186. According to the Petitioners, the withdrawal of the Income Tax Provisions, constituted:

a case of arbitrariness on the part of lawmakers, since they could have opted for a *vacatio legis* period long enough to give the relevant taxpayer that began their entrepreneurial activities at any time during the period when the previously existing legal regulation was in effect the ability to use the tax exemption on an equal footing and for the same period of time.¹³⁸

187. In response to the Petitioners' complaint, and upon invitation by the Czech Constitutional Court, the Czech Government, including the ERO, and both houses of the Czech Parliament, made submissions opposing the complaint.¹³⁹

188. On 15 May 2012, the Czech Constitutional Court upheld the measures, finding that neither the introduction of the Solar Levy nor the withdrawal of the Income Tax Provisions violated the Czech Constitution as long as Czech law provided for mechanisms to mitigate any "strangling" or "suffocating" effects.¹⁴⁰

189. Having recapitulated the arguments put to it, the Czech Constitutional Court stated, *inter alia*, that:

The Constitutional Court has not ignored the fact that it had been the state that guaranteed, by means of a law, a fifteen-year payback period on investment and a certain amount of revenues per unit of electricity produced from renewable sources, thereby motivating the affected entities to undertake entrepreneurial activities in the area of energy production from renewable sources.¹⁴¹

190. The Czech Constitutional Court concluded, *inter alia*, that:

¹³⁶ May 2012 Constitutional Court Judgment, para. 2 (Ex. CLA-12/R-110).

¹³⁷ May 2012 Constitutional Court Judgment, para. 6 (Ex. CLA-12/R-110).

¹³⁸ May 2012 Constitutional Court Judgment, para. 8 (Ex. CLA-12/R-110).

¹³⁹ May 2012 Constitutional Court Judgment, paras. 14-22 (Ex. CLA-12/R-110).

¹⁴⁰ May 2012 Constitutional Court Judgment, paras. 88-89 (Ex. CLA-12/R-110).

¹⁴¹ May 2012 Constitutional Court Judgment, para. 86 (Ex. CLA-12/R-110).

The principle of legal certainty cannot be viewed as being identical to a requirement of absolute unchangeability of legal regulation, since legal regulation is subject to, among other things, social and economic changes and the requirement of ensuring that the state budget remains stable.¹⁴²

191. Following the May 2012 Constitutional Court Judgment, individual photovoltaic investors brought proceedings against their tax administrations, alleging that, in their particular case, the Solar Levy had a “strangling effect” on them.¹⁴³ By late 2013, several cases reached the Czech Supreme Administrative Court as the highest Czech Court competent in taxation matters, which denied all claims, noting, *inter alia*, that “[t]he Constitutional Court’s instruction to take liquidating effects of the solar power levy into account in individual cases can only be carried out under current legislation using the institute of tax remission pursuant” to the Tax Procedure Code.¹⁴⁴
192. On 10 July 2014, the Czech Supreme Administrative Court ruled that the Solar Levy was “in nature a decrease in governmental subsidy and not a tax” and therefore it did not cause double taxation on the income of solar electricity producers.¹⁴⁵
193. On 18 September 2014, in response to the May 2012 Constitutional Court Judgment, the Czech Financial Administration stated as follows:

Producers potentially affected by the individual effect of the solar levy found by the Constitutional Court to be “strangling” have been and are able to at least mitigate, if not fully eliminate, its impact using standard tools [*e.g.* tax deferral or payment in instalments] under the Tax Administration Law.¹⁴⁶

E. THE EC’S DECISIONS ON COMPATIBILITY OF THE RES REGIME WITH EU STATE AID LAW

194. On 8 January 2013, the Czech Republic notified the EC that it had passed the New Act on Promotion (“**First Notification**”).¹⁴⁷
195. On 12 June 2014, the EC issued its decision that the financial support foreseen by the New Act on Promotion was granted directly from the State budget and, therefore, involved State aid, but

¹⁴² May 2012 Constitutional Court Judgment, para. 85 (**Ex. CLA-12/R-110**).

¹⁴³ Counter-Memorial, para. 228.

¹⁴⁴ Grand Chamber of the Czech Supreme Administrative Court, Case No. 1 Afs 76/2013-57, 17 December 2013, para. 59 (**Annex 13 to Frýzek Report**).

¹⁴⁵ Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 17, 20 (**Ex. CLA-2**).

¹⁴⁶ “Solution to Potential Individual Liquidating Effects of Levy on Electricity Generated from Solar Radiation,” Financial Administration Press Release (financnisprava.cz), 18 September 2014 (**Ex. R-196**).

¹⁴⁷ Reply, para. 392.

that, by virtue of an exemption, the incentives were still compatible with the internal market.¹⁴⁸

196. On 11 December 2014, the Czech Republic filed with the EC a second notification of the RES support mechanisms in respect of RES plants commissioned before 1 January 2013 (“**Second Notification**”).¹⁴⁹ Upon this notification, the EC opened another preliminary examination into the compatibility of the Incentive Regime with EU State aid law as it was applied between 2006 and 2012.¹⁵⁰

197. On 28 November 2016, in response to the Second Notification, the EC decided as follows:

The Commission regrets that the Czech Republic put the aid measure in question into effect in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

However, it has decided, on the basis of the foregoing assessment, not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.¹⁵¹

¹⁴⁸ EC’s Communication on EU State Aid Modernisation, 8 May 2012 (**Ex. R-83**).

¹⁴⁹ Reply, para. 397.

¹⁵⁰ Memorial, para. 52.

¹⁵¹ EC Decision on State Aid, 28 November 2016 (**Ex. R-411**).

V. THE JURISDICTION OF THE TRIBUNAL

198. The Respondent argues that the Tribunal lacks jurisdiction over all claims brought by the Claimant.¹⁵²

199. The Claimant contends that the Tribunal has jurisdiction over the claims it has brought.¹⁵³

200. The Parties' respective arguments are set out in detail in the sections which follow.

A. WHETHER THE CLAIMANT IS AN "INVESTOR" WITHIN THE MEANING OF THE BIT

1. The Respondent's Position

201. The Respondent argues that, pursuant to Article 8 of the BIT, the jurisdiction of the Tribunal is confined to disputes involving an investor of the other Contracting Party. Under the definition of investor set out in Article 1(2), an investor may be a legal person of a Contracting Party,¹⁵⁴ which, according to Article 1(2)(b), is an entity "incorporated or constituted in accordance with, and recognized as a legal person by its laws, having the permanent seat in the territory of that Contracting Party".¹⁵⁵ According to the Respondent, the Claimant does not meet the required condition of having a permanent seat in Cyprus.¹⁵⁶ It follows, so says the Respondent, that the Claimant is not an investor within the meaning of the BIT.¹⁵⁷

202. The Respondent argues that the Claimant's explanation as to why it is seated in Cyprus ignores the "*effet utile*" of the jurisdictional requirement by conflating the concepts of permanent seat and registered offices.¹⁵⁸ In particular, the Respondent submits that the Greek-language version of the BIT, in which "permanent seat" is preceded by "and", lends further support to its interpretation.¹⁵⁹

¹⁵² Rejoinder, paras. 335, 336.

¹⁵³ Reply, paras. 490-492, *noting* that the Respondent abandoned its initial objection based on an alleged lack of jurisdiction *ratione temporis*.

¹⁵⁴ Rejoinder, para. 436.

¹⁵⁵ Rejoinder, para. 437; Hearing Transcript (3 March 2017), 142:17-143:1.

¹⁵⁶ Rejoinder, para. 437.

¹⁵⁷ Rejoinder, para. 464; Hearing Transcript (3 March 2017), 142:10-12.

¹⁵⁸ Rejoinder, para. 440.

¹⁵⁹ Hearing Transcript (3rd March 2017), 143:5-15.

203. In order to determine whether an investor has a permanent seat in a host country, the Respondent argues in favour of a test which, as held in *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Venezuela*, takes into account the ordinary meaning of the term as the place of actual or effective management and not merely that of registration.¹⁶⁰ The Respondent submits that this test is applicable to the present circumstances because the Claimant's incorporation under Cypriot law requires a registered office¹⁶¹ and the BIT's requirements in respect of both incorporation and seat in the definition of investor must be satisfied.¹⁶² In addition, this test is consistent with the purpose of BITs in general, as exemplified by the decision in *Alps Finance and Trade AG v. Slovakia* and the object and purpose of the BIT.¹⁶³
204. The Respondent contends that, contrary to the Claimant's argument that it is a mere holding company that cannot reasonably be expected to maintain extensive offices, the Claimant is indeed required to demonstrate that it is effectively managed from Cyprus by reference to its actual activities on the date it consented to arbitration.¹⁶⁴ Otherwise, an incentive to create opaque corporate layers to ensure treaty coverage would be created, which would defeat the BIT's purpose.¹⁶⁵
205. The Respondent argues that the Claimant has failed to demonstrate that on 10 June 2011, the date it consented to arbitration, its effective administration took place in Cyprus.¹⁶⁶ It says that the Claimant has failed to satisfy a number of requirements, as set out below.
206. The Respondent notes that the Claimant does not appear to have its own offices in Cyprus and does not pay (and has not paid) rent for any premises in Cyprus.¹⁶⁷ To the extent that the Claimant asserts that it uses the offices of Worthald Partners, the Respondent notes that this is an advisory firm involved in the Claimant's investment decisions and which is managed by Mr.

¹⁶⁰ Rejoinder, paras. 441, 444, referring to *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, paras. 144-154 (**Ex. CLA-161**) ("*Tenaris*"). Hearing Transcript (3 March 2017), 145:5-8.

¹⁶¹ Rejoinder, para. 442, referring to Companies Law, Cap. 113, § 102(1) and (2) (**Ex. RLA-335**).

¹⁶² Rejoinder, para. 443, referring to *Tenaris*, paras. 147, 150 (**Ex. CLA-161**).

¹⁶³ Rejoinder, para. 444, referring to *Alps Finance and Trade AG v. Slovakia*, Award, 5 March 2011, para. 226 (**Ex. CLA-16**) ("*AFT*").

¹⁶⁴ Rejoinder, paras. 445-447, referring to *Tenaris*, para. 200 (**Ex. CLA-161**); *Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 223 (**Ex. RLA-38**) ("*Eureko*").

¹⁶⁵ Rejoinder, para. 447.

¹⁶⁶ Rejoinder, para. 449, referring to *Tenaris*, para. 216 (**Ex. CLA-161**).

¹⁶⁷ Rejoinder, para. 452.

Chroustovský.¹⁶⁸ Mr. Chroustovský is a Czech national and resident, and a shareholder in, and member of the Investment Committee of, the Claimant.¹⁶⁹ Further, Worthald's address in Cyprus is also the registered address of numerous other companies, two of which serve as the Claimant's sole director and corporate secretary, respectively.¹⁷⁰

207. As for meetings of the board of directors, the Claimant refers to a plurality of Cypriot directors, but the only entity that features as being represented in the minutes is CCY Management, which is part of the Citco Group of Companies. CCY Management offers an array of services, including corporate secretarial services such as attending meetings. The Respondent considers it likely that CCY Management, as the Claimant's sole Cypriot director, is a nominee director affiliated with Citco, and that the alleged regular meetings of the Claimant's director at the registered office were routinely held meetings constitutive of services provided by Citco.¹⁷¹ As for meetings of the shareholders allegedly held at the Claimant's seat, Mr. Milorad Vujnovic, a director for CCY Management, signed by proxy on behalf of the Claimant's three Czech shareholders.¹⁷²
208. So far as the Claimant's managers are concerned, the Claimant failed to demonstrate that Mr. Chroustovský, Mr. Petr. Sýkora and Mr. Jan Černý, all Czech nationals and residents, are located in Cyprus.¹⁷³ Similarly, the Claimant provided no evidence that it has any employees in Cyprus. Indeed, if there were any, it appears that they were in the Czech Republic.¹⁷⁴
209. In the context of the Claimant's sale of its interest in SolarOne in 2010, the Respondent also notes that the Claimant provided as contact details in a sale flyer, among others, Worthald Partners' Prague address, to which reference has also been made in the prospective buyers' correspondence.¹⁷⁵ No evidence has been provided at all by the Claimant as to the whereabouts

¹⁶⁸ Rejoinder, para. 450, *referring to* First Chroustovský Statement, paras. 5, 24.

¹⁶⁹ Rejoinder, para. 450, *referring to* First Chroustovský Statement, paras. 1, 24.

¹⁷⁰ Rejoinder, para. 452.

¹⁷¹ Rejoinder, paras. 453-454.

¹⁷² Rejoinder, para. 455, *referring to* Minutes of the meetings of the Claimant's shareholders, 26 May 2011 and 12 March 2012 (**Ex. C-253**).

¹⁷³ Rejoinder, para. 456.

¹⁷⁴ Rejoinder, para. 457.

¹⁷⁵ Rejoinder, para. 458, *referring to* "Sale flyer" prepared by Worthald Partners in October 2010 (**Annex XIV to First Chroustovský Statement**); E-mail correspondence between Mr. Jiří Chroustovský and Mr. Martin Masat (KPMG Ceska republika, s.r.o.), p. 2 (**Annex XVI to First Chroustovský Statement**); Purchase offer presented by REN Power CZ, a.s., 16 June 2011, p. 1 (**Annex XVII to First Chroustovský Statement**).

of its management records.¹⁷⁶ Moreover, the Claimant's tax returns show that it neither owns nor rents property in Cyprus.¹⁷⁷ Contrary to its assertion, the Claimant has also not submitted any evidence, except for an audit by a third-party Cypriot firm, to prove that its seat is in Cyprus.¹⁷⁸ While it apparently filed tax returns in Cyprus in 2009 and 2010, there is no record that the Claimant made any payment of taxes in Cyprus in those years.¹⁷⁹

210. According to the Respondent, the Claimant's use of a bank account with a Cypriot bank amounted to a "momentarily funnelling" of "Czech funds". It points to certain transactions involving millions of Euros, the source of which is redacted, and which appear to correspond to sums accruing to the Claimant's directors and shareholders, deposited in September 2009 in the Cypriot bank account and promptly transferred back to SolarOne.¹⁸⁰
211. The Respondent further contends that the Claimant has not even established that it had a registered office in Cyprus, which is the requirement under the standard it advocates. The Respondent argues that a certificate of incorporation furnishes no conclusive evidence as to the existence of a registered office.¹⁸¹

2. The Claimant's Position

212. The Claimant contends that it has a "permanent seat" in Cyprus and is consequently a "foreign investor" under the BIT.¹⁸²
213. According to the Claimant, in order to qualify as a Cypriot investor, it is sufficient to maintain a registered office in Cyprus. Under Article 1(2)(b) of the BIT, a "registered office" is the same as a "seat", as held in *Tokios Tokelès v. Ukraine* and *Total v. Argentina* in relation to similar

¹⁷⁶ Rejoinder, para. 459.

¹⁷⁷ Rejoinder, para. 460, *referring to* WAIEN Income Tax Return for 2009 (**Ex. C-250**); WAIEN Income Tax Return for 2010 (**Ex. C-251**).

¹⁷⁸ Rejoinder, para. 461.

¹⁷⁹ Rejoinder, para. 462, *referring to* WAIEN Income Tax Return for 2009 (**Ex. C-250**); WAIEN Income Tax Return for 2010 (**Ex. C-251**).

¹⁸⁰ Rejoinder, para. 463, *referring to* Bank account statement issued on 29 January 2009 (**Annex XXVIII to Second Chroustovský Statement**); Bank account statement issued on 29 September 2009 (**Annex XXIX to Second Chroustovský Statement**); WAIEN Income Tax Return for 2009, item 2.3.7 (**Ex. C-250**).

¹⁸¹ Hearing Transcript (3 March 2017), 145:9-25.

¹⁸² Reply, paras. 485-486.

- provisions.¹⁸³ The Claimant argues that the fulfilment of this requirement is evidenced by the certificate issued by the Registrar of Companies of Nicosia on 29 September 2010.¹⁸⁴
214. The Claimant further contends that, even if it were considered a “shell company”, it would remain entitled to the protection afforded by the BIT, since the requirement of a seat is merely formal and a stringent economic nexus to Cyprus need not be established.¹⁸⁵ It says this contention finds support in Article 63(2) of EU Regulation 1215/2012, whereby “statutory seat”, as applied to Cyprus, Ireland and the United Kingdom, is regarded as equivalent to “registered office”.¹⁸⁶
215. The Claimant also relies upon the absence in the BIT of any express exclusion from investment treaty protection in the case of entities lacking substantive connection to their place of incorporation, as observed in Cypriot and Czech investment treaty practice. The Claimant adds that Cypriot law, which is relevant to determine the ordinary meaning of “seat”, does not recognize the concept of “real seat” (*siege réel*).¹⁸⁷
216. In addition, the Claimant contends that it is a Cypriot investor, even if it were accepted that for it to have a seat in Cyprus it must have its central management or administration there. The Claimant submits that it operates in Cyprus, as evidenced by the facts that (1) it holds a bank account with a Cypriot bank, used to transfer funds to SolarOne; (2) its financial statements are audited by Cypriot accountants; (3) it pays taxes in Cyprus; (4) it has Cypriot directors regularly meeting at its registered office; and (5) its shareholders also regularly hold meetings at the seat.¹⁸⁸
217. In this connection, the Claimant argues that the Respondent’s reliance on *Alps Finance and Trade v. Slovak Republic* is inapposite, since the BIT does not contain, unlike the Swiss-Slovak Republic BIT, any provision requiring that “real economic activities” be carried out by an investor in order to establish that it has a seat in the asserted jurisdiction.¹⁸⁹ By reference to the position of the tribunal in *Tenaris* with respect to holding companies, the Claimant submits that

¹⁸³ Reply, paras. 487-490, referring to *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 43 (Ex. CLA-159) (“*Tokios Tokelès*”); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006, para. 57 (Ex. CLA-160) (“*Total Decision on Jurisdiction*”).

¹⁸⁴ Reply, para. 491, referring to WAIEN’s commercial register (Ex. C-16).

¹⁸⁵ Rejoinder on Jurisdiction, paras. 168-172.

¹⁸⁶ Rejoinder on Jurisdiction, paras. 153-162, referring to Regulation (EU) No. 1215/2012, 12 December 2012, Articles 24, 63(2) (Ex. C-280).

¹⁸⁷ Rejoinder on Jurisdiction, paras. 145-152.

¹⁸⁸ Reply, para. 492.

¹⁸⁹ Reply, para. 493.

protection under the BIT is not conditional on evidence of extensive management responsibilities. On the contrary, given that Cypriot legislation favours the establishment of holding companies in its territory and that such companies were not excluded from protection under the BIT, evidence that the Claimant's shareholders' and board of directors' meetings were held in Cyprus is sufficient to prove that the Claimant had its seat in Cyprus.¹⁹⁰

218. Furthermore, the Claimant contests the Respondent's objections that the Claimant was not a foreign investor and that, by commencing the present proceedings, it abused international investment protection.¹⁹¹ According to the Claimant, the nationality of the shareholders is irrelevant and an entity controlled by nationals of the host state may qualify as investor.¹⁹² In this vein, the Claimant argues that nationality planning is permitted under international law, insofar as it occurred before a dispute was remotely foreseeable. It does not constitute abusive "forum shopping".¹⁹³ Thus, the Claimant fulfils the requirements to qualify as a protected investor under the BIT as well as under the ECT.¹⁹⁴

3. The Tribunal's Decision

219. The Tribunal notes that considerable disagreement exists between the Parties as to whether the Claimant qualifies as an "investor" under the BIT.¹⁹⁵ In this regard, the main question which divides the Parties appears to be whether having a "registered office" is sufficient for a legal entity incorporated under the laws of one of the Contracting Parties to the BIT to fulfil the requirement of "having the permanent seat in the territory of that Contracting Party" pursuant to Article 1(2)(b) of the BIT.¹⁹⁶ Despite the fact that the Tribunal finds jurisdiction under the ECT, which does not contain the requirement of a permanent seat, it must decide this question as it relates to the Tribunal's jurisdiction, *rationae personae*, under the BIT.
220. The Tribunal is not persuaded that the Claimant qualifies as an "investor" under the BIT. In particular, for the reasons more fully explored below, the Tribunal finds itself in agreement with

¹⁹⁰ Reply, paras. 494-499.

¹⁹¹ Reply, paras. 500-501.

¹⁹² Reply, paras. 502-508, *referring inter alia to Tokios Tokelès*, para. 36 (Ex. CLA-159).

¹⁹³ Reply, paras. 509-514.

¹⁹⁴ Reply, para. 518.

¹⁹⁵ Rejoinder, paras. 437, 464; Hearing Transcript (3 March 2017), 142:10-12; Reply, paras. 485-486.

¹⁹⁶ Rejoinder, para. 437; Reply, paras. 487-490. The Parties also disagree as to whether a certificate of incorporation is sufficient to establish the existence of a registered office. *See* Hearing Transcript (3rd March 2017), 145:9-25; Reply, para. 491.

the Respondent to the extent that the latter argues that a registered office is insufficient to satisfy the requirement of “having the permanent seat” set out in Article 1(2)(b) of the BIT.

221. The Tribunal recalls that the interpretation of Article 1(2)(b) of the BIT is governed by the customary international law rules of treaty interpretation as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. This is not disputed by the Parties. A series of key propositions flow from these VCLT provisions.
222. As a preliminary matter, the Tribunal considers that the interpretation of the BIT, including Article 1(2)(b) thereof, is governed exclusively by international law. Reference to domestic law, including the internal laws of the Contracting Parties to the BIT, is to be made only if, and to the extent, permitted by international law (as would be the case, for example, if the BIT contained an express *renvoi*).
223. As Article 31 of the VCLT provides, the first step of the interpretative exercise entails consideration of the ordinary meaning of the terms of the BIT provision, considered in their context and in the light of the treaty’s object and purpose. The treaty practice of the Parties to the BIT and other acts which are a source of obligations for the Parties to the BIT, such as EU regulations, may be taken into account “together with the context” of the BIT, to the extent that they set out, or are grounded upon, “relevant rules of international law applicable in the relations between the parties” pursuant to Article 31(3)(c) of the VCLT.
224. If the text of a provision of the BIT comprises some elements which justify a *renvoi* to domestic law, and some which do not, the Tribunal does not consider it appropriate to refer to domestic law for all purposes of its interpretation. In particular, where a provision of the BIT has a separable grammatical structure, those elements that do not require a *renvoi* to domestic law must retain their autonomous meaning under international law, whereas those (separable) elements that envisage a *renvoi* must be approached differently.¹⁹⁷
225. On the basis of the above preliminary considerations, the Tribunal now turns to the interpretation of Article 1(2)(b) of the BIT and the Parties’ arguments in support of their respective positions.
226. Article 1(2)(b) of the BIT, it will be recalled, provides as follows:
- The term “legal person” shall mean, with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as legal person by its laws, having the permanent seat in the territory of the Contracting Party.

¹⁹⁷ *Orascom TMT Investments S.à r.l. Claimant v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, para. 278, referring to “[t]he grammatical and syntactic structure of the provision and the context in which the term *siège social* is employed”.

227. The Tribunal finds it useful to analyse the text of the provision in terms of its grammatical structure and syntactical features, before proceeding to establish the content of the elements of the definition it sets out.
228. The opening part of Article 1(2)(b) of the BIT contains the *definiendum*, or object, namely the term “legal person”.¹⁹⁸ The remainder of the sentence concerns the *definiens* and is composed of three elements, as follows: (1) “any entity incorporated or constituted in accordance with,” (2) “and recognized as legal person by its laws,” (3) “having the permanent seat in the territory of the Contracting Party.” The first two phrases are of an equal nature, which follows from the use of the conjunction “and”, and both are jointly qualified by the third phrase.
229. Given this structure, the Tribunal finds that there are three cumulative conditions which must be satisfied by “any entity” in order to qualify as an “investor” under the BIT.¹⁹⁹ The Tribunal also notes that the fact that the three elements are cumulative is not contested by the Parties.
230. As for the first two elements, the Tribunal notes that Article 1(2)(b) subjects both the incorporation or constitution of a legal entity and the recognition of the legal entity to the internal law of the respective Contracting Party.
231. As for the third element, namely “having the permanent seat”, the Tribunal observes that the term “seat” is employed in a qualified manner, as part of the phrase “having the permanent seat in the territory of that Contracting Party.” While a *renvoi* to domestic law governing the incorporation or constitution of a legal entity and its recognition as a legal person is required, the interpretation and application of the third element does not require such a *renvoi*. Notably, this approach is consistent with that taken by the tribunal in *Orascom TMT Investments S.à r.l. Algeria*.²⁰⁰
232. In connection with the third element, the Parties disagree as to (1) whether an effective interpretation of the BIT must lead to the conclusion that the third element differs from, and adds to, the requirements set out in the two first elements; and – if so – (2) the content of the third element.

¹⁹⁸ The full opening phrase of the sentence’s main, and only, clause is as follows: “[t]he term “legal person” shall mean, with respect to either Contracting Party, [...]”.

¹⁹⁹ Rejoinder, para. 437; Hearing Transcript (3 March 2017), 142:17 to 143:1.

²⁰⁰ *Orascom TMT Investments S.à r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, para. 278.

233. The Parties have invoked a number of decisions in support of their respective positions on these issues. Whereas the Respondent has relied extensively on the decision in *Tenaris*,²⁰¹ the Claimant has based its reasoning upon the decisions in *Tokios Tokelès* and *Total*.²⁰² More particularly, the Respondent has advanced what it considers to be the ordinary meaning of the phrase “permanent seat”, as construed in light of the object and purpose of the BIT, of its *effet utile* and of investment treaties in general.²⁰³ In contrast, to substantiate its position that a registered office is sufficient, the Claimant relies on the ordinary meaning of “seat”, the investment treaty practice of the Parties to the BIT, the use in relation to Cyprus of “statutory seat” as equivalent to “registered office” in Article 63(2) of EU Regulation 1215/2012, and Cypriot domestic law.²⁰⁴
234. In the Tribunal’s view, on a proper analysis, the element of Article 1(2)(b) that requires an autonomous interpretation, without recourse to domestic law, has not been satisfied in this case.
235. The Tribunal first observes that, contrary to the Claimant’s submission, the enquiry mandated by the BIT on this issue does not involve Cypriot law. As noted above, while a *renvoi* is expressly made in connection with the incorporation or constitution and recognition elements set out in Article 1(2)(b) of the BIT, this *renvoi* does not extend to the third element in issue here. Hence, the alleged non-recognition of the concept of “real seat” in Cypriot law has no bearing on the Tribunal’s determination of the content of the requirement of “having the permanent seat” in Cyprus. This is a requirement autonomous and independent from Cypriot law.
236. Likewise, the Tribunal disagrees with the Claimant’s contention that the requirement of “having the permanent seat” in Cyprus is to be interpreted as co-extensive with the concept of a “statutory seat” and, in particular, with the place of office registration as provided for in Article 63(2) of EU Regulation 1215/2012. The definition of “legal person” under the BIT is a matter of international law. While an EU regulation may be taken into account, together with the context of Article 1(2)(b) of the BIT, in the present case, given the specific features of Article 1(2)(b) of the BIT, the Tribunal does not consider the definition in Article 63(2) of EU Regulation 1215/2012 relevant to its enquiry.

²⁰¹ Rejoinder, para. 448(a)-(i) *referring to Tenaris*, para. 224(a)-(j) (**Ex. CLA-161**).

²⁰² Reply, paras. 487-490, *referring to Tokios Tokelès*, para. 43 (**Ex. CLA-159**); *Total* Decision on Jurisdiction, para. 57 (**Ex. CLA-160**).

²⁰³ Rejoinder, paras. 440-444, *referring to Alps Finance and Trade AG v. Slovakia*, Award, 5 March 2011 (**Ex. CLA-16**).

²⁰⁴ Rejoinder on Jurisdiction, paras. 145-162.

237. As to the precise meaning of the requirement of “having the permanent seat”, under Article 1(2)(b) of the BIT, the Tribunal agrees with the *Tenaris* tribunal’s approach, albeit rendered in different circumstances.
238. In *Tenaris*, the tribunal interpreted and applied two provisions. First, Article 1(1)(b) of the Portugal-Venezuela BIT, which employs the term “seat” (“*sede*”) without any qualification.²⁰⁵ Second, Article 1(B) of the Belgium/Luxembourg-Venezuela BIT, which uses “seat” in a qualified manner, as part of the phrase “corporate seat” (“*siège social*”).²⁰⁶ The *Tenaris* tribunal held that both the text of the provisions and the principle of effectiveness required that the “seat” requirement, whether qualified or not, be given effect, so that it would necessarily mean something different from, and additional to, incorporation, and thus more than registration, which is merely a formal aspect of incorporation. It reasoned further that this additional meaning would be coextensive with the requirement that “seat” be where “actual or genuine corporate activity” takes place, which amounts to the place of “actual or effective management” of the legal entity.²⁰⁷
239. In line with this analysis, the Tribunal also concludes that “seat” must mean more than mere registration or incorporation. This all the more so in the present BIT, given that the text of Article 1(2)(b) further qualifies the use of “seat” by adding an additional requirement of permanency. The text of the provision therefore strongly indicates that the requirement of “having the permanent seat” must have a meaning separate from the requirements of incorporation or constitution of a legal entity and recognition of the legal entity as a legal person.
240. This finding is consistent with the object and purpose of the BIT as stipulated in its preamble. In particular, the Tribunal’s reading of Article 1(2)(b) of the BIT is consistent with the intention of the Contracting Parties “to maintain conditions favourable to investments of investors of one Contracting Party in the territory of the other Contracting Party”.²⁰⁸ It thus ensures that investment protection is reciprocal, by requiring that a legal entity of one Contracting Party is

²⁰⁵ Article 1(1)(b) of the Portugal-Venezuela BIT (in Portuguese), reads, in its relevant parts, as follows: “[...]. *As pessoas colectivas [...] que tenham sede numa das Partes Contratantes e estejam constituídas e funcionem de acordo com a lei dessa Parte Contratante [...]*”.

²⁰⁶ Article 1(B) of the Portugal-Venezuela BIT (in Portuguese), reads, in its relevant parts, as follows: “*les «societes, c’est-à-dire toute personne morale constituée conformément à la législation du Royaume de Belgique, du grand-duché de Luxembourg ou de la République du Venezuela et ayant son siège social sur le territoire du Royaume de Belgique; du grand-duché de Luxembourg ou de la République du Venezuela respectivement [...]*”.

²⁰⁷ *Tenaris*, paras. 150, 151, 154 (Ex. CLA-161).

²⁰⁸ BIT, Preamble, para. 3 (Ex. C-2).

accorded treaty protection only if, among other criteria, it is more than merely incorporated or registered in the territory of the other Contracting Party.²⁰⁹

241. The Claimant has submitted, in the alternative to its main argument, that, even if it were considered a “shell company”, it would remain entitled to treaty protection as an “investor” given the absence of a “denial of benefits” provision excluding entities lacking a substantive connection from treaty protection. Further, and in any case, the Claimant argues that it does have a seat in Cyprus. The Tribunal is unpersuaded on both counts.
242. The Claimant’s first submission relies on a reading whereby the context of the provision, *i.e.*, the absence of a specific kind of clause in the remainder of the treaty, would trump the express text of the BIT. This is an impermissible approach to treaty interpretation. But in any event, such a reading would take no account of the fact that “denial of benefits” provisions tend only to apply to a legal entity that qualifies as an “investor” under the treaty in the first place, albeit one controlled by “third-country nationals”.²¹⁰ Hence, to the extent that a company without substantive connection to Cyprus is not an “investor” under the BIT, reasoning based on the absence of a “denial of benefits” provision in the BIT is of no assistance.
243. As to the Claimant’s second submission, in the Tribunal’s view the Claimant has not demonstrated that it has its “permanent seat” in Cyprus. According to the *Oxford Dictionary*, as also from obvious standard usage, the adjective “permanent” applies to a state of affairs “[l]asting or intended to last or remain unchanged indefinitely”, and, in particular, one which is “[l]asting or continuing without interruption.”²¹¹
244. On the basis of the totality of evidence and submissions before it, the Tribunal cannot agree with the Claimant’s assertion that it has established its permanent seat in Cyprus. The Tribunal considers that the Claimant does not operate on a permanent basis in Cyprus, and nor is there any basis to conclude that it has “the permanent seat” there.
245. In particular, the aspects set out below demonstrate otherwise.
246. The Claimant’s managers, namely Mr. Chroustovský, Mr. Petr. Sýkora and Mr. Jan Černý, all of whom are Czech nationals and residents, were not based in Cyprus.

²⁰⁹ BIT, Preamble, para. 4 (Ex. C-2).

²¹⁰ *Tokios Tokelès*, paras. 35-36 (Ex. CLA-159).

²¹¹ Available at <https://en.oxforddictionaries.com/definition/permanent>.

247. The Claimant's employees, if any,²¹² were likewise mainly based in the Czech Republic, and had a limited and temporary involvement in its Cypriot operations, as illustrated by Mr. Sýkora's participation in SolarOne's shareholders' meetings.
248. The Claimant's tax returns indicate that it owns or rents no property in Cyprus, nor was any payment of taxes made in Cyprus for the years of 2009 and 2010, in relation to which the Claimant had filed tax returns.
249. The Claimant's bank account with a Cypriot bank was used temporarily only, to transfer funds in September 2009, which were promptly transferred back to SolarOne.
250. Lastly, during his testimony, Mr. Chroustovský stated that: (1) he permanently resides in the Czech Republic;²¹³ (2) he had "never visited" and had "never even been" to the Claimant's office in Cyprus;²¹⁴ and that (3) he had "never attended in person" any of the Claimant's shareholders' meetings and had "never [been] physically there".²¹⁵
251. In light of the foregoing analysis, the Tribunal does not consider it necessary to embark upon an analysis as to whether the Claimant has abused investment treaty protection by commencing the present proceedings.
252. For the reasons set out above, the Tribunal determines that the Claimant is not an "investor" under the BIT, as it does not have "the permanent seat" in Cyprus, pursuant to Article 1(2)(b) of the BIT. It follows that the Tribunal lacks jurisdiction *rationae personae*.
253. The Claimant has initiated claims under BIT Article 2(2) ("fair and equitable treatment" and "full protection and security") as well as a claim for "non-impairment" pursuant to the BIT's Most Favored Nation Treatment provision on the basis of BIT Article 3(1), 3(2) and 3(4) and on the German and Netherlands investment treaties concluded with the Czech Republic. However, as the Tribunal has declined jurisdiction under the BIT, these claims are not admitted.

²¹² Hearing Transcript (28 February 2017), 73:3-5: "Q. Do you have any employees there? A. I believe there was a director, but he is not an employee."

²¹³ Hearing Transcript (28 February 2017), 66:13-14.

²¹⁴ Hearing Transcript (28 February 2017), 72:15-19: "Q. When was the last time that you visited WAIEN's office in Cyprus? A. Because as partners we did not need to be present there in person, I have never visited this office, I've never been there."

²¹⁵ Hearing Transcript (28 February 2017), 73:6-16: "Q. [...]. Have you ever had a shareholders' meeting of WAIEN in Cyprus? [...]. A. All shareholders' meetings take place every year, because the auditor's report as well as the financial statements have to be approved. Yes, there were shareholders' meetings of WAIEN in Cyprus. Q. Did you ever attend those meetings yourself? A. My participation was done through proxy, on the basis of a power of attorney. So I have never attended in person, I was never physically there."

B. WHETHER THE CLAIMANT MADE A “FOREIGN” INVESTMENT WITHIN THE MEANING OF THE ECT

1. The Respondent’s Position

254. The Respondent argues that the Tribunal lacks jurisdiction under the ECT over investment owned by domestic investors through a foreign shell company.²¹⁶
255. Pursuant to the text of Article 1(6) of the ECT, which defines the term “investment”, the alleged investment of the Claimant does not qualify for the purposes of the Article, because it does not exhibit the economic characteristics of an investment, including most notably a contribution made from outside the host state, as opposed to one which is merely held by the putative investor.²¹⁷ The Respondent contends that the ECT is to be interpreted as requiring that the investment be of foreign origin, as an economic characteristic.²¹⁸
256. The Respondent further contends that WAIEN’s claim to investment protection implies an abuse of process and falls short of the requirement that investment protection be conditional on an investment being mutually beneficial for both home and host states.²¹⁹
257. The Respondent alleges that WAIEN maintains a purely Czech operation and is a shell company, the shareholders and beneficial owners of which are three Czech nationals which purchased a Czech limited liability company and which, in turn, acquired two Czech SPVs to construct two solar plants in the Czech Republic.²²⁰ In the Respondent’s submission, the Claimant has merely disguised its domestic investment as international.²²¹ In this regard, the Respondent further contends that the Claimant’s argument that the BIT and the ECT definitions of nationality do not call for an inquiry into that of the parties controlling the investor, is inapposite, even if it were

²¹⁶ Rejoinder, para. 337.

²¹⁷ Rejoinder, paras. 470-474, referring to *Nova Scotia Power Incorporated (Canada) v. Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, para. 82 (**Ex. RLA-304**) (“*Nova Scotia*”); *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, paras. 232, 257 (**Ex. RLA-308**) (“*Standard Chartered*”).

²¹⁸ Rejoinder, paras. 475-476, referring *inter alia* to *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 97 (**Ex. RLA-1**) (“*Phoenix*”). Hearing Transcript (3 March 2017), 146:3-8.

²¹⁹ Rejoinder, paras. 478-479, referring to *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 62 (**Ex. RLA-314**).

²²⁰ Rejoinder, paras. 480-484, referring to *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paras. 166, 178, 180, 183, 185 (**Ex. CLA-163**) (“*KT Asia*”).

²²¹ Hearing Transcript (3 March 2017), 146:8-14.

assumed to be correct; the question is not whether the Claimant is a protected investor, but rather whether the investment involved originates from outside the Czech Republic.²²²

2. The Claimant's Position

258. The Claimant argues that the Tribunal is not called upon to determine whether the funds it used originated from outside the Czech Republic, since a requirement concerning the origin of capital lacks a basis in the text of the ECT and, generally, is not well established as a matter of international investment law and arbitral jurisprudence.²²³
259. To this end, the Claimant contests the soundness and relevance of an inherent meaning test in determining the existence of an investment.²²⁴ Such a test remains controversial. It has been associated primarily with Article 25 of the ICSID Convention which, unlike the ECT, contains no definition of investment.²²⁵ Also, the applicable criteria according to this test are not necessarily applicable by analogy to the ECT, in which a different concept of investment obtains. In the rare instances where this test has been applied, tribunals have relied upon it to decline jurisdiction over straightforward commercial transactions.²²⁶ The Claimant adds that ECT tribunals have refrained from basing their determination as to whether a claimant possesses an investment within the meaning of Article 1(6) of the ECT on an alleged objective meaning of the term investment.²²⁷ Furthermore, arbitral tribunals have refused to incorporate additional requirements into the definition of investment under the applicable treaty on grounds of an allegedly objective meaning of investment.²²⁸
260. More specifically, the Claimant submits that the origin of the funds underlying the Claimant's investment is irrelevant for jurisdictional purposes.²²⁹ The Claimant argues that, in any event, the requirement that a financial contribution be made was plainly met by the Claimant: it paid for its

²²² Rejoinder, paras. 481, 482.

²²³ Rejoinder on Jurisdiction, paras. 173, 184.

²²⁴ Rejoinder on Jurisdiction, para. 174, 181-183. Hearing Transcript (27 February 2017), 98:4-8.

²²⁵ Rejoinder on Jurisdiction, para. 174, 181-183. Hearing Transcript (27 February 2017), 98:8-12.

²²⁶ Rejoinder on Jurisdiction, paras. 174, 181-183.

²²⁷ Rejoinder on Jurisdiction, paras. 175-176.

²²⁸ Rejoinder on Jurisdiction, paras. 177-179.

²²⁹ Rejoinder on Jurisdiction, paras. 184-194, *referring inter alia to KT Asia*, paras. 192, 194, 197, 216, 221 (**Ex. CLA-163**) ("*KT Asia*"). Hearing Transcript (27 February 2017), 98:20-24, 99:5-16.

share capital in SolarOne and made significant transfers of funds in order to develop the photovoltaic project.²³⁰

261. The Claimant submits that its beneficial owners engaged in legitimate nationality planning, particularly in light of the fact that its incorporation took place well in advance of the Measures. The Claimant emphasises that the Respondent has failed to address the only aspect of potential relevance to a determination of the existence of an alleged “abuse of process” in this instance, namely the timing of the Claimant’s investment.²³¹ The Claimant submits that no question of “manufacturing” jurisdiction arose, because its investments were in place before any dispute. The Claimant was incorporated four years in advance of the challenged measures and made its investments without any hint as to a dispute with the Respondent.²³²

3. The Tribunal’s Decision

262. The Tribunal notes the Parties’ disagreement as to whether the Claimant has made an investment within the meaning of Article 1(6) of the ECT. In particular, the Parties disagree as to whether an investment requires the contribution of funds which originate from outside the host state.
263. It is recalled that the Respondent relies primarily upon the decisions in *Nova Scotia*²³³ and *Standard Chartered*,²³⁴ to argue that a contribution of foreign origin is required by the inherent meaning of the term “investment”. The Claimant contests the existence and, if any, the relevance of an inherent meaning of investment. In the alternative, it submits that it made an investment which satisfies such an inherent conception by making an appropriate financial contribution.
264. The Tribunal is not persuaded that funds must originate from outside the host state for a contribution so funded to qualify as an investment under the ECT. The Tribunal agrees with the Claimant that the primary basis for the Tribunal’s decision is the text of the ECT. It reaches its conclusion on this basis and does not deem it necessary to address the Parties’ submissions in the alternative, or those regarding the existence of an inherent meaning of investment.
265. As previously noted, the interpretation of a treaty provision is governed by the customary international law rules codified in Articles 31 and 32 of the Vienna Convention on the Law of

²³⁰ Rejoinder on Jurisdiction, para. 195.

²³¹ Rejoinder on Jurisdiction, paras. 196-197. Hearing Transcript (27 February 2017), 100:19-22.

²³² Rejoinder on Jurisdiction, paras. 198-200, *referring to* Second Chroustovský Statement, para. 10. Hearing Transcript (27th February 2017), 101:18-21.

²³³ *Nova Scotia*, para. 82 (Ex. RLA-304).

²³⁴ *Standard Chartered Bank*, para. 232 (Ex. RLA-308).

Treaties. That is not disputed by the Parties. Further, and again as noted previously in this Award, consistent with Article 31 of the VCLT, the ordinary meaning of the terms of a treaty provision, considered in their context and in the light of its object and purpose, forms the first step of any interpretive exercise.

266. Article 1(6) of the ECT reads as follows:

As used in this Treaty:

[...]

(6) “Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector. A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the “Effective Date”) provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

“Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter efficiency projects” and so notified to the Secretariat.

267. The Tribunal is not persuaded that Article 1(6) of the ECT establishes a requirement as to the foreign origin of the funds of an investment. In particular, the Tribunal notes that Article 1(6) refers to “every kind of asset”, regardless of the origin of the funds for its acquisition. The only restriction is that the asset in question is “owned or controlled directly or indirectly by an Investor”. The Tribunal considers that whether an investment is owned by an investor is a question to be determined independent of the question of the origin of the funds employed by an investor to acquire such investment. Furthermore, while the investor needs to be a national of another Contracting Party, the ECT does not require that the funds originate in the other Contracting Party.

268. The Respondent has relied upon a number of decisions, to the relevance of which the Tribunal now briefly turns. Most prominently amongst these are the decisions in *Nova Scotia* and *Standard Chartered*.

269. As the Claimant has correctly observed, in *Nova Scotia* the tribunal held that the dispute concerned a sale of goods, which could not be considered an “investment”.²³⁵ Its reasoning therefore is not applicable to present circumstances. As for *Standard Chartered*, the tribunal in that arbitration found that the use of the verb “made” entailed an investor’s “active” role, “rather than simple passive ownership.”²³⁶ In this regard, it suffices to note that, unlike Article I(a) of the Tanzania-UK BIT, Article 1(6) of the ECT does not employ the verb “made” and expressly provides for indirect control. In any case, if a requirement as to the degree of involvement of the investor in the making of an investment were applicable, such requirement would not have any bearing upon the origin of the funds applied by the investors.
270. The Parties are also divided as to whether the Claimant’s alleged status as a shell company and the allegedly domestic nature of its investment preclude treaty protection and the Tribunal’s exercise of jurisdiction in relation to the Claimant and its contributions under the ECT. In support of its propositions that treaty protection and the Tribunal’s jurisdiction are precluded, the Respondent principally relies on the decisions in *Phoenix* and *KT Asia*. The Claimant argues that the Czech nationality of its beneficial owner and the degree of intensity of its economic connection with Cyprus have no bearing upon the existence and scope of treaty protection under the ECT.
271. The *Phoenix* tribunal considered the *bona fide* character of the investment to establish whether “the Claimant engaged in an abusive attempt to get access to ICSID”.²³⁷ Notwithstanding this fact, which renders the decision inapposite in principle, the Tribunal notes that the *Phoenix* tribunal considered the timing of the claim and that, as correctly pointed out by the Claimant, in this case the Claimant’s incorporation took place before any dispute was foreseeable.²³⁸ The situation was therefore different for the claimant in *Phoenix*, which notified the dispute to the respondent before it registered the ownership of the companies at issue in the Czech Republic.²³⁹
272. In relation to *KT Asia*, the Tribunal notes that the tribunal undertook an inquiry into the meaning of “investment” under the ICSID Convention, which has no application to the present case. In addition, the parties in that matter had not contested that the “objective definition” of investment

²³⁵ *Nova Scotia*, para. 113 (Ex. RLA-304).

²³⁶ *Standard Chartered Bank*, para. 232 (Ex. RLA-308).

²³⁷ *Phoenix*, paras. 136 (Ex. RLA-1).

²³⁸ Rejoinder on Jurisdiction, paras. 191-202.

²³⁹ *Phoenix*, paras. 138 (Ex. RLA-1).

was relevant to both the BIT and the ICSID Convention.²⁴⁰ As such, the decision in *KT Asia* of limited if any assistance for present purposes. But more than this, the Tribunal observes that, according to this decision, a commitment of resources must be made, failing which an “asset belonging to the claimant” is not to be deemed a protected investment. The *KT Asia* tribunal, which denied jurisdiction on the sole basis of its finding that no contribution had been made,²⁴¹ did not interpret the BIT so as to set out a requirement concerning the origin of funds. In this case, the Claimant has argued that it made a financial contribution. The Respondent does not seem to contest this proposition, having confined its position in this respect to arguing that the Claimant’s contribution did not originate outside the host state.

273. Lastly, the Tribunal has considered the Parties’ submissions regarding the alleged character of the Claimant as a shell company, and whether the holding of such an entity is insufficient to constitute an investment under the BIT.

274. The Tribunal’s observations regarding the general relevance of the decision in *KT Asia* above hold true in relation to this argument as well. Article 1(6) of the ECT neither requires that an investment belongs to, or be owned by, an entity having a substantial connection with its place of incorporation, nor does it preclude the protection of an investment made by an entity which mainly serves as a holding company. The Tribunal agrees with the Claimant’s contention that the ECT does not require that a substantial connection be established for a legal entity to be deemed an investor and for its investment to be protected.

275. For the foregoing reasons, the Tribunal finds that it has jurisdiction *ratione materiae* over the Claimant’s investments under the ECT.

C. WHETHER THE SOLAR LEVY IS A TAX FOR THE PURPOSES OF THE ECT TAX CARVE-OUT (ARTICLE 21 ECT)

1. The Respondent’s Position

276. The Respondent argues that the Tribunal lacks jurisdiction over the Solar Levy as this measure is a tax under Czech law for purposes of the ECT’s tax exclusion clause set out in Article 21 of the ECT.²⁴² The Respondent observes that the Claimant itself considered the Tax Incentives to

²⁴⁰ *KT Asia*, para. 166 (Ex. CLA-163)

²⁴¹ *KT Asia*, para. 206 (Ex. CLA-163)

²⁴² Rejoinder, para. 351.

be taxation measures²⁴³ and contends that the only disagreement with the Claimant pertains to the characterization of the Acts which adopted and extended the Solar Levy as “Taxation Measures”.²⁴⁴

277. The Respondent agrees with the Claimant that Article 31 of the VCLT governs the interpretation of Article 21(7) of the ECT. It submits that the Contracting State parties gave the term “Taxation Measures” a special meaning, whereby, for the determination of the character of a measure as a “provision relating to taxes of the domestic law” within the meaning of Article 21(7)(a)(i) of the ECT, the Tribunal “must look to the domestic law of the Czech Republic”.²⁴⁵
278. The Respondent contests all of the Claimant’s arguments which contradict this proposition for the following reasons (broadly summarized): (1) the use of domestic law to determine the characterization of a measure as a tax is justified, given the express *renvoi* to domestic law in Article 21 of the ECT and the importance of a state’s taxation power, which is admitted by the Claimant;²⁴⁶ (2) the intention of the ECT’s drafters lends support to the need to resort to domestic law, as evidenced by Article 21(5) of the ECT, which calls upon competent domestic tax authorities to state their views as to the limited number of tax-related issues capable of submission to international arbitration;²⁴⁷ (3) the Claimant has not explained why the use of domestic law would undermine the ECT’s purpose;²⁴⁸ and (4) it is not contrary to good faith that states have resort to their own domestic law, for, as a matter of fact, states are free to opt out of international obligations. In any event, the Respondent has not sought to act as judge and jury or to escape its international obligations, as it has accepted that the Tribunal will make the ultimate determination as to whether the Solar Levy meets the definition set out in Article 21(7) of the ECT.²⁴⁹
279. The Respondent, referring to the decision in *Emmis and others v. Hungary*, argues that the character of the Solar Levy must be established with reference to Czech domestic law. Like any tax, the Solar Levy has a rate, a base and a taxpayer, and was treated as a tax by the Czech legislative, executive and judicial organs. This is evidenced, most notably, by its inclusion in the Tax Administration Law (“TAL”) and its characterization by the Czech Constitutional Court as

²⁴³ Rejoinder, para. 352.

²⁴⁴ Rejoinder, para. 340; Hearing Transcript (27 February 2017), 241:11-15.

²⁴⁵ Rejoinder, paras. 341-345; Hearing Transcript (27 February 2017), 244:4-15.

²⁴⁶ Rejoinder, para. 347; Hearing Transcript (27 February 2017), 245:2-12.

²⁴⁷ Rejoinder, para. 348; Hearing Transcript (27 February 2017), 246:16-20.

²⁴⁸ Rejoinder, para. 349.

²⁴⁹ Rejoinder, paras. 350-352.

a “tax or fee” within the meaning of Article 11(5) of the Czech Republic’s Charter of Fundamental Rights and Freedoms (“**Charter**”), holding that the Solar Levy, like any other taxes, should be “levied only on the basis of the law.”²⁵⁰ In this connection, the Respondent notes that Article 11(5) of the Charter and Section 2(3) of the TAL are legislative instruments for the purposes of Article 21(7) of the ECT. In response to the Claimant’s argument that Article 11(5) of the Charter is inconclusive so far as the question whether the Solar Levy constitutes a tax is concerned, as it refers to “taxes and fees”, the Respondent notes that the Claimant does not argue that the Solar Levy is a “fee” rather than a “tax”. In addition, the Solar Levy is classified as a tax by the OECD and EUROSTAT. Moreover, the reason for taxes and fees being treated under the same umbrella in the TAL is that Czech legal and accounting practice does not differentiate between taxes and other public charges.²⁵¹ Furthermore, the Respondent draws the Tribunal’s attention to the fact that the ECT only requires that the Solar Levy be a measure “relating to taxes of the domestic law”, which is presently the case as it is designated as a tax in the Czech Republic’s Tax Code, is collected as such, and is accounted for and reported as a tax.²⁵² Hence, in light of the above, the Solar Levy qualifies as a “Taxation Measure” under Article 21(7), and is thus covered by the carve-out in Article 21(1) of the ECT.²⁵³

280. The Respondent emphasizes that the character of the Solar Levy must be determined by reference to Czech legislation, and not to academic literature. In relation to the place of “academic theory”, the Respondent submits that the ECT does not call for an academic exercise, since Article 21(7) of the ECT places exclusive reliance upon legislation and the Contracting States’ power to decide what is a tax. In any event, academic theory is unhelpful in this case, given the inherent lack of clarity of the term “taxes”, acknowledged in scholarly writing.²⁵⁴ However, even if the Tribunal

²⁵⁰ Rejoinder, paras. 353-359, *referring to Emmis and others v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, para. 175 (**Ex. RLA-207**); Decision of the Supreme Administrative Court, Case No. 9 Afs 13/2013, 10 July 2014 (**Ex. CLA-2**) (“**July 2014 Judgment**”); Decision of the Czech Constitutional Court, No. 2216/14, 13 January 2015, para. 33 (**Annex 14 to First Expert Report of Mr. Libor Frýzek, dated 25 June 2015 [First Frýzek Report]**). Hearing Transcript (27 February 2017), 182:20-22.

²⁵¹ Rejoinder, paras. 360-364, *referring to* Charter of Fundamental Rights and Freedoms (No. 2/1993 Coll.), 15 June 1993, Article 11(5) (**Ex. R-111**); Act 280/2009 Coll., Tax Administration Law, Section 2(3) (**Ex. R-188**); Expert Report on Czech Tax Issues by Mr. Radek Halíček, dated 8 October 2015 (“**Halíček Report**”), paras. 28-32; Expert Report on Czech Tax Issues by Mr. Petr Kotáb, dated 19 September 2016, (“**Kotáb Report**”), paras. 17-21, 24, 26-28, 34, 48; Second Expert Report of Mr. Libor Frýzek, dated 23 March 2016 (“**Second Frýzek Report**”), paras. 11-13, 15, 18, 30; First Expert Report by Mr. David Borkovec, dated 24 March 2016 (“**First Borkovec Report**”), paras. 27, 28, 61. *See also* Hearing Transcript (27 February 2017), 182:21-23.

²⁵² Rejoinder, paras. 365-366.

²⁵³ Rejoinder, para. 366.

²⁵⁴ Rejoinder, paras. 367-373; First Frýzek Report, para. 26; Second Frýzek Report, para. 30 ; First Borkovec Report, paras. 27, 29-32; Kotáb Report, paras. 41, 47, 96, 100.

were to consider “academic theory” relevant, the Respondent submits that the Solar Levy possesses the six features identified and relied upon by the Claimant as the test of a taxation measure.²⁵⁵ In particular, it is uncontested that the Solar Levy is obligatory, non-refundable, introduced by law and intended to serve as income of the state budget for the financing of society-wide needs.

281. In addition to the above, the Respondent claims that the Solar Levy is also non-equivalent. According to the Respondent, this fact is acknowledged by the Claimant’s experts who state that the Solar Levy is “formally indeed non-equivalent,” and that “equivalence” exists only “to a certain extent.”²⁵⁶ The Respondent contends that the right to receive the FiT is independent from the Solar Levy “due to the absence of an immediate, direct and concrete consideration in return on the part of the public authority.”²⁵⁷ Instead, the right derives from the obligation of compulsory purchasers to purchase RES electricity at a fixed price. Indeed, solar plants installed before the solar boom and producers of non-solar forms of RES electricity are equally entitled to the FiT, but not liable to pay the Solar Levy.²⁵⁸ The relationship between the Solar Levy and the FiT is confined to the fact that both are charged on the same product, namely electricity produced by solar RES, at an amount which corresponds to a fixed proportion of the price received for such electricity. Similar relations are commonly seen in relation to other taxes, such as VAT, which amounts to a percentage of the value of goods and services the consumption of which is taxed.²⁵⁹ In short, payment of the Solar Levy involves no “*quid pro quo*” in consideration for receiving the FiT.²⁶⁰
282. In addition, the budgetary expenditure subsidizing RES actually increased in 2014, whereas the Solar Levy payable by solar generators in receipt of FiT support was reduced by Act 310/2013 Coll. from 26% to 10%, thus illustrating the lack of any correlation.²⁶¹ In this vein, the Respondent argues that the amount of the budget subsidy is not calculated by reference to the

²⁵⁵ Rejoinder, paras. 374-375 ; First Borkovec Report, para. 23. *See also* Hearing Transcript (27 February 2017), 182:24-25.

²⁵⁶ Rejoinder, para. 378; First Frýzek Report, para. 30; Borkovec Report, para. 36, respectively stating that the Solar Levy is “formally indeed non-equivalent,” and that “equivalence” exists only “to a certain extent.” *See also* Hearing Transcript (27 February 2017), 182:25 to 183:14.

²⁵⁷ Rejoinder, para. 379, *quoting from* R. Boháč, “Tax Revenues of Public Budgets in the Czech Republic” (excerpt), p. 225 (**Ex. R-318**).

²⁵⁸ Rejoinder, para. 379, *referring to* Act on Promotion, Article 4(4) (**Ex. R-5**).

²⁵⁹ Rejoinder, para. 379; Hearing Transcript (27 February 2017), 186:10-13.

²⁶⁰ Rejoinder, para. 379.

²⁶¹ Rejoinder, para. 381, *referring to* Article 1(8)-(9), 1(12), Act 310/2013 Coll., (**Ex. C-104**); 2014 Report on the Activities and Finances of ERO, 15 March 2016, p. 23 (**Ex. R-270**).

amounts collected through the Solar Levy and that, unlike the budget subsidy, Solar Levy revenues were a function of the quantity of electricity produced by solar RES producers. While the Solar Levy was originally expected to offset approximately one third of the budgetary expenditure on RES subsidies, this was merely an estimate and, ultimately, no correlation ever existed in practice.²⁶²

283. Contrary to the Claimant's argument, the Solar Levy is also not a fee. In particular, it is not paid on a transactional basis; it is not "voluntary"; and it is not "irregular".²⁶³ In any case, the Claimant's proposition that the Solar Levy is a fee for receiving the FiT is inconsequential, since the distinction between taxes and fees is of very limited significance under contemporary Czech tax law and practice, and given that fees "relate to" taxes, within the meaning of Article 21(7) of the ECT, to the extent that a fee administered by the TAL is part of the Czech tax system.²⁶⁴
284. Moreover, the Solar Levy is not paid for a specific purpose. Leaving aside the irrelevance of legislative reasons for this purpose and the existence of purpose-oriented taxes, as exemplified by road taxes, the absence of a specific purpose is demonstrated by the fact that proceeds of the Solar Levy were deposited into the general treasury account.²⁶⁵ Given its nature as a revenue raising measure, which was meant to reduce excessive profits, the Solar Levy on the contrary was a tax measure perfectly consistent with *bona fide* taxation purposes.²⁶⁶
285. The Respondent argues further that the Solar Levy is treated as a tax by the Czech judicial organs, most notably by the Constitutional Court in a decision specifically examining the Solar Levy, and the Supreme Administrative Court.²⁶⁷ In particular relation to the decisions of the Supreme

²⁶² Rejoinder, para. 380.

²⁶³ Rejoinder, paras. 382-384.

²⁶⁴ Rejoinder, para. 384.

²⁶⁵ Rejoinder, paras. 385-388, *referring to* Kotáb Report, paras. 56-60; First Frýzek Report, paras. 25, 26(f).

²⁶⁶ Rejoinder, paras. 389-393, *referring to* *Yukos Universal Limited v. Russia*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, paras. 1407, 1431-1432 (**Ex. CLA-7**) ("*Yukos*"); May 2012 Constitutional Court Judgment, para. 67 (**Ex. CLA-12/R-110**). *See also* Hearing Transcript (27 February 2017), 246:24 to 247:4.

²⁶⁷ Rejoinder, paras. 394-396, *referring to* Haliček Report, paras. 47-48; 2 May 2012 Constitutional Court Judgment, paras. 46, 59, 60, 64 (**Ex. CLA-12/R-110**); Decision of the Grand Chamber of the Czech Supreme Administrative Court, Case No. 1 Afs 76/2013-57, 17 December 2013, paras. 36, 50 (**Annex 13 to First Frýzek Report**); Decision of the Czech Supreme Administrative Court, Case No. 1 Afs 256/2014 - 28, 25 March 2015, para. 42 (**Annex 18 to First Frýzek Report**); Decision of the Czech Supreme Administrative Court, Case No. 1 Afs 80/2012-44, 20 December 2012, para. 19 (**Ex. R-30**); Decision of the Czech Supreme Administrative Court, Case No. 5 Afs 126/2013-34, 7 May 2014, paras. 6, 40 (**Annex 21 to Second Frýzek Report**); Decision of the Supreme Administrative Court, Case No. Afs 66/2012-38, 24 July 2013, p. 4 (**Ex. R-362**); Decision of the Czech Constitutional Court, Case No. II. ÚS 2216/14, 13 January 2015, para. 29 (**Annex 14 to First Frýzek Report**).

Administrative Court, the Respondent emphasizes that the judgment of the Grand Chamber of 17 December 2013 confirmed that the Solar Levy was a tax. That is a ruling which enjoys greater authority than, and is not affected by, those adopted by individual panels, such as the judgment of 10 July 2014 of the Supreme Administrative Court relied upon by the Claimant. To the extent that the latter decision held that the Solar Levy was not of a tax nature, on grounds of its non-equivalence, this conclusion was set out in a “single-paragraph *obiter* statement” which, in the opinion of the Respondent, resulted from the panel’s lack of familiarity with the mechanics of RES support.²⁶⁸

286. Furthermore, the Czech authorities did not argue before the Supreme Administrative Court that the Solar Levy is not a tax and are, thus, not estopped from alleging that it is, in fact, a tax. The Claimant’s allegation is based on an unwarranted assumption and disproved most notably by the fact that the *dictum* that the Solar Levy is not a tax was rendered by the Supreme Administrative Court *sua sponte*.²⁶⁹
287. The Respondent argues that the Claimant’s remaining indicators of the non-tax nature of the Solar Levy are wrong. As for the submission to Parliament of draft Act 402/2010 by the Ministry of Industry and Trade instead of the Ministry of Finance, the Respondent observes that the Ministry of Finance and the Government as a whole were involved in the process, which led to the adoption of the Solar Levy.²⁷⁰ With regard to the use of the term “levy”, the Respondent states that the use of the term resulted from the Ministry of Finance’s practice of using different terminology for *ad hoc* taxes introduced by general legislation. In any event, there are other levies in Czech legislation, most of which are taxes.²⁷¹ As for the limited extent of the group of taxpayers, the Respondent observes that there are taxes in the Czech system for the payment of which only several hundred subjects are liable.²⁷² The Respondent alleges that the acknowledgement of the potential expropriatory effects of the Solar Levy by the Constitutional Court relates to the constitutionality of the measure, not its tax nature. In any event, the Constitutional Court did not

²⁶⁸ Rejoinder, paras. 397-407, *referring to* July 2014 Judgment, paras. 14, 19-20 (**Ex. CLA-2**); Decision of the Grand Chamber of the Czech Supreme Administrative Court, Case No. 1 Afs 76/2013-57, 17 December 2013, para. 50 (**Annex 13 to First Frýzek Report**); Halíček Report, para. 46, Kotáb Report, paras. 76, 80-84, 86-91, 94, 100.

²⁶⁹ Rejoinder, paras. 408-411.

²⁷⁰ Rejoinder, paras. 412-413, *referring to* Kotáb Report, para. 39; First Witness Statement of Ladislav Minčíč Statement, dated 19 September 2016 (“**First Minčíč Statement**”), para. 6.

²⁷¹ Rejoinder, paras. 414-415, *referring to* Minčíč Statement, para. 14.

²⁷² Rejoinder, para. 416, *referring to* Kotáb Report, paras. 65.

find the Solar Levy to be a confiscatory tax.²⁷³ As for the temporary nature of the Solar Levy, the Respondent argues that temporary taxes have been levied in the Czech Republic in the past and that there is no requirement that a measure be indefinite in order to qualify as a tax.²⁷⁴ From the foregoing, it follows, according to the Respondent, that both the Solar Levy and the Tax Holiday, the character as a tax of which is not in dispute, are taxes.²⁷⁵

288. Finally, and in response to the allegation that the Solar Levy was enacted in bad faith, the Respondent submits that the Claimant's allegations of impropriety are unfounded; the Solar Levy applied to all solar producers, regardless of whether they were entitled to investment treaty protection.²⁷⁶ Referring to the decision of the tribunal in *Tza Yap Shum v. Republic of Peru*, the Respondent argues that good faith must, in principle, be assumed;²⁷⁷ that, in any case, the Energy Charter Secretariat 2015 publication does not suggest that taxes must be imposed in good faith,²⁷⁸ and that, even if it were accepted that bad faith was involved, such conduct would only be relevant to the merits,²⁷⁹ but it would not affect the character as a tax of the Solar Levy under Czech domestic law. Furthermore, the Respondent submits that no bad faith can be inferred from the use of a mechanism, which the Claimant deems convoluted since, as observed by the tribunal in *Invesmart, B.V. v. Czech Republic*, not having resort to the most obvious solution is not an automatic indication of bad faith.²⁸⁰ To conclude, the Respondent requests that the Tribunal decline jurisdiction in relation to the Claimant's ECT claims.

2. The Claimant's Position

289. The Claimant challenges the Respondent's objection to jurisdiction, and in particular its submission that the Solar Levy is a tax due to its characterization as such under Czech law and that the VCLT plays no role, since the ECT defines "taxation measure" by express reference to

²⁷³ Rejoinder, para. 417, referring to Kotáb Report, para. 63.

²⁷⁴ Rejoinder, paras. 418-419, referring to Kotáb Report, para. 68.

²⁷⁵ Rejoinder, para. 420.

²⁷⁶ Rejoinder, para. 423, referring to Minčič Statement, para. 15.

²⁷⁷ Rejoinder, para. 424, quoting *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, para. 125 (Ex. RLA-30).

²⁷⁸ Rejoinder, para. 422.

²⁷⁹ Rejoinder, para. 421, quoting *EnCana Corporation v. Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, para. 147 ("*EnCana*") (Ex. RLA-22), and *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, para. 207 (Ex. RLA-14).

²⁸⁰ Rejoinder, paras. 425-430, referring to *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), 26 June 2009, paras. 430, 484, 501 (Ex. RLA-286) ("*Invesmart*").

domestic law.²⁸¹

290. Pointing out that what is at issue is the interpretation of a treaty provision, the Claimant argues that the applicable rules of interpretation are contained in Article 31(1) of the VCLT, whereby the definition of “taxation measure” set out in Article 21(7) of the ECT must be interpreted in good faith, bearing in mind the context and the object and purpose of the ECT.²⁸²
291. In this connection, the Claimant argues that, as recognized by the Respondent, the VCLT is applicable to, and plays a central role in, the interpretation of Article 21 of the ECT.²⁸³ In particular, the Claimant contends that, since the Respondent has failed to establish that a “special meaning” pursuant to Article 31(4) of the VCLT is to be attributed to the term “taxation measures” in Article 21(7) of the ECT, only its “ordinary meaning” is to be taken into account.²⁸⁴ Furthermore, the Claimant maintains that the *renvoi* to domestic law does not preclude the application of Article 31(1) of the VCLT to the interpretation of Article 21(7) of the ECT, due to the latter’s international nature as a treaty provision.²⁸⁵
292. The Claimant contends that the Respondent’s interpretation of Article 21(7) of the ECT, according to which a contracting state’s mere characterization of a measure as “taxation” would suffice to remove it from the scope of the ECT, is at odds with the ECT’s drafters’ intention, the good faith standard, and the purpose of the ECT. In particular, relying upon the decisions in *Yukos Universal Limited v. Russia*,²⁸⁶ *RosInvestCo UK Ltd. v. The Russian Federation*,²⁸⁷ and *Quasar de Valores v. The Russian Federation*,²⁸⁸ the Claimant argues that a good faith interpretation of the ECT tax carve-out is called for, whereby it is confined to *bona fide* measures. Contracting States are thereby prevented from an otherwise unrestricted freedom to escape their obligations under the ECT.²⁸⁹ In this vein, the Claimant maintains that a determination as to the *bona fide* character of a measure is crucial to establish whether it is a “taxation measure” within the meaning of Article 21 of the ECT and, thus, of relevance not only to the merits of, but also to a

²⁸¹ Reply, paras. 519-523; Rejoinder on Jurisdiction, paras. 14-15, 20-21, 129-130.

²⁸² Reply, paras. 524-530.

²⁸³ Rejoinder on Jurisdiction, paras. 21-22, 27-28.

²⁸⁴ Rejoinder on Jurisdiction, paras. 24-26.

²⁸⁵ Rejoinder on Jurisdiction, paras. 27-32.

²⁸⁶ *Yukos* (Ex. CLA-7).

²⁸⁷ *Rosinvest* (Ex. CLA-10).

²⁸⁸ *Quasar* (Ex. CLA-11).

²⁸⁹ Reply, paras. 531541, *referring, inter alia, to Yukos*, paras. 1430, 1431 (Ex. CLA-7).

- tribunal's jurisdiction over, a dispute arising out of such a measure.²⁹⁰
293. The Claimant submits that the Solar Levy is not a *bona fide* taxation measure,²⁹¹ since it was not introduced to raise budget revenue, as claimed by the Respondent, but was instead a deliberate use of its power to tax to avoid international responsibility.²⁹² According to the Claimant a State's authority over taxation matters is not absolute and, thus, an interpretation of the tax carve-out to the effect that reliance is to be placed exclusively upon domestic law would be contrary to the principle of good faith and the ECT's purpose.²⁹³ Furthermore, the Claimant, contesting the relevance of the decisions relied upon by the Respondent, argues that Article 21 of the ECT does not permit a State to opt out of its obligations thereunder, nor does it allow a State to deny the ECT's protection to an investor.²⁹⁴
294. The Claimant adds that the lack of good faith on the part of the Respondent is evidenced by the rationale of, and background to, the Solar Levy; the use of taxation as a mechanism to disguise a reduction of the amount of support accorded to solar energy producers; and the inconsistent conduct of the Respondent following the enactment of the Solar Levy.²⁹⁵
295. As for the abusiveness of the Respondent's exercise of its taxation power, the Claimant submits that this power was used to adopt a measure, which was clearly not a tax, as evidenced by declarations of the Deputy Environmental Minister and the Minister of Industry and Trade at meetings held by the Economic Coordination Committee and the Economic Committee of the Chamber of Deputies on 15 October²⁹⁶ and 2 November 2010,²⁹⁷ respectively. The Claimant does not accept that an attempt to find a lawful solution to a problem is necessarily an indication of good faith, since compliance with domestic law is not an excuse for breaches of international obligations. Also, the Claimant does not accept that the applicability of the Solar Levy regardless

²⁹⁰ Rejoinder on Jurisdiction, paras. 12, 16-18, 41, 47-49.

²⁹¹ Reply, paras. 612-613; Rejoinder on Jurisdiction, paras. 9, 67-69, 87.

²⁹² Reply, paras. 542-543, 550; Rejoinder on Jurisdiction, paras. 9, 50.

²⁹³ Rejoinder on Jurisdiction, paras. 33-37.

²⁹⁴ Rejoinder on Jurisdiction, paras. 38-39.

²⁹⁵ Rejoinder on Jurisdiction, paras. 51-55, *referring to* Second Frýzek Report, para. 78; Third Expert Report of Mr. Libor Frýzek, dated 22 December 2016 ("**Third Frýzek Report**"), para. 33; First Expert Report of Mr. David Borkovec, dated 24 March 2016, para. 43; Second Expert Report of Mr. David Borkovec, dated 23 December 2016 ("**Second Borkovec Report**"), para. 42.

²⁹⁶ Rejoinder on Jurisdiction, paras. 60-61, *referring to* Minutes of the third meeting of the Coordination Committee of 15 October 2010, p. 4 (**Ex. C-112**).

²⁹⁷ Rejoinder on Jurisdiction, paras. 60, 62, *referring to* Minutes of Session of the Economic Committee of the Chamber of Deputies of 2 November 2010, p. 5 (**Ex. C-123**).

of the nationality of solar energy producers demonstrated that their ability to invoke investment treaty protection had not been considered. In this regard, the Claimant highlights that the Respondent sought legal opinions concerning the risks of investment arbitration as a result of the enactment of the Solar Levy.²⁹⁸

296. As for the inconsistency of the Respondent's conduct, the Claimant refers to the 10 July 2014 decision of the Czech Supreme Administrative Court, which in the context of a decision addressing the issue of whether, in combination with the corporate income tax, the Solar Levy would have been in breach of the prohibition of double taxation, held that the Solar Levy is not a tax.²⁹⁹ According to the Claimant, the decision of the Supreme Administrative Court should preclude any further discussion in this arbitration as to the nature of the Solar Levy as a tax under Czech law.³⁰⁰
297. The Claimant contests the relevance of the rulings relied upon by the Respondent in support of the proposition that, in accordance with Czech case law, the Solar Levy is not a tax. Instead, the Claimant submits that: (1) the question of whether the Solar Levy is a tax was directly addressed by the Supreme Administrative Court and not merely in an *obiter* portion of the decision; (2) the judgment of the Grand Chamber of 17 December 2013, relied upon by the Respondent, only characterized the Solar Levy as a tax, because it is administered according to the TAL; (3) the decision of the Supreme Administrative Court of 10 July 2014 is not isolated, since several other judgments of Czech courts, including the Constitutional Court and the Second and Fifth Chambers of the Supreme Administrative Court have ruled that the Solar Levy is not a tax, but a *de facto* reduction of the FiT.³⁰¹
298. With regard to the Respondent's purported explanations for the implementation of the Solar Levy instead of a direct reduction of the FiT, the Claimant advances a number of arguments. In response to the proposition that a direct reduction of the FiT would have needed to be much greater than 26%, the Claimant notes that this is unsupported by the facts. In fact, while during

²⁹⁸ Rejoinder on Jurisdiction, paras. 63-65, *referring to* Minčič Statement, para. 15.

²⁹⁹ Rejoinder on Jurisdiction, para. 66, *referring to* Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 19-20 (**Ex. CLA-2**).

³⁰⁰ Rejoinder on Jurisdiction, paras. 71-73, *referring to* Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 19-20 (**Ex. CLA-2**).

³⁰¹ Rejoinder on Jurisdiction, para. 109-119, *citing to* Decision of the Grand Chamber of the Czech Supreme Administrative Court, Case No. 1 Afs 76/2013-57, 17 December 2013, para. 28 (**Annex 13 to First Frýzek Report**); Decision of the Czech Constitutional Court, Case No. 2216/14, 13 January 2015, para. 5 (**Annex 14 to First Frýzek Report**); 15 May 2012 Constitutional Court Judgment, para. 45 (**Ex. CLA-12/R-110**); Decision of the Czech Constitutional Court, Case No. 3211/13, 6 February 2014, para. 5 (**Annex 16 to First Frýzek Report**).

the meeting of the Economic Committee of 2 November 2010 an increase of the Solar Levy rate from 26% to 50% was discussed so as to avoid the imposition of a tax on emission allowances, the question of a direct reduction of the FiT was not in issue.³⁰² Also, the Solar Levy is not necessarily more flexible than a reduction of the FiT, nor temporary, and, in any case, a reduction of the FiT did not have to be permanent.³⁰³ In addition, the enactment of a direct reduction of the FiT would not have been more cumbersome than the introduction of the Solar Levy.³⁰⁴

299. The Claimant characterizes the Solar Levy as a reduction of a promised benefit, adopted in the form of a tax for the purpose of taking advantage of the tax carve-out under the ECT. This is allegedly evidenced by discussions in the Czech Parliament prior to the adoption of Act No. 402/2010, most notably during a meeting of the Emergency Coordination Committee held in October 2010,³⁰⁵ and the Respondent's own allegation that the measure was in fact not a tax, made in connection with a challenge to the Solar Levy before the Czech Supreme Court.³⁰⁶ The Claimant adds that the Respondent, for this reason, is now estopped from arguing that the Solar Levy is a *bona fide* tax under international law.³⁰⁷ For its part, the Claimant also contends that it is not estopped from characterizing the Solar Levy as a non-tax measure, most notably since terms used in the SPV's financial statements are irrelevant for the purposes of determining the nature of the Solar Levy as a tax.³⁰⁸
300. In addition, the Claimant further contends that the Solar Levy is not a tax under Czech law.³⁰⁹ According to the Claimant, Article 11(5) of the Charter and Section 2(3) of the TAL are irrelevant for the determination of the nature of the Solar Levy, since (1) both provisions and related accounting and budgetary regulations do not distinguish between taxes and fees; (2) Article 2(3) of the TAL contains no general definition of tax, which is absent in the Czech legal system; and (3) in any case, the Czech legislator knowingly employed the label "levy" instead of "tax".³¹⁰

³⁰² Rejoinder on Jurisdiction, paras. 56-57, *referring to* Minutes of Session of the Economic Committee of the Chamber of Deputies, 2 November 2010, pp. 3-4, 12 (**Ex. C-123**).

³⁰³ Rejoinder on Jurisdiction, para. 58, *referring to* Minčič Statement, paras. 13, 16.

³⁰⁴ Rejoinder on Jurisdiction, para. 59, *referring to* Minčič Statement, para. 16.

³⁰⁵ Reply, paras. 544-548, *referring to* Minutes of Session of the Economic Committee of the Chamber of Deputies, 2 November 2010, p. 5 (**Ex. C-123**).

³⁰⁶ Reply, para. 549, *referring to* Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 19-20 (**Ex. CLA-2**).

³⁰⁷ Reply, paras. 550, 614-615; Rejoinder on Jurisdiction, para. 74.

³⁰⁸ Rejoinder on Jurisdiction, para. 12.

³⁰⁹ Reply, paras. 551-552, 600; Rejoinder on Jurisdiction, paras. 131-132.

³¹⁰ Reply, paras. 553-557.

301. Furthermore, according to the Claimant, the Solar Levy does not possess the six features of a tax, namely, that it is: (1) obligatory, (2) non-refundable, (3) non-equivalent, (4) introduced by law, (5) intended to serve as income, and (6) paid for no specific purpose.³¹¹ In light of these features, the Claimant puts forward a number of specific arguments, as broadly summarized below.
302. First, the Solar Levy was enacted and “earmarked” for a specific purpose, namely to offset the costs incurred by the Respondent in connection with the support it had undertaken to provide to solar energy producers without formally reducing the level of tariffs guaranteed to them.³¹² This purpose is clearly indicated by the parliamentary discussions leading to the introduction of Act No. 402/2010. Therefore, the Solar Levy lacks one typical feature of all taxes, according to academic theory.³¹³
303. In this vein, the Claimant argues that the legislative reasons for implementing the Solar Levy are “irrelevant for the purposes of the ‘specific purpose’ inquiry”. Instead, the Tribunal should focus on the “purpose for which the funds are actually allocated”.³¹⁴ The Claimant argues further that the existence of a specific purpose is a mandatory feature of taxes; that the Solar Levy is a *de facto* reduction of the FiT and not a revenue-raising measure and therefore does not meet the *bona fide* test as articulated by the *Yukos* tribunal; and that reliance on the fact that the Solar Levy is collected in a separate account, not administered by the same Ministry in charge of budgetary contributions to the FiT, entails a formalistic distinction and is irrelevant since the cash flows of the Solar Levy and the RES support subsidy are connected through the State budget.³¹⁵
304. Second, the Claimant argues that the Solar Levy does not meet the non-equivalence requirement, which is a mandatory requirement of all taxes. This entails that no consideration on the part of the State for the payment of a tax must be involved, as acknowledged by all four party experts.³¹⁶ According to the Claimant, there was a direct link, or a “*quid pro quo*”, between the Solar Levy and the payment of FiT and Green Bonuses.³¹⁷ This conclusion finds support in the decision of the Czech Supreme Administrative Court of 10 July 2014, which held that the Solar Levy was

³¹¹ Reply, paras. 558-562, 600.

³¹² Reply, paras. 563-574, *referring to* Minutes of Session of the Economic Committee of the Chamber of Deputies, 2 November 2010, p. 1 (**Ex. C-123**). *See also* Rejoinder on Jurisdiction, paras. 10-11.

³¹³ Rejoinder on Jurisdiction, paras. 96-100.

³¹⁴ Rejoinder on Jurisdiction, para. 93.

³¹⁵ Rejoinder on Jurisdiction, paras. 90-95.

³¹⁶ Rejoinder on Jurisdiction, para. 101.

³¹⁷ Reply, paras. 575-577.

not a tax, but a *de facto* reduction of the FiT and Green Bonuses.³¹⁸ The decision, in the Claimant's submission, is thorough and highly authoritative, therefore dealing a fatal blow to the Respondent's argument.³¹⁹ In particular, the decision lends further support to the fundamental character of non-equivalence as a feature of all taxes, and also confirms that the Solar Levy fails to meet the non-equivalence standard, a conclusion shared by Messrs. Borkovec and Frýzek.³²⁰

305. With respect to certain decisions of the Czech Supreme Administrative Court and the Constitutional Court relied upon by the Respondent,³²¹ the Claimant contends that only the decision of 10 July 2014 actually analysed the Solar Levy, and that the references to the Solar Levy as a "tax" in the other decisions are either vague or confined to the character as a tax for the purposes of the TAL. In any event, these decisions were without prejudice to the finding of the Grand Chamber of the Supreme Administrative Court which held that, while being a "tax" within the meaning of Section 2(3) of the TAL, the Solar Levy resulted in a *de facto* decrease of the level of support to solar energy producers.³²²
306. The Claimant further contends that the Respondent is estopped from claiming in these proceedings that the Solar Levy is not linked to the FiT, given certain statements of the Czech Ministry of Finance before the Constitutional Court.³²³ In this regard, the Claimant contends that the Respondent's view that the only link between the FiT and the Solar Levy is that "the former is the taxable base of the latter"³²⁴ is disproved by the referenced statements of the Minister of Finance, to the effect that income from the Solar Levy "serves to compensate the additional expenses associated with the obligation to purchase electricity from solar radiation" and that the FiT and the Solar Levy "are inherently tied together, since they are connected through the fiscal

³¹⁸ Reply, paras. 578-582, 614, *referring to* Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 5, 19-20 (**Ex. CLA-2**).

³¹⁹ Rejoinder on Jurisdiction, para. 105.

³²⁰ Rejoinder on Jurisdiction, paras. 106-107, *referring to* Second Borkovec Report, para. 49 and Third Frýzek Report, para. 37, stating, respectively, that "the equivalent consideration for the Solar levy is the State subsidy contribution for the payment of further FiT or Green Bonuses, taking into account the financing mechanism of the FiT/Green Bonuses." and that "the solar levy cannot be considered non-equivalent and thus lacks a defining feature for a 'tax'. [...] this conclusion was also reached by the Supreme Administrative Court decision of 10 July 2014 (para. 19 and 20), which – as of today – remains the sole Czech ruling that thoroughly analyzed the nature of the solar levy" (emphasis omitted).

³²¹ Reply, paras. 583-592, *referring to* Decision of the Czech Constitutional Court, Case No. 2216/14, 13 January 2015, paras. 25, 33 (**Ex. CLA-13**); Decision of the Grand Chamber of the Czech Supreme Administrative Court, Case No. 1 Afs 76/2013-57, 17 December 2013, paras. 23, 28, 50 (**Annex 13 to First Frýzek Report**).

³²² Reply, paras. 585, 591-592.

³²³ Rejoinder on Jurisdiction, para. 103.

³²⁴ Rejoinder on Jurisdiction, para. 102.

aspects.”³²⁵

307. Third, five further indicators of the non-tax nature of the Solar Levy exist:³²⁶ (1) the enactment of Act No. 402/2010 differed from the usual legislative process, as the bill was submitted to Parliament by the Ministry of Industry and Trade, unlike most taxation measures which are presented by the Ministry of Finance;³²⁷ (2) the Solar Levy applies to “a narrow group of taxpayers”, composed of solar energy producers identified on the basis of their date of connection to the grid, a non-tax criterion applied at the discretion of grid operators;³²⁸ (3) the Solar Levy was temporary, which further demonstrates the non-tax nature of the Solar Levy,³²⁹ (4) the term “levy” was employed, instead of “tax”, without explanation,³³⁰ and (5) the Solar Levy was not proportional, as it may have “strangling” or “liquidating” effects according to the Czech Constitutional Court.³³¹ In addition, the possession of features present in other types of payments, such as certain “fees”, does not render the Solar Levy a tax, nor do accounting, budgetary and statistics rules whereby the Solar Levy is treated as a tax.³³²
308. The Claimant submits that the definition of tax set out in the decisions in *EnCana Corporation v. Republic of Ecuador*, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, and *Burlington Resources Inc. v. Republic of Ecuador*, each brought against Ecuador under different U.S. and Canadian treaties, is not applicable to the Solar Levy, since the tax carve-outs involved in those treaties did not define “tax” or “taxation measure”, unlike the ECT.³³³ Even assuming that the definition set out in these cases is applicable, the Claimant argues that

³²⁵ Rejoinder on Jurisdiction, para. 102, *referring* to opinion of the Czech Ministry of Finance provided to the Constitutional Court in 2011 during the proceedings that led to decision No. 220/2012 Coll., para 31-32 (**Annex 22 to Second Frýzek Report**).

³²⁶ Rejoinder on Jurisdiction, paras. 120-128.

³²⁷ Reply, paras. 594, 599, *referring to* First Frýzek Report, paras. 46-47.

³²⁸ Reply, paras. 595, 599, 607.

³²⁹ Reply, paras. 596, 599.

³³⁰ Reply, paras. 597, 599.

³³¹ Reply, para. 598, *referring to* Decision of the Czech Constitutional Court, 13 January 2015, Case No. ÚS 2216/14, para. 35 (**Ex. CLA-13**); May 2012 Constitutional Court Judgment, para. 88 (**Ex. CLA-12/R-110**).

³³² Rejoinder on Jurisdiction, para 122.

³³³ Reply, paras. 604-605, *relying on* *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2018, para. 174 (**Ex. CLA-46**) (“*Duke Energy v. Ecuador*”); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 165 (**Ex. RLA-14**) (“*Burlington Decision on Jurisdiction*”); *EnCana Corporation v. Republic of Ecuador*, Award, 3 February 2006, paras. 141-142 (**Ex. RLA-22**) (“*EnCana Award*”).

the Solar Levy, despite having been introduced by law, does not meet the other requirements of that definition, since it is unclear that the narrow group of taxpayers amounts to a “class of persons”, no payment was made to the State, which merely acted as collecting agent but did not retain any funds, and no public purpose existed.³³⁴

3. The Tribunal’s Decision

309. Preliminarily, the Tribunal notes that the Parties’ disagreement regarding the ECT’s tax carve-out is limited to the question whether the Solar Levy constitutes a “Taxation Measure” within the meaning of Article 21 of the ECT and, as such, is excluded from the Tribunal’s jurisdiction under the ECT. As the Respondent contends, the Claimant “does not deny that the Tax Incentives provided for by the Act on Income Tax are ‘taxation measures’ covered by the carve-out,” and that “Claimant’s only disagreement with the Czech Republic’s analysis relates to the characterization – for purposes of the ECT – of the Acts that introduced and extended the Solar Levy as “Taxation Measures,”³³⁵ a proposition that the Respondent repeated at the Hearing³³⁶ and that the Claimant did not challenge at any time.
310. As a consequence, the Tribunal has little doubt that the Income Tax measures and the Shortened Depreciation fall within the ECT’s tax carve-out. Accordingly, the Tribunal accepts that it lacks jurisdiction to hear Claimant’s claims regarding those two measures under the ECT. The Tribunal’s analysis is therefore limited to the question whether it has jurisdiction under the ECT over the Claimant’s claims related to the Solar Levy.
311. The Tribunal’s analysis begins with the burden of proof. The “Taxation” provision of the ECT relied upon by the Respondent is an exception to the more general provisions of the ECT. As such, it is clear that the Respondent bears the burden of proof of establishing that the Solar Levy may be characterized as a “provision relating to taxes of the domestic law” within the meaning of Article 21(7)(a)(i) of the ECT.
312. This allocation of the burden of proof is consistent with the text of Article 21 of the ECT, which provides in relevant part: “Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties.” It is also consistent with the character of Taxation Measures as an exception to the more

³³⁴ Reply, paras. 606-611.

³³⁵ Rejoinder, para. 340.

³³⁶ Hearing Transcript (27 February 2017), 241:11-15 (“You heard the Claimants accept that two of them, the repeal of the income tax holiday and the depreciation changes, are in fact taxation measures. So that leaves us really with the only issue of whether the solar levy is also a taxation measure.”).

general terms of the ECT. The Respondent indeed does not dispute that it bears the burden of proof that the Solar Levy constitutes a “tax” or “Taxation Measure” within the meaning of Article 21.

313. In the Tribunal’s view, the Respondent has not discharged this burden of proof. As discussed below, the Tribunal is not convinced that the Solar Levy constitutes a “tax” as a matter of Czech law, as principally contended by the Respondent. Likewise, even apart from Czech law, the Tribunal is not persuaded that the Solar Levy may be characterized as a tax or Taxation Measure within the meaning of Article 21 of the ECT. As a consequence, the Tribunal concludes that it does not lack jurisdiction over the Claimant’s claims related to the Solar Levy under the ECT on this ground.
314. First, the Respondent’s primary contention is that the Tribunal “must look to the domestic law of the Czech Republic”³³⁷ in determining whether the Solar Levy is a tax within the meaning of Article 21 of the ECT. The Tribunal is satisfied that the application of the ECT’s tax carve-out is conditional on the State invoking the Article 21 exception, characterizing the putative “Taxation Measure” as a tax in nature and substance as a matter of its domestic law.
315. It is undisputed, and the Tribunal agrees, that Article 21 must be interpreted in accordance with the standards set out by the VCLT, particularly in its Article 31, and international law generally.³³⁸ This requires that effect be given to Article 21(7)’s *renvoi* to the domestic law of the Contracting Party invoking Article 21. Indeed, Article 21(7)(a)(i) of the ECT refers expressly to a “provision relating to taxes *of the domestic law* of the Contracting Party” (emphasis added). The Tribunal shares the Respondent’s view that this “means necessarily that the relevant assessment must be made under the domestic law of the respondent State.”³³⁹
316. This interpretation is consistent with the text of Article 21(7). It is, in the Tribunal’s view, also consistent with Article 21’s objective to permit, within the limits of the provision, Contracting Parties to carve-out measures from certain ECT standards – that is to “exclude a taxation measure from the coverage of the standards of protection.”³⁴⁰ Critically, however, unless a Contracting State has itself chosen to characterize a measure as a tax measure in its own domestic legal order, that measure does not fall within the scope of Article 21 of the ECT. In short, Article 21 applies,

³³⁷ Rejoinder, paras. 346; Counter-Memorial, paras. 408-413.

³³⁸ Reply, para. 525; Rejoinder, para. 342.

³³⁹ Counter-Memorial, para. 409.

³⁴⁰ Uğur Erman Özgür (for the Energy Charter Secretariat), *Taxation of Foreign Investments under International Law: Article 21 of the Energy Charter Treaty in Context*, 2015, p. 20 (Ex. CLA-116).

prima facie, only to those measures which constitute taxation measures within the legal order of the State invoking the Article 21 exception. (As discussed below, there are also international limits imposed by Article 21 on those measures which a Contracting State may define as tax measures as a matter of its domestic law, but this is a separate and subsequent issue.)

317. Applying this analysis, the Tribunal is not persuaded that the Respondent has discharged its burden of proving that the Solar Levy was a tax as a matter of domestic Czech law. Rather, the expert evidence and other materials before the Tribunal indicate that the Solar Levy was regarded as a tax as a matter of Czech law only for certain limited purposes, but as something other than a tax for other, more significant, purposes. In the Tribunal's view, this is insufficient to justify a conclusion that the Solar Levy was characterized by Czech law as a tax within the meaning of Article 21 of the ECT.
318. As a preliminary matter, the Tribunal notes that the Solar Levy was titled just that – the “Solar Levy” – not the “Solar Tax” or the like. Where the inquiry is whether a measure is characterized as a tax or taxation measure under Czech law, it is of some significance that the measure was, in contrast to many other fiscal measures in the Czech Republic, not denominated by the Czech legislature as a tax. If this were the only consideration militating against characterization of the Solar Levy as a tax under Czech law, the Tribunal would be reluctant to attach dispositive weight to it. However, as discussed below, there are other, more substantial, considerations that point against characterization of the measure as a tax under Czech law.
319. Most importantly, the Tribunal notes that the 10 July 2014 decision of the Czech Supreme Administrative Court held that, for double taxation purposes, the Solar Levy is not a tax under Czech law. The Court addressed the question whether, combined with the corporate income tax, the Solar Levy would have entailed an unlawful double taxation, and rejected that conclusion, holding that the Solar Levy was not a tax, but rather “in nature” a reduction of the government subsidy (FiT and Green Bonuses).³⁴¹ The Supreme Administrative Court reasoned that “[t]he subject of the [Solar Levy] is the amount resulting from the consideration of stipulating the amount of government support for this type of economic activity,”³⁴² which led it to conclude that the Solar Levy lacked the essential feature of “non-equivalence,” which in its view was necessary for categorization of the measure as a “tax” under Czech law.³⁴³

³⁴¹ Decision of the Czech Supreme Administrative Court, 10 July 2014, para. 20 (Ex. CLA-2).

³⁴² Decision of the Czech Supreme Administrative Court, 10 July 2014, para. 19 (Ex. CLA-2).

³⁴³ Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 19-20 (Ex. CLA-2).

320. There is no dispute that the Czech Supreme Administrative Court was the Czech Republic's highest judicial authority on the (non-constitutional) questions it addressed regarding the nature of the Solar Levy. In its 10 July 2014 decision, the Court specifically addressed the nature and substance of the Solar Levy. The Tribunal has little doubt that this characterization was not an *obiter* statement, but a necessary element in the Court's holding.³⁴⁴ The Tribunal also notes that other judgments of Czech courts, including the Constitutional Court and Chambers of the Supreme Administrative Court have likewise found the Solar Levy to be, in essence, a reduction of the FiT, not a tax.³⁴⁵
321. Given the foregoing authorities, the Tribunal would be very reluctant to adopt a different conclusion as to the nature and substance of the Solar Levy under Czech law. In particular, the Tribunal is not persuaded by the argument that the Czech legal system does not assign judicial decisions (or decisions by courts other than the Constitutional Court) *erga omnes* effect or recognise them as sources of law.³⁴⁶ That is not uncommon in civil law jurisdictions. More importantly, as the Respondent's expert conceded at the Hearing, the formal status and effect is in no way indicative of the interpretative authority that Supreme Administrative Court judgments have in the Czech domestic legal system: "Although the decisions of the Supreme Administrative Court are not considered a formal source of law in the Czech Republic, as a civil law country which does not have the system of court precedents, an established and long-term adjudicator, which means case law, is usually considered to be an interpretative guide which may have a relatively high level of authority."³⁴⁷
322. The Tribunal considers that for the characterization of the Solar Levy in the Czech legal order, Czech judicial decisions, including those of the Supreme Administrative Court, offer the best available guidance, and it therefore attaches particular weight to them.
323. The Tribunal draws further comfort in reaching this conclusion from the fact that the Respondent

³⁴⁴ The Tribunal does not accept the Respondent's argument that the Supreme Administrative Court's decision came in a "single-paragraph *obiter* statement." On the contrary, as Respondent's expert acknowledged in cross-examination, this element of the Court's decision was both necessary to its holding and was elaborated upon in several points in the Court's judgment (Hearing Transcript (1 March 2017), 163:22-164:8).

³⁴⁵ Decision of the Grand Chamber of the Czech Supreme Administrative Court, Case No. 1 Afs 76/2013-57, 17 December 2013, para. 28 (**Annex 13 to First Frýzek Report**); Halíček Report, para. 46; May 2012 Constitutional Court Judgment, para. 45 (**CLA-12/R-110**); Decision of the Czech Constitutional Court, Case No. 3211/13, 6 February 2014, para. 5 (**Annex 16 to First Frýzek Report**); Decision of the Czech Constitutional Court, Case No. 2216/14, 13 January 2015, para. 5 (**Annex 14 to First Frýzek Report**).

³⁴⁶ Kotáb Report, para 81.

³⁴⁷ Hearing Transcript (1 March 2017), 140:18-141:1.

itself contended, through its Ministry of Finance, that the Solar Levy was not a tax in proceedings before the Czech courts. In particular, the Czech Finance Ministry argued before the Czech Constitutional Court that the Solar Levy was “aimed to decrease the economic feed-in tariffs”³⁴⁸ and that “from the material perspective, the introduced measures [including the Solar Levy] are considered a reduction of subsidy”³⁴⁹ In the Tribunal’s view, these characterizations are entirely consistent with the Supreme Administrative Court’s 10 July 2014 decision that the Solar Levy was a *de facto* reduction of the FiTs, rather than a tax.

324. The Tribunal is not convinced that it should attach comparable weight to the various decisions on which the Respondent relies to argue that the Solar Levy was a tax under Czech law. These judicial decisions focus on determining whether or not the Solar Levy is governed by the procedural and administrative provisions of the TAL and that it complies with the requirements of Article 11(5) of the Charter.³⁵⁰ It is undisputed that the TAL’s definition of “tax” applies to a broad variety of public charges, including administrative fees, fines and other charges which are not commonly considered taxes under Czech law.³⁵¹ It is also undisputed that Article 11(5) of the Charter is applicable not only to taxes, but also to fees.³⁵² In light of the foregoing, in the Tribunal’s view, these authorities only demonstrate that the Solar Levy was established in compliance with the Charter’s legal constraints and administered in accordance with the TAL’s procedural requirements, applicable to both taxes and other fees. In the Tribunal’s view, these conclusions are certainly not dispositive of the proper characterization of the Solar Levy and they do not diminish the persuasiveness of the Supreme Administrative Court’s 10 July 2014 decision

³⁴⁸ Detailed opinion of the Czech Ministry of Finance provided to the Constitutional Court in 2011 during the proceedings that led to decision No. 220/2012 Coll, para. 118 (**Annex 22 to Second Frýzek Report**).

³⁴⁹ Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 19-20 (**Ex. CLA-2**).

³⁵⁰ Halíček Report, paras. 47-48, May 2012 Constitutional Court Judgment, paras. 46, 59, 60, 64 (**Ex. CLA-12/R-110**); Decision of the Grand Chamber of the Czech Supreme Administrative Court, Case No. 1 Afs 76/2013-57, 17 December 2013, paras. 36, 50 (**Annex 13 to First Frýzek Report**); Decision of the Czech Supreme Administrative Court, Case No. 1 Afs 256/2014 - 28, 25 March 2015, para. 42 (**Annex 18 to First Frýzek Report**); Decision of the Czech Supreme Administrative Court, Case No. 1 Afs 80/2012-44, 20 December 2012, para. 19 (**Ex. R-30**); Decision of the Czech Supreme Administrative Court, Case No. 5 Afs 126/2013-34, 7 May 2014, paras. 6, 40 (**Annex 21 to Second Frýzek Report**); Decision of the Supreme Administrative Court, Case No. Afs 66/2012-38, 24 July 2013, p. 4 (**Ex. R-362**), Kotáb Report, paras. 91-92, 94, fn. 105-07; Decision of the Czech Constitutional Court, Case No. II. ÚS 2216/14, 13 January 2015, para. 29 (**Annex 14 to First Frýzek Report**).

³⁵¹ First Frýzek Report, para. 38; Rejoinder, para. 374; Hearing Transcript (1 March 2017), 144:20-23 (“Q. So, on any analysis, the definition of ‘tax’ under the TAL extends to a great many payments that are clearly not taxes? A. Okay. That’s right, yes.”).

³⁵² Article 11(5) of the Charter provides: “Taxes and fees shall be levied only on the basis of law;” Charter of Fundamental Rights and Freedoms (No. 02/1993 Coll.) (**Ex. R-111**). Rejoinder on Jurisdiction, para. 80; Hearing Transcript (1 March 2017), 84:8-85:6.

in the present case.

325. The Tribunal reaches the conclusion that the Solar Levy does not constitute a tax under Czech law primarily on the basis of the Czech judicial decisions addressing its characterization. The Tribunal shares the Respondent's view that, in these particular circumstances, "[a]cademic literature [...] cannot be determinative as to whether a particular measure is legally a tax."³⁵³ The academic literature which addresses the nature and substance of the Solar Levy under Czech Law and which is relied on by the Parties fails to engage with a number of the above referenced judicial decisions.³⁵⁴ In these circumstances, the Tribunal is not persuaded that it should attach decisive weight to any of the academic commentary in the record, or that any of this commentary displaces the Supreme Administrative Court's characterization of the Solar Levy.
326. In summary, the Tribunal is not persuaded that the Respondent has discharged its burden of proving that the Solar Levy was characterized as a tax under Czech law. In its view, the weight of the evidence is that the Solar Levy was regarded as something other than a tax and was not supportive of a conclusion that it was a measure to which the carve-out of Article 21 of the ECT is applicable.
327. Second, and independently, the Tribunal is also not persuaded that the Solar Levy is a tax or taxation measure within the limits contemplated by Article 21 of the ECT.
328. As discussed above, Article 21 excludes specified tax measures from the scope of the ECT, but only in so far as that measure is characterized as a tax measure under the domestic law of the State invoking the ECT's tax carve-out. Unless a measure is regarded as a tax measure by the State which has enacted it, and which relies upon it under Article 21, neither the text nor object and purpose of Article 21 are satisfied.
329. In addition, however, the Tribunal also concludes that a measure characterized as a taxation measure by a Contracting Party will only be excluded from the scope of the ECT, if it falls within the limits of legitimate regulatory measures provided by Article 21 of the ECT itself (as well as customary international law).³⁵⁵ In this regard, Article 21 imposes implicit limits on those measures which may be invoked by a Contracting Party under the ECT's tax carve-out. Accepting the existence of international limits on the Contracting Parties' right to exclude

³⁵³ Rejoinder, para. 369.

³⁵⁴ See, e.g., R. Boháč, "Tax Revenues of Public Budgets in the Czech Republic" (excerpt) (**Ex. R-318**); Hearing Transcript (1 March 2017), 173:2-16.

³⁵⁵ Uğur Erman Özgür (for the Energy Charter Secretariat), *Taxation of Foreign Investments under International Law: Article 21 of the Energy Charter Treaty in Context*, 2015, p. 20 (**Ex. CLA-116**).

taxation measures from certain provisions of the ECT does not strip the Contracting Parties from one of their “most quintessential sovereign powers.”³⁵⁶ Instead, it acknowledges that any sovereign prerogative has its limits, which are, in the present case, imposed by the text and purposes of Article 21 of the ECT. The Contracting Parties are, of course, free to make use of their regulatory power and adopt measures in fiscal matters. They are, however, limited in their right to invoke such measures under the ECT.

330. A contrary conclusion, that is, finding that the definition of tax measures in Article 21 of the ECT was not subject to any inherent limits, would empower Contracting Parties to define unilaterally which measures fall within the ECT’s protective scope. The Tribunal does not consider that the drafters of Article 21 intended such a result. Moreover, this would contravene the object and purpose of the ECT, which is to establish uniform standards among the Contracting Parties. This is an aim to which Article 21 is clearly intended to be an exception, since its scope is specifically limited to tax measures. The Tribunal is persuaded that Article 21 imposes international limits on what may constitute a tax measure for these purposes.
331. Article 21’s limits are necessarily implied as the provision itself does not set out an explicit international definition of “Taxation measures.” There is, however, no need for the Tribunal to provide a comprehensive definition. It suffices for the Tribunal to address the facets of Article 21’s limits, which it considers relevant in the present case.
332. In the Tribunal’s view, Article 21 was not intended to exclude from the ECT’s scope measures the main objective of which was other than that of the raising of general revenue for the State,³⁵⁷ and which were formulated and structured as taxation measures for a particular ulterior reason (such as, here, reducing the risk of legal challenges).
333. Although not dependent upon a finding of bad faith, this conclusion is consistent with the principle that treaty obligations must be interpreted, and performed, in good faith.³⁵⁸ The Tribunal shares the view that: “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

³⁵⁶ Hearing Transcript (27 February 2017), 245:7-12.

³⁵⁷ *Yukos*, paras. 1430-31 (Article 21 applies only to “actions that are motivated for the purpose of raising general revenue for the State”; actions taken “to achieve an entirely unrelated purpose” are not within Article 21) (**Ex. CLA-7**). See also *Quasar de Valores SICAV S.A. et al. v. The Russian Federation*, Award, 20 July 2012, para. 179 (“international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures ... as taxation”) (**Ex. CLA-11**).

³⁵⁸ Article 31(1) VCLT (“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.”).

fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage ...’ 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.”³⁵⁹

334. The Tribunal considers these principles particularly significant under the ECT. The purpose of the ECT was to “promote long-term cooperation in the energy field”³⁶⁰ and the treaty was designed to promote transparency, fairness and stability. These considerations underscore the importance of good faith in the application of Article 21 to a Contracting Party’s regulatory measures.

335. In light of these principles, the Tribunal takes the view that the Solar Levy falls outside the scope of Article 21 of the ECT. The Tribunal attaches particular weight to statements made at the time of the enactment of the Solar Levy, which clearly evidence that the Solar Levy’s main objective was to reduce FiTs payable to certain solar energy producers, and not the general raising of state revenue. Importantly, these statements also evidence that the Solar Levy was structured, in many respects, as a tax for a particular reason, namely to avoid claims against the Czech Republic under the ECT. By way of example:

(a) 23 September 2010 Emergency Coordination Committee: “More stringent measures that would put the support of RES, and especially PVPP to an end” gave rise to a “risk of arbitration”; Committee charged with deciding “whether legal analysis of potential arbitrations with the assessment of risks and costs for the state budget if the proposal for more stringent measures is passed, e.g., *by adopting the change in the feed-in tariff for RES*.”³⁶¹

(b) 15 October 2010 Emergency Coordination Committee: “Deputy Environmental Minister Bízková stated that it is necessary to *find a formally correct mechanism for reduction of the support of RES from photovoltaic power plants*, such that it cannot be legally contested.”³⁶²

(c) 2 November 2010 Economic Committee of the Chamber of Deputies: “The issue of arbitrations in general is absolutely erratic [sic]. [...] I declare that it will *reduce the amount of intended support* to make it bearable for the Czech Republic and for

³⁵⁹ *Phoenix*, para. 107 (Ex. RLA-1).

³⁶⁰ Article 2 of the ECT.

³⁶¹ Invitation and Minutes of 1st Meeting of Coordination Committee for the assessment of the impact of support of renewable energy sources on electricity prices, 23 September 2010, p. 5 (Ex. R-213).

³⁶² Minutes of the third meeting of the Coordination Committee, 15 October 2010, p. 4 (Ex. C-112).

electricity consumers in the Czech Republic. This method – through the withholding tax – is not just a retroactive correction of support. One may argue as to whether or not this is retroactive. Nonetheless, it is a similar situation as if you changed the conditions for investors by increasing the income tax. From the arbitration perspective, they will strive to advocate the principle on which the support for RES has been based, *i.e.*, their 15-year payback period [...] the rest is the question of tax regimes – this is the responsibility of each country, and *changes in tax rates should not be challenged in arbitrations.*³⁶³

(d) 29 November 2010 Senate Session: “I would like to say that, explicitly, when it comes to the relation of taxes in contracts, in agreement on the protection and support of investments respectively, there is usually the clause explicitly exempting the tax issues from the contracted subjects.”³⁶⁴

(e) Ministry of Finance opinion to Czech Constitutional Court: “The state uses the [Solar Levy] measures [...] to regulate prices”³⁶⁵ and “Introduction of the levy [...] is aimed to decrease the economic feed-in tariffs.”³⁶⁶

(f) Chairman of ERO: “it would be appropriate to reduce the FiT for photovoltaic power plants [...] much more but ERO was not allowed to do so.”³⁶⁷

336. The Tribunal accepts that one purpose of the Solar Levy was to raise revenue for the State (to finance the subsidies to solar energy producers).³⁶⁸ Most importantly, however, the Solar Levy was structured to adjust the level of the FiT payable to certain renewable energy producers rather than to raise revenue. This is evidenced, in the Tribunal’s view, by the unusually narrow class of persons subject to the Solar Levy; the method of calculating the Solar Levy; and the possibility that the Solar levy could not only be paid quarterly by the solar energy producers, but could also be withheld from the FiTs paid to those producers.

³⁶³ Minutes of Session of the Economic Committee of the Chamber of Deputies, 2 November 2010, p. 5 (emphasis added) (**Ex. C-123**).

³⁶⁴ Transcript of the Senate session, 29 November 2009 (**Ex. C-225**).

³⁶⁵ Detailed opinion of the Czech Ministry of Finance provided to the Constitutional Court in 2011 during the proceedings that led to decision No. 220/2012 Coll., para. 246 (**Annex 22 to Second Frýzek Report**).

³⁶⁶ Detailed opinion of the Czech Ministry of Finance provided to the Constitutional Court in 2011 during the proceedings that led to decision No. 220/2012 Coll., para. 118 (**Annex 22 to Second Frýzek Report**).

³⁶⁷ Statement by Mr Fírt (Chairman of ERO) in Summary of witness statements contained in the Suspension resolution of the Czech Police, p. 3 (**Annex 8 to First Frýzek Report**).

³⁶⁸ Frýzek Hearing presentation, slide 7; Rejoinder, para 389.

337. Despite this, the Solar Levy was structured, in a number of respects, to resemble a tax; as the Respondent correctly observes, the Solar Levy did not formally reduce the FiT, was imposed (like many taxes) on a specified base with specified rates and was collected pursuant to the TAL. In the Tribunal's view, however, the main reason for these characteristics, as evidenced by the statements quoted above, was an effort to bring the Solar Levy within the scope of Article 21 and thereby avoid the restrictions of the ECT.
338. The Tribunal again notes the 10 July 2014 decision of the Czech Supreme Administrative Court, and the submissions of the Czech Ministry of Finance to the Czech Constitutional Court, concluding that the Solar Levy was a *de facto* reduction of the FiTs payable to certain renewable energy producers. In the Tribunal's view, the Supreme Administrative Court's analysis is persuasive: for the reasons outlined above, the main focus of the Solar Levy was the reduction of certain FiTs, as evidenced by both the measure's structure and the parliamentary statements made in connection with its enactment.
339. The Tribunal emphasizes that this case does not involve conduct comparable to that in *RosInvestCo UK Ltd. v. The Russian Federation*, and *Quasar de Valores v. The Russian Federation*. There is no suggestion that the Respondent used its tax authority to target political opponents, to seize control of major economic enterprises or to accomplish objectives unrelated to fiscal and budgetary issues. The Respondent's conduct here is simply not of the same character, and it did not act abusively, duplicitously or with similar bad faith.
340. Having said this, as discussed above, the nature and objectives of the Solar Levy are such that it does not fall within the definition of a tax measure under Article 21. As its structure and legislative history make clear, the Solar Levy was not designed primarily to raise revenue, but instead to reduce the FiTs for a specific set of renewable energy producers, with the Solar Levy being structured, in many respects, as a tax in an attempt to reduce the risk of legal challenges. This was not the purpose of the ECT. If the Solar Levy were to be exempted from the scope of the ECT, the treaty's object and purposes would be materially frustrated.

D. THE CLAIMANT'S INVESTMENT WITHIN THE MEANING OF THE ECT

1. The Respondent's Position

341. The Respondent argues that the Claimant cannot bring a claim for the entirety of SolarOne's shares since, in November 2009, prior to the adoption of the contested measures, a 10% stake

had been transferred to Mr. Chroustovský.³⁶⁹ The Respondent contends that the Claimant, which characterises its claims as relating to damages suffered by its own investment inclusive of a 10% call option in SolarOne (the “**Call Option**”), cannot bring a claim in respect of the 10% SolarOne stake held by Mr. Chroustovský.³⁷⁰

342. The Respondent submits that the Call Option is not an investment under the ECT; it does not qualify as a “form of equity participation” as set out in Article 1(6) of the ECT, because it does not involve actual ownership but only creates a right to potential ownership, as the Claimant itself acknowledges.³⁷¹ The Call Option neither involves a contribution nor risk, since the purpose of a call option is precisely to eliminate risk as to return on investment.³⁷² In addition, referring to the decision in *Yukos*, among others, the Respondent submits that even if it were accepted that a call option is an investment, the Call Option is merely a contingent right, since no transfer of ownership resulted from the November 2009 transfer agreement, relied upon by the Claimant.³⁷³ The Respondent also argues that an abuse of process would take place, through exercise of the Call Option after the dispute arose, if the Tribunal were to exercise jurisdiction over the 10% stake in SolarOne.³⁷⁴
343. As for the Claimant’s remaining 90% stake in SolarOne (the “**90% stake**”), which encompasses half of the damages claimed in this arbitration, the Respondent argues that, on the assumption that a protected investment was made, no obligation would have been owed continuously to date to the Claimant under the ECT.³⁷⁵ Since the Claimant’s shares were transferred to Mr. Jan Černý, a Czech national and one of the Claimant’s shareholders, on 25 May 2016, claims in connection with any injury to SolarOne resulting from breaches allegedly committed after that date fall outside the Tribunal’s jurisdiction. Thus, the Tribunal jurisdiction is confined to claims for injury suffered by the Claimant, if any, while it owned SolarOne.³⁷⁶

³⁶⁹ Rejoinder, para. 485.

³⁷⁰ Rejoinder, para. 486, referring to *Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paras. 153, 316(a) (Ex. RLA-15) (“*Impregilo*”).

³⁷¹ Rejoinder, para. 489.

³⁷² Rejoinder, para. 490.

³⁷³ Rejoinder, paras. 492, 493, referring to *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Interim Award On Jurisdiction and Admissibility, 30 November 2009, paras. 528-529 (Ex. RLA-317) (“*Yukos Award on Jurisdiction*”).

³⁷⁴ Rejoinder, paras. 494, 495.

³⁷⁵ Rejoinder, paras. 496-498.

³⁷⁶ Rejoinder, paras. 494-503.

2. The Claimant's Position

344. The Claimant states that it is asserting claims in respect of damages suffered by its own investment in the form of a Call Option, and thus, contrary to the Respondent's contention, not on behalf of Mr. Chroustovský.³⁷⁷
345. The Claimant submits that the Call Option is a protected investment under the ECT. This follows not only from the text of the ECT, but additionally in light of the fact that the Call Option exhibits the features which the Respondent attributes to an investment, such as economic value and the assumption of risk. No abuse of process would be involved, since the Call Option had been acquired even before the dispute became foreseeable.³⁷⁸
346. The Claimant further submits that its claim is not confined to the shares owned at the time of adoption of the challenged measures since, pursuant to the plain language of Article 1(6) of the ECT, the Call Option is a protected investment, regardless of the fact that the option concerns shares that the Claimant "may eventually come to own".³⁷⁹ The Claimant argues that the Call Option involved neither uncertainty as to its exercise nor a contractual performance contingent on the mere will of the Claimant.³⁸⁰ The Claimant further contends that the exercise of the Call Option was not barred by the prohibition on "company chains", abrogated on 1 January 2014.³⁸¹
347. As for the remaining 90% interest in SolarOne, the Claimant argues that, as of 1 January 2011 (the valuation date), it is undisputed that it had a protected investment which was breached upon implementation of the challenged measures. According to the Claimant, the 25 May 2016 sale does not impinge on the Tribunal's jurisdiction over the 90% stake, nor preclude the Claimant's entitlement to damages arising out of the breach, which encompasses the effects of the measures thereafter, including both "by" and "after" the date of the award.³⁸²

³⁷⁷ Reply, paras. 616-619.

³⁷⁸ Rejoinder on Jurisdiction, paras. 201-208.

³⁷⁹ Reply, para. 620.

³⁸⁰ Reply, para. 621-622.

³⁸¹ Reply, para. 623.

³⁸² Rejoinder on Jurisdiction, paras. 209-212.

3. The Tribunal's Decision

348. The Tribunal's decision regarding this aspect of the controversy is divided into two parts, concerning the Call Option, on the one hand, and the remaining 90% stake in SolarOne, on the other hand.

Regarding the Call Option

349. The Parties are divided as to the character of the Call Option as an investment. Given the analysis earlier in this Award, the Tribunal need only make a finding as to the character of the Call Option as an investment pursuant to Article 1(6) of the ECT, having decided that it lacks jurisdiction to consider the Claimant's claims under the BIT.

350. As an initial matter, the Tribunal notes that call options are not included among the classes of investment expressly enumerated in Article 1(6) of the ECT. The Tribunal, therefore, has to determine whether the Call Option constitutes a "kind of asset", for the purposes of the chapeau to Article 1(6) of the ECT.

351. Article 1(6) of the ECT does not provide a definition of "asset". Taking into account the text of the remainder of Article 1(6) of the ECT, the Tribunal further notes that the classes of investments enumerated in the provision comprise, among others, several kinds of rights, including rights whereby a person is entitled to participate in a company or business, including in the form of equity participation. According to the second paragraph of Article 1(6) of the ECT, the form of an asset does not affect its character as an investment. Thus, the main attribute applicable to any asset not expressly enumerated and described in the text is that it shall have been invested, regardless of the form of such investment. From the above, the Tribunal concludes that an "asset" comprises any right invested by an investor, regardless of the form of the investment and any changes thereto.

352. Therefore, the Tribunal considers it apt to determine, first, whether a call option is an asset. In this regard, the conclusions of the tribunal in *Yukos* in relation to call options are of assistance.³⁸³ The *Yukos* tribunal concluded that the call options at issue did not bear upon its determination regarding ownership of, and control over, the shares in question.³⁸⁴ In particular, "[n]o transfer of property will have occurred unless and until the option is exercised, but until it is (and it may never be) all property remains with the grantor of the option".³⁸⁵ The Tribunal agrees with this

³⁸³ *Yukos* Award on Jurisdiction, paras. 436, 459-460, 499-500, 510, 525, 527-528 (Ex. RLA-317).

³⁸⁴ *Yukos* Award on Jurisdiction, para. 528 (Ex. RLA-317).

³⁸⁵ *Yukos* Award on Jurisdiction, para. 527 (Ex. RLA-317).

broad observation. A call option is a right which, unless exercised, has no bearing upon the matter of ownership of another right, including a right constitutive of an asset within the meaning of Article 1(6) of the ECT. Importantly, a call option is ancillary in character: its object is not the making of an investment. Rather it is the asset actually invested (*i.e.*, the subject of the call option) that is the principal right constitutive of an investment under Article 1(6) of the ECT.

353. For the foregoing reasons, the Tribunal concludes that the Call Option is not an asset invested by the Claimant and, thus, falls outside the scope of the Tribunal's jurisdiction.

Regarding the 90% stake in SolarOne

354. The Tribunal now turns to the Parties' difference regarding damages allegedly caused to the Claimant's 90% stake in SolarOne.

355. The Respondent contests the character of the 90% stake as a protected investment after 25 May 2016 when the Claimant's shares were transferred to Mr. Jan Černý. In particular, the Respondent contests the Tribunal's jurisdiction over any alleged damage to the 90% stake caused on or after 25 May 2016, since following the transfer of the 90% stake on this date, so it is said, no obligation was owed anymore to the Claimant under the ECT. The Tribunal observes that, notwithstanding its contention as to the absence of any protected investment, the Respondent accepts that the Tribunal has jurisdiction over measures (if any) that caused injury to the Claimant's 90% stake on or prior to 25 May 2016. The Claimant argues that its 90% stake does constitute a protected investment; that a breach took place as of the date of valuation, namely 1 January 2011; and that the alleged breach has a continuing effect beyond 25 May 2016, including any damages which might be suffered by, or after, the date of issuance of this Tribunal's award.

356. As for its jurisdiction *ratione materiae*, the Tribunal recalls its observations regarding Article 1(6) of the ECT. As pointed out above, its finding in relation to the 90% stake has to be based exclusively on the ECT, having decided that it lacks jurisdiction to consider the Claimant's claims under the BIT.

357. Pursuant to Article 1(6) of the ECT, the Tribunal is of the view that the 90% stake does constitute a protected investment under the ECT. In particular, as opposed to the ancillary nature of call options, the 90% stake is an asset constitutive of the principal right owned by the Claimant as a protected investor under the ECT. The Tribunal, thus, has jurisdiction *ratione materiae* over the 90% stake.

358. As for its jurisdiction *ratione temporis*, the Tribunal addresses the Parties' arguments relating to injury allegedly suffered before and on or after 25 May 2016.

359. For the avoidance of doubt, there is no dispute that claims concerning any measures allegedly committed by the Claimant prior to 25 May 2016 fall within the Tribunal's jurisdiction.
360. With respect to claims for injury allegedly caused to the 90% stake on or after 25 May 2016, the Tribunal notes that, as held by the tribunal in *Impregilo S.p.A. v Islamic Republic of Pakistan*, it is necessary to distinguish between "jurisdiction *ratione temporis* [...]" and the applicability *ratione temporis* of the substantive obligations contained" in the respective investment treaty.³⁸⁶ In light of this distinction, and on a proper analysis, the Tribunal considers that what is at issue is not the Tribunal's jurisdiction *ratione temporis*, but the applicability of relevant substantive obligations under the ECT. Furthermore, the Tribunal considers that questions as to jurisdiction are to be distinguished from those relating to the merits of the dispute, including the character of a breach as continuing, and the applicability and content of treaty provisions setting out obligations allegedly breached.
361. The Respondent does not contest the jurisdiction of the Tribunal on the basis of the 25 May 2016 transfer of the 90% stake. The Tribunal considers that, to the extent that the 90% stake was owned by the Claimant, both at the time of the alleged measures forming the basis of the claims and at the time of commencement of the present proceedings on 22 April 2014, the Tribunal has jurisdiction *ratione temporis* over any alleged injury suffered on or after 25 May 2016. The real question which divides the Parties is how the Tribunal should deal with the injury allegedly caused after the transfer of the 90% stake. For the Tribunal, its jurisdiction on the matter is without prejudice to its determinations as to the applicability and content of substantive provisions of the ECT.
362. To conclude, the Tribunal has jurisdiction over the 90% stake, without prejudice to its determinations as to the applicability and content of treaty provisions setting out obligations owed to the Claimant in relation to injury allegedly caused to the Claimant on or after 25 May 2016.

E. WHETHER THE TRIBUNAL HAS JURISDICTION IN A DISPUTE BETWEEN EU INVESTORS AND EU MEMBER STATES

363. On 6 March 2018, the Grand Chamber of the Court of Justice of the European Union ("ECJ" or "CJEU") rendered its judgment in *Slovak Republic v. Achmea BV*.³⁸⁷ In the operative part of the judgment, the ECJ ruled that:

³⁸⁶ *Impregilo*, para. 309 (Ex. RLA-15).

³⁸⁷ *Slovak Republic v. Achmea BV*, ECJ Judgment, Case C-284/16, 6 March 2018 (Ex. RLA-349) ("*Achmea judgment*").

Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.³⁸⁸

364. Article 267 of the Treaty on the Functioning of the European Union (“TFEU”) provides:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

365. Article 344 of the TFEU reads:

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

366. The Parties disagree on the impact of the *Achmea* judgment on this Tribunal’s jurisdiction. The Respondent argues that the Tribunal “has no jurisdiction to hear the captioned matters because the [Respondent’s] consent to arbitration under the relevant treaties is ineffective under applicable EU law, as conclusively determined in the *Achmea* Judgment.”³⁸⁹ The Claimant contends that “the *Achmea* judgment does not affect [the Tribunal’s] jurisdiction.”³⁹⁰

367. In particular, the Tribunal invited submissions from the Parties on the following issues:

1. Whether the *Achmea* judgment is dependent on the specific wording of the BIT that was at issue in the case before the ECJ and how it relates to the BITs at issue in the present proceedings;

³⁸⁸ *Achmea* judgment, para. 62 (Ex. RLA-349).

³⁸⁹ Respondent’s Comments on *Achmea*, para. 167.

³⁹⁰ Claimant’s Comments on *Achmea*, para. 222.

2. Whether and how the *Achmea* judgment applies in arbitrations where the arbitral seat is outside of the EU, including in particular the impact, if any, of Article 344 TFEU on the validity of an intra-EU BIT jurisdiction clause for an arbitral tribunal sitting outside of the EU;
3. Whether and how the *Achmea* judgment applies to the Energy Charter Treaty;
4. Whether and how the *Achmea* judgment actually impacts upon the jurisdiction of an arbitral tribunal sitting outside of the EU, as distinct from the enforceability of awards within the EU;
5. How the *Achmea* judgment fits in, if at all, with Articles 59 and 30 of the Vienna Convention on the Law of Treaties;
6. The relevance of Articles 27 and 46 of the Vienna Convention on the Law of Treaties for the present arbitrations;
7. How Swiss courts and Swiss scholarship have considered the position of EU law in a legal universe consisting of international law and domestic law;
8. The impact, if any, of Article 177(2) of the Swiss Federal Code on Private International Law; and
9. The role of waiver / estoppel, including in light of Article 186(2) of the Swiss Federal Code on Private International Law, in this context.

368. The Tribunal notes that the aforementioned questions were put to the Parties in each of the four coordinated arbitrations in PCA Case Nos. 2014-19, 2014-20, 2014-20 and 2014-22, independent of whether the Tribunal found jurisdiction under the BIT in each respective case. Although not all of the Parties' submissions may be equally relevant in a case where the Tribunal declines jurisdiction under the BIT for other reasons, the Tribunal has decided for purposes of consistency to set out summaries of the Parties' answers to all questions below.

1. Whether the *Achmea* judgment is dependent on the specific wording of the BIT that was at issue in the case before the ECJ and how it relates to the BITs at issue in the present proceedings

(a) The Respondent's Position

369. According to the Respondent, the *Achmea* judgment is not limited to the specific wording of Article 8 of the Czech and Slovak Federative Republic-Netherlands BIT ("**CSFR-Netherlands BIT**") at issue before the ECJ, but extends to similar provisions in other investment treaties, including the ECT.³⁹¹ This is because the question answered by the ECJ in *Achmea* "was worded to cover, in a general manner, investor-State provisions 'in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT).'"³⁹²

370. In addition, the Respondent notes that the wording of *Achmea* applies to "(i) 'any provision in an

³⁹¹ Respondent's Comments on *Achmea*, paras. 60-62, referring to *Achmea* judgment, paras. 31, 56, 62 (**Ex. RLA-349**); Respondent's Reply on *Achmea*, para. 24.

³⁹² Respondent's Comments on *Achmea*, para. 59, referring to *Achmea* judgment, para. 23 (**Ex. RLA-349**).

international agreement’ (ii) ‘concluded between EU Member States’ (iii) ‘under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal.’³⁹³ As Article 26 of the ECT fulfils these criteria, the *Achmea* judgment is also applicable to this case.

371. In the Respondent’s submission, the “provisions at issue in this proceeding also are squarely captured by the ECJ’s underlying *ratio decidendi*” in *Achmea*.³⁹⁴ Specifically, the Respondent takes the view that the need to protect the effectiveness of EU law by disallowing “any ‘outsourcing’ to non-EU judicial fora of disputes that are capable of pertaining – even potentially – to regulatory and legislative powers of the EU and its Member States in matters coming within the scope of EU law” applies to any arbitration clauses similar to Article 8 of the CSFR-Netherlands BIT.³⁹⁵ Such clauses undermine the autonomy of EU law, because (1) the disputes which the tribunal in question is called on to resolve “are liable to relate to the interpretation or application of EU law”; (2) the tribunal is not “situated within the judicial system of the EU,” and, in particular, cannot “be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU”; and (3) an award made by such a tribunal is not “subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling.”³⁹⁶
372. The Respondent thus argues that Article 26 of the ECT is equally incompatible with EU law as it may also require the Tribunal to interpret or apply EU law in resolving the dispute.³⁹⁷ The Respondent rejects the Claimant’s argument that EU law would not be relevant to the present dispute, because the treaty does not contain an express choice of law provision.³⁹⁸ The Respondent highlights that the treaty is not a “self-contained legal framework, isolated from international and domestic law”³⁹⁹ and that the Tribunal has to decide the dispute on the basis of

³⁹³ Respondent’s Reply on *Achmea*, para. 24, referring to *Achmea* judgment, paras. 61-62 (**Ex. RLA-349**).

³⁹⁴ Respondent’s Reply on *Achmea*, para. 25.

³⁹⁵ Respondent’s Comments on *Achmea*, paras. 63-64, referring to *Achmea* judgment, paras. 32-37, 43, 57 (**Ex. RLA-349**).

³⁹⁶ Respondent’s Comments on *Achmea*, para. 65, referring to *Achmea* judgment, paras. 39, 43, 50 (**Ex. RLA-349**).

³⁹⁷ Respondent’s Comments on *Achmea*, paras. 67-71, 76.

³⁹⁸ Respondent’s Reply on *Achmea*, paras. 10-12.

³⁹⁹ Respondent’s Reply on *Achmea*, para. 13, referring to *BG Group Plc. v. Argentina*, UNCITRAL, Award, 24 December 2007, para. 100 (**Ex. CLA-129**).

all relevant rules of international law, including the TFEU.⁴⁰⁰

373. In addition, the Tribunal is not “a court or tribunal of a Member State” and as a result cannot refer a question concerning the interpretation of EU law to the ECJ.⁴⁰¹ The Tribunal’s award will be final and sufficient judicial remedies against a potential breach of EU law will not be available.⁴⁰² This is especially true in this proceeding, which is seated in Switzerland and, therefore, outside the EU.⁴⁰³
374. According to the Respondent, the aptness of a broad reading of the *Achmea* judgment is confirmed in the Opinion of Advocate General Wathelet and in the academic literature.⁴⁰⁴
375. The Respondent further rejects the Claimant’s argument that this Tribunal should disregard the ECJ’s treaty interpretation in *Achmea* in favour of an interpretation that is in line with international law principles of treaty interpretation and rely on “better reasoned”⁴⁰⁵ parts of the Opinion of the Advocate General Wathelet.⁴⁰⁶
376. The Respondent concludes that the *Achmea* judgment “is not dependent on the specific wording of the CSFR-Netherlands BIT [and] applies with equal force” to this arbitration,⁴⁰⁷ and that “there can be no doubt that the BIT’s dispute resolution clause [is] in conflict with the TFEU.”⁴⁰⁸

(b) The Claimant’s Position

377. The Claimant summarizes its position as follows:

The *Achmea* judgment concerned a BIT, the CSFR-Netherlands BIT, under which EU law was applicable law pursuant to its choice-of-law clause. Unlike that BIT, the BITs

⁴⁰⁰ Respondent’s Reply on *Achmea*, paras. 10-15, referring to *Case Concerning the Payment of Various Serbian Loans Issued in France (France v. Yugoslavia)*, PCIJ judgment, 12 July 1929, para. 31 (Ex. RLA-428).

⁴⁰¹ Respondent’s Comments on *Achmea*, para. 72.

⁴⁰² Respondent’s Comments on *Achmea*, paras. 73-74, referring to *Achmea* judgment, paras. 51, 55 (Ex. RLA-349).

⁴⁰³ Respondent’s Comments on *Achmea*, para. 80, referring to *Achmea* judgment, paras. 55-56 (Ex. RLA-349).

⁴⁰⁴ Respondent’s Reply on *Achmea*, para. 28, referring to *Achmea* Judgment, Opinion of Advocate General Wathelet, 19 September 2017, paras. 3, 132 (Ex. RLA-432).

⁴⁰⁵ Respondent’s Reply on *Achmea*, para. 30, referring to Claimant’s Comments on *Achmea*, paras. 35, 56-57, 68.

⁴⁰⁶ Respondent’s Reply on *Achmea*, para. 31.

⁴⁰⁷ Respondent’s Comments on *Achmea*, para. 82.

⁴⁰⁸ Respondent’s Reply on *Achmea*, para 37.

invoked by the Claimants do not contain any such clause.⁴⁰⁹

378. For the Claimant, the *Achmea* judgment only applies to instances in which a tribunal may have to decide on substantive issues of EU law. In contrast, in the present dispute, EU law is not part of the applicable law. Therefore, an interpretation of EU law by the Tribunal “cannot have the effect of compromising the effectiveness of EU law”, especially considered that the Tribunal is seated outside of the EU.⁴¹⁰
379. The Claimant stresses that the present dispute cannot be decided on the basis of EU law. Since the ECT “do[es] not refer to it, either directly or indirectly”, EU law does not qualify as “customary international law and general principles of law” forming the *lex generalis* of the dispute.⁴¹¹ For the Claimant, EU law is only relevant in the present dispute as a rule of interpretation under Article 31(3)(c) of the VCLT.⁴¹² The Claimant rejects the Respondent’s argument that, even in the absence of an express choice of law clause, EU law may still form part of the applicable international law.⁴¹³
380. The Claimant further argues that the *Achmea* judgment is “deeply flawed” since the ECJ “fails to consider the basic international law principles of treaty interpretation, and in particular the one of ‘systemic integration’ embedded in Article 31(3)(c) VCLT”.⁴¹⁴ Therefore, according to the Claimant, no authority can be accorded to the ECJ’s conclusion that intra-EU BITs conflict with EU law.⁴¹⁵ In particular, the ECJ’s holding in *Achmea* is incorrectly based on the potential, rather than on the actual, application of EU law on the part of the Tribunal.⁴¹⁶ Additionally, the ECJ wrongly affirmed that the *Achmea* tribunal would have been unable to request a preliminary ruling from the ECJ.⁴¹⁷ The ECJ in *Achmea* could instead have “avoided a conflict of norms by recognizing that intra-EU BIT tribunals qualify as courts or tribunals of EU Member States under Article 267 TFEU.”⁴¹⁸ In any event, no interpretation of EU law arises out of this dispute that

⁴⁰⁹ Claimant’s Comments on *Achmea*, para. 213; Claimant’s Reply on *Achmea*, para. 17.

⁴¹⁰ Claimant’s Reply on *Achmea*, paras. 17-19.

⁴¹¹ Claimant’s Reply on *Achmea*, paras. 9-10, referring to Claimant’s Comments on *Achmea*, para. 22.

⁴¹² Claimant’s Reply on *Achmea*, paras. 9-11.

⁴¹³ Claimant’s Reply on *Achmea*, para. 11.

⁴¹⁴ Claimant’s Comments on *Achmea*, para. 48.

⁴¹⁵ Claimant’s Comments on *Achmea*, para. 213.

⁴¹⁶ Claimant’s Comments on *Achmea*, paras. 54-55.

⁴¹⁷ Claimant’s Comments on *Achmea*, paras. 56-57.

⁴¹⁸ Claimant’s Reply on *Achmea*, paras. 23-24.

could be referred to the ECJ, as the issue of the jurisdiction of the Tribunal is a matter of international law.⁴¹⁹ Finally, the ECJ's reasoning concerning "the alleged limited review of intra-EU BIT awards under national law and on a supposed distinction with commercial arbitration" is flawed, as the principle of party autonomy is the basis of both investment treaty and commercial arbitration.⁴²⁰

381. The Claimant emphasises that the Tribunal is not asked to "second-guess the Court", but rather to "ensure that the relation between EU law and international treaties is viewed not through the prism of the primacy of EU law but under general international law, which does not endorse such primacy".⁴²¹ According to the Claimant, it follows that Articles 344 and 267 TFEU, on their ordinary meaning, do not prohibit investor-State arbitration.

382. In any case, the Claimant submits that "even if EU law were applicable law under the [ECT] (*quod non*), it would only be so in relation to merit issues."⁴²² The Claimant argues that the alleged conflict between EU law and investment treaties is one of jurisdiction, connected to states' consent to arbitration.⁴²³ As the Tribunal's jurisdiction derives from the ECT, which does not refer explicitly to EU law, the Tribunal is not bound by the *Achmea* judgment. In the absence of "a clear positive rule of EU law prohibiting arbitration between an EU Member State and a national of another EU Member State",⁴²⁴ the Tribunal should decide whether a conflict between the ECT and EU law exists only on the basis of international law.⁴²⁵

2. Whether and how the *Achmea* judgment applies in arbitrations where the arbitral seat is outside of the EU, including in particular the impact, if any, of Article 344 TFEU on the validity of an intra-EU BIT jurisdiction clause for an arbitral tribunal sitting outside of the EU

(a) The Respondent's Position

383. The Respondent submits that the seat of arbitration and the procedural law under which the

⁴¹⁹ Claimant's Reply on *Achmea*, para. 24.

⁴²⁰ Claimant's Comments on *Achmea*, para. 58.

⁴²¹ Claimant's Reply on *Achmea*, para. 25.

⁴²² Claimant's Reply on *Achmea*, para. 12.

⁴²³ Claimant's Reply on *Achmea*, para. 12.

⁴²⁴ Claimant's Comments on *Achmea*, para. 69; Claimant's Reply on *Achmea*, para. 12.

⁴²⁵ Claimant's Comments on *Achmea*, para. 62; Claimant's Reply on *Achmea*, paras. 9-12.

arbitration is conducted are irrelevant to the application of the *Achmea* judgment.⁴²⁶ This is so, because Article 344 of the TFEU prohibits EU Member States from submitting a dispute concerning the interpretation or application of EU law to any external dispute settlement entities, regardless of the latter's governing procedural law.⁴²⁷ According to the Respondent, to interpret the *Achmea* judgment otherwise would be contrary to its clear language and its purpose to ensure the effectiveness of EU law.⁴²⁸

384. The Respondent notes that the ECJ decided that arbitral proceedings lack adequate safeguards to ensure the “full effectiveness of EU law”, notwithstanding the fact that the arbitration giving rise to the *Achmea* judgment had its seat in Germany, an EU Member State. This reasoning, so argues the Respondent, applies *a fortiori* to this arbitration, in which the Tribunal's award will be subject to review by the courts of a non-EU country (*i.e.*, Switzerland).⁴²⁹

(b) The Claimant's Position

385. The Claimant notes that the arguments elaborated in its answer to Question 1 “are even more pertinent, because the seat of these arbitrations is in Switzerland, outside the EU.” From the Swiss law perspective, EU law is *res inter alios acta* and in no way can be accorded primacy over international law. Under Swiss international arbitration law, the *Achmea* judgment is irrelevant to assess the jurisdiction of this Tribunal.⁴³⁰ According to the Claimant, the ECJ in *Achmea* recognizes that the principle of effectiveness of EU law is limited to the territory of EU Member States.⁴³¹

3. Whether and how the *Achmea* judgment applies to the Energy Charter Treaty

(a) The Respondent's Position

386. The Respondent submits that the *Achmea* judgment applies to proceedings under the ECT, because EU law forms part of the applicable law under the ECT.⁴³²
387. According to the Respondent, the term “international agreements concluded between [EU]

⁴²⁶ Respondent's Comments on *Achmea*, para. 83, referring to *Achmea* judgment, paras. 61-62 (Ex. RLA-349).

⁴²⁷ Respondent's Comments on *Achmea*, para. 84, referring to *Achmea* judgment, para. 56 (Ex. RLA-349).

⁴²⁸ Respondent's Comments on *Achmea*, para. 89.

⁴²⁹ Respondent's Comments, para. 88, referring to *Achmea* judgment, paras. 50-56 (Ex. RLA-349).

⁴³⁰ Claimant's Comments, para. 214. See also Claimant's Reply on *Achmea*, para. 19.

⁴³¹ Claimant's Reply on *Achmea*, para. 19, referring to *Achmea* judgment, para. 34 (Ex. RLA-349).

⁴³² Respondent's Reply on *Achmea*, para. 38.

Member States” in the operative part of the *Achmea* judgment “encompasses agreements reached between Member States within a multilateral framework (such as the ECT) which includes non-Member States as their Parties.”⁴³³ The ECJ intended its reasoning to apply also to multilateral treaties “to the extent such agreements apply within the EU and do not affect [...] third States’ rights”.⁴³⁴ This conclusion is said to be confirmed by the fact that, in *Achmea*, the ECJ intentionally reformulated the question put to it by the German *Bundesgerichtshof* from one concerning a “bilateral investment protection agreement between Member States,”⁴³⁵ to one concerning “international agreement[s] concluded between Member States” in general.⁴³⁶

388. The Respondent rejects the Claimant’s argument that the ECT differs from intra-EU BITs because the EU is a contracting party to it. Specifically, the Respondent notes that, as also confirmed in the *Mox Plant* decision in relation to the United Nations Convention on the Law of the Sea (“UNCLOS”), Article 344 TFEU “applies squarely” to multilateral treaties to which the EU is a party.⁴³⁷ For the Respondent, a treaty involving the EU as a contracting party poses a greater threat to the autonomy of EU law than treaties not involving the EU, because such treaty becomes part of EU law.⁴³⁸ Therefore (1) “any dispute about the interpretation and application of the ECT within EU Member States automatically constitutes a dispute about the interpretation and application of EU law”; (2) “the ECT cannot be applied as between EU Member States to the extent it is contrary to the EU Treaties”; and (3) “in accordance with Article 344 of the TFEU, EU Member States may not submit disputes concerning the ECT to non-EU dispute resolution bodies.”⁴³⁹
389. Additionally, the Respondent notes that Article 26 of the ECT shares the same characteristics as Article 8 of the CSFR-Netherlands BIT. On this basis, it rejects the Claimant’s contention that the situation in this arbitration is different from that found in *Achmea*.⁴⁴⁰

⁴³³ Respondent’s Comments on *Achmea*, para. 91, referring to *Achmea* judgment, para. 62 (Ex. RLA-349).

⁴³⁴ Respondent’s Reply on *Achmea*, para. 40.

⁴³⁵ Respondent’s Comments on *Achmea*, para. 92, referring to *Achmea* judgment, para. 23 (Ex. RLA-349).

⁴³⁶ Respondent’s Comments on *Achmea*, para. 92, referring to *Achmea* judgment, para. 31 (Ex. RLA-349).

⁴³⁷ Respondent’s Reply on *Achmea*, paras. 43-44, referring to *Mox Plant* (Commission v. Ireland), ECJ Judgment, Case C-459/03, 30 May 2006, paras. 123-135 (Ex. RLA-209) (“*Mox Plant*”).

⁴³⁸ Respondent’s Comments on *Achmea*, para. 98, referring to A. von Bogdandy, M. Smrkoiij, European Community and Union Law and International Law, Max Planck Encyclopedia of Public International Law, 2011, paras. 6, 9 (Ex. RLA-361).

⁴³⁹ Respondent’s Comments on *Achmea*, para. 99.

⁴⁴⁰ Respondent’s Comments on *Achmea*, paras. 95-96, referring to Claimant’s letter to the Tribunal, 13 April 2018, pp. 3-4.

390. Further, the Respondent argues that the *dictum* in the *Achmea* judgment, which states that:

It is true that, according to settled law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected [...].⁴⁴¹

is concerned only with “the possibility for the EU to subject itself to non-EU jurisdictions”.⁴⁴²

Hence, it does not apply to this arbitration, which concerns a dispute settlement mechanism included in an agreement concluded between EU Member States.⁴⁴³

391. The Respondent concludes that this Tribunal is bound to apply Article 351(1) of the TFEU, pursuant to which Member States’ obligations under EU Treaties prevail over any conflicting obligations in force between the Member States under other multilateral treaties.⁴⁴⁴ This is in line with the international law principle of *pacta sunt servanda*.⁴⁴⁵ In this regard, the Respondent suggests that the Tribunal follow the analysis of the tribunal in *Electrabel S.A. v. The Republic of Hungary* – which found that, in case of incompatibility, EU law prevails over the ECT’s substantive protections –, and disregard the reasoning in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* – which held that *Achmea* does not apply to multilateral treaties such as the ECT. For the Respondent, *Masdar* lacks “any analysis of relevant EU law”.⁴⁴⁶

392. It is the Respondent’s position that the applicability of Article 351 of the TFEU is not affected by Article 16 of the ECT, which provides that ECT provisions “more favorable to the investor” prevail over other treaties. The accession of the Czech Republic to the EU in 2004 pre-empted incompatible previous agreements and their conflict clauses.⁴⁴⁷ Nor can Article 16 of the ECT

⁴⁴¹ Respondent’s Comments on *Achmea*, para. 105, referring *Achmea* judgment, paras. 57-58 (Ex. RLA-349).

⁴⁴² Respondent’s Comments on *Achmea*, paras. 106-107.

⁴⁴³ Respondent’s Comments on *Achmea*, paras. 108-109.

⁴⁴⁴ Respondent’s Comments on *Achmea*, para. 91, referring to *Jean-Claude Levy*, ECJ Judgment, Case C-158/91, 2 August 1993, paras. 12-13 (Ex. RLA-370).

⁴⁴⁵ Respondent’s Reply on *Achmea*, para. 41, referring to *Mox Plant* (Ex. RLA-209).

⁴⁴⁶ Respondent’s Reply on *Achmea*, para. 42, referring to *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 679 (Ex. CLA-199) (“*Masdar*”); *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras. 4.178-4.189 (Ex. RLA-39) (“*Electrabel Decision on Jurisdiction*”).

⁴⁴⁷ Respondent’s Reply on *Achmea*, para. 48.

prevail over Article 351 of the TFEU as *lex specialis*, because the principle of primacy plays such a central role in the legal system of the EU that it would be “manifestly absurd [and] unreasonable” to assume that EU Member States would have “deliberately signed [it] away” by joining the ECT.⁴⁴⁸

(b) The Claimant’s Position

393. The Claimant argues that the Tribunal must base its decision on international law rather than on EU law.⁴⁴⁹ Questions of jurisdiction in ECT proceedings can only be decided on the basis of the ECT’s terms and they do not give priority to EU law over the ECT.⁴⁵⁰ In the absence of a choice of law clause providing for the applicability of EU law to this dispute, any jurisdictional conflict between EU law and the ECT must therefore be resolved in favor of the ECT.⁴⁵¹
394. Relying on *Masdar* and the Decision on the *Achmea* Issue in *Vattenfall AB et al. v. Federal Republic of Germany*, the Claimant observes that Article 26(6) ECT only governs “the substantive standards of protection, and not the provisions on dispute resolution, Article 26(6) applies exclusively to the merits of ECT disputes and not to jurisdiction”.⁴⁵²
395. Even if there was a relevant conflict between EU law and the ECT, such conflict should be resolved on the basis of Article 16 ECT, providing that “the ECT’s provisions more favorable to the investor prevail over those of other (prior or subsequent) treaties”, rather than on the basis of Article 351 of the TFEU.⁴⁵³ The Claimant contends that the prevalence of Article 16 ECT over Article 351 TFEU is confirmed by all tribunals that have dealt with the issue, save for the tribunal in *Electrabel*.⁴⁵⁴

⁴⁴⁸ Respondent’s Reply on *Achmea*, para. 51.

⁴⁴⁹ Claimant’s Reply on *Achmea*, paras. 13-15, 43.

⁴⁵⁰ Claimant’s Reply on *Achmea*, paras. 15, 71, referring to *Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. Arb/12/12, Decision on the *Achmea* Issue, 31 August 2018, paras. 123-125, 131, 156, 166, 121 (**Ex. RLA-425**) (“**Vattenfall Decision on the Achmea Issue**”).

⁴⁵¹ Claimant’s Reply on *Achmea*, para. 65-71.

⁴⁵² Claimant’s Comments on *Achmea*, paras. 100-101, referring to *Masdar*, para. 679 (**Ex. CLA-199**); Claimant’s Reply on *Achmea*, paras. 13-15, referring to *Vattenfall Decision on the Achmea Issue*, paras. 114-116, 121 (**Ex. RLA-425**).

⁴⁵³ Claimant’s Reply on *Achmea*, paras. 72-77.

⁴⁵⁴ Claimant’s Reply on *Achmea*, para. 74, referring to *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 7.6.7 (**Ex. RLA-41**) (“**AES**”); *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 202 (**Ex. RLA-384**); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 75 (**Ex. CLA-173**); *Masdar*, para. 332 (**Ex. CLA-199**); *Vattenfall Decision on the Achmea Issue*, paras. 227, 229 (**Ex. RLA-425**).

396. The Claimant further submits that a “good faith interpretation of the instruments in question cannot support the conclusion that the ECT does not give rise to *inter se* obligations among EU Member States, including in relation to investor-state arbitration.”⁴⁵⁵
397. According to the Claimant, the principle of harmonious interpretation is even more pertinent in relation to the ECT, because the EU is itself a contracting party to this treaty, and this leads to the presumption that “the EU intended to enter into obligations *consistent* with EU law.”⁴⁵⁶
398. Citing *Masdar*, the Claimant highlights that “the *Achmea* judgment does not consider, and therefore does not even purport to be relevant for, multilateral treaties like the ECT, to which the EU itself is a party.”⁴⁵⁷ Further, the Claimant notes that the ECJ never mentions the ECT in *Achmea*.⁴⁵⁸ For the Claimant, the ECJ’s “silence speaks volumes”.⁴⁵⁹
399. The Claimant rejects the Respondent’s argument that the reference to “international agreements between Member States” in *Achmea* includes the ECT as inconsistent with ECJ jurisprudence, which distinguishes between intra-EU agreements and agreements with third states.⁴⁶⁰
400. The Claimant also disagrees with the Respondent’s argument that Article 344 of the TFEU applies to the ECT based on the *Mox Plant* judgment, where the ECJ found Ireland in breach of EU law for having sued the United Kingdom before an arbitral tribunal.⁴⁶¹ Such reference to *Mox Plant* is inapposite, not only because the ECT does not include a disconnection clause (as, in contrast, UNCLOS does), but also because, unlike Ireland, the Claimant is not asking the Tribunal to apply or interpret EU law.⁴⁶²

⁴⁵⁵ Claimant’s Comments on *Achmea*, para. 215.

⁴⁵⁶ Claimant’s Comments on *Achmea*, paras. 106-108, referring to *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 280(2) (**Ex. RLA-382**) (“*Blusun*”).

⁴⁵⁷ Claimant’s Comments on *Achmea*, para. 215, referring to *Masdar* (**Ex. CLA-199**). See also Claimant’s Reply on *Achmea*, para. 56.

⁴⁵⁸ Claimant’s Comments on *Achmea*, paras. 102-104. Respondent’s Reply on *Achmea*, paras. 48-49.

⁴⁵⁹ Claimant’s Reply on *Achmea*, para. 51.

⁴⁶⁰ Claimant’s Reply on *Achmea*, paras. 54-56, referring to *Masdar*, paras. 678-679 (**Ex. CLA-199**); *Greentech Energy Systems A/S and others v. Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018, para. 220 (**Ex. RLA-424**); *Vattenfall* Decision on the *Achmea* Issue, paras. 161-162 (**Ex. RLA-425**).

⁴⁶¹ Claimant’s Reply on *Achmea*, paras. 57-64.

⁴⁶² Claimant’s Reply on *Achmea*, paras. 60-62.

4. Whether and how the *Achmea* judgment actually impacts upon the jurisdiction of an arbitral tribunal sitting outside of the EU, as distinct from the enforceability of awards within the EU

(a) The Respondent's Position

401. According to the Respondent, the ECJ's interpretation of the EU Treaties "do[es] not create, but clarify existing EU law [and] therefore take[s] effect from the date on which the relevant State has become bound by" the instruments at issue.⁴⁶³ Thus, as the *Achmea* judgment makes clear that the investment arbitration clauses in intra-EU investment treaties are incompatible with EU law and therefore inapplicable as between EU Member States, the Tribunal does not have jurisdiction to hear any claims submitted after the Czech Republic's accession to the TFEU on 1 May 2004.⁴⁶⁴ In this regard, the Respondent notes that "[t]his is a separate issue from the enforcement of the award either inside or outside the EU."⁴⁶⁵

(b) The Claimant's Position

402. The Claimant submits that "[t]he *Achmea* judgment does not impact on the jurisdiction of a Swiss-seated tribunal. The potential unenforceability of this Tribunal's award within the EU is irrelevant for jurisdiction under Swiss law."⁴⁶⁶

5. How the *Achmea* judgment fits in, if at all, with Articles 59 and 30 of the Vienna Convention on the Law of Treaties

(a) The Respondent's Position

403. The Respondent submits that Article 59 of the VCLT is of no relevance to this case, because the *Achmea* judgment concerns specific provisions of intra-EU investment treaties and not the treaties as a whole.⁴⁶⁷

404. In contrast, Article 30 of the VCLT, which codifies the principle of *lex posterior*, is "perfectly consistent" with the *Achmea* judgment. Unlike Article 59, Article 30 of the VCLT applies to specific treaty provisions, *i.e.*, those enabling investment arbitration, and not the treaty as a

⁴⁶³ Respondent's Comments on *Achmea*, paras. 73-75.

⁴⁶⁴ Respondent's Comments on *Achmea*, paras. 117, 119-120, referring to *Exportur SA v. LOR SA and Confiserie du Tech SA*, ECJ Judgment, Case C-3/91, 10 November 1992, para. 8 (**Ex. RLA-359**).

⁴⁶⁵ Respondent's Comments on *Achmea*, para. 120.

⁴⁶⁶ Claimant's Comments on *Achmea*, para. 216.

⁴⁶⁷ Respondent's Comments on *Achmea*, paras. 121-122.

whole.⁴⁶⁸ The Respondent also notes that the “same subject matter” requirement in Article 30 VCLT “should not [...] be interpreted restrictively or applied at the level of the treaty as a whole.”⁴⁶⁹ Instead, it should be deemed satisfied when “(i) a certain course of conduct attracts the application of two different treaties and; (ii) the fulfillment of an obligation under one treaty affects the fulfillment of obligations under, or undermines the object and purpose of, the other treaty”,⁴⁷⁰ According to the Respondent, this is presently the case:⁴⁷¹ as both investment treaties and the EU Treaties are concerned with intra-EU investment activities, it can reasonably be expected that issues of EU law will arise in investor-State arbitration.⁴⁷² The applicability of Article 30 of the VCLT thus ensures the prevalence of the later treaty, the TFEU, over the earlier investment treaty.

405. In any event, the residual nature of Article 30 of the VCLT paves the way to the application of more specific conflict rules, such as Article 351 of the TFEU, as relevant *lex posterior*.⁴⁷³ In particular, Article 351 of the TFEU prevails over both the *lex posterior* principle, codified in Article 30 of the VCLT, and the *lex specialis* principle invoked by the Claimant, which the Respondent both regards as “default rules [inapplicable] in case a different conflict rule is applicable between the Parties.”⁴⁷⁴ In this regard, the Respondent notes that Article 351 of the TFEU is of “general scope and applies to all international agreements which may impact on the application of EU law, irrespective of subject matter”.⁴⁷⁵ Moreover, the Respondent argues that Article 351 of the TFEU is a conflict of laws rule binding on all EU Member States, including the Czech Republic, and thus represents part of the law applicable to the present dispute.⁴⁷⁶

⁴⁶⁸ Respondent’s Comments on *Achmea*, para. 123.

⁴⁶⁹ Respondent’s Comments on *Achmea*, para. 128, referring to International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 2006, p. 112, paras. 21-22 (**Ex. RLA-390**) (“**ILC Fragmentation Report**”); S. Hindelang, Circumventing Primacy of EU Law and the Judicial Monopoly of Resorting to Dispute Resolution Mechanisms Provided for in Inter-Se Treaties? The Case of Intra-EU Investment Protection, Legal Issues of Economic Integration, 2012, pp. 193-94 (**Ex. RLA-391**). See also Respondent’s Reply on *Achmea*, para. 56, referring to D. Kerstin, Article 30, in O. Dörr, K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties A Commentary, Springer, 2018, p. 544 (**RLA-429**) (“**Dörr/Schmalenbach**”).

⁴⁷⁰ Respondent’s Comments on *Achmea*, para. 129, referring to ILC Fragmentation Report, paras. 23-25 (**Ex. RLA-390**).

⁴⁷¹ Respondent’s Comments on *Achmea*, paras. 130-135.

⁴⁷² Respondent’s Comments on *Achmea*, para. 135.

⁴⁷³ Respondent’s Comments on *Achmea*, paras. 124-126.

⁴⁷⁴ Respondent’s Reply on *Achmea*, para. 59.

⁴⁷⁵ Respondent’s Reply on *Achmea*, para. 61.

⁴⁷⁶ Respondent’s Reply on *Achmea*, para. 18.

406. The Respondent rejects the Claimant’s argument that the ECT should be given precedence over EU law as *lex specialis*.⁴⁷⁷ In particular, the Respondent argues that investment treaties and EU law lack “otherness”, which is necessary for the application of the *lex specialis* principle. Instead, the two regimes constitute “part and parcel of the same European legal regime that was intended to increase economic integration and prosperity in Europe.”
407. The Respondent concludes that both Article 351 of the TFEU and Article 30 of the VCLT render the investor-State arbitration provisions in this proceeding inapplicable.⁴⁷⁸

(b) The Claimant’s Position

408. The Claimant submits that “Articles 59 and 30 VCLT are not applicable for the resolution of the (apparent) conflict at issue, because the treaties invoked by the Claimant and the EU Treaties do not have the same ‘subject matter’.”⁴⁷⁹ In support of its position, the Claimant cites previous awards holding that investment treaties:

(i) have a different and more specific *objective* than the EU Treaties, *i.e.* to protect foreign investors and investments, (ii) provide broader *substantive* protection non-equivalent to that available under the EU Treaties, for instance with reference to the FET standard, and (iii) provide a *fundamental* procedural protection, *i.e.* investor-state arbitration, with no parallel in the EU Treaties.⁴⁸⁰

409. The Claimant puts special emphasis on the analogous conclusions reached by the tribunal in *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, which rejected the relevance of the *Achmea* judgment to its jurisdiction “on the ground that Article 30(3) VCLT could not apply for lack of the same subject matter requirement.”⁴⁸¹
410. The Claimant argues that the “same subject matter” consideration under Articles 59 and 30 of the

⁴⁷⁷ Respondent’s Reply on *Achmea*, para. 54.

⁴⁷⁸ Respondent’s Comments on *Achmea*, para. 138.

⁴⁷⁹ Claimant’s Comments on *Achmea*, para. 217. *See also* Claimant’s Comments on *Achmea*, paras. 81-84; Claimant’s Reply on *Achmea*, paras. 36-37.

⁴⁸⁰ Claimant’s Comments on *Achmea*, para. 82, *referring to* *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 10 April 2010, paras. 75-77, (**Ex. CLA-4**); *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. The Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, para. 253 (**Ex. CLA-232**) (“*Wirtgen*”); *Eureko*, paras. 250, 264 (**Ex. RLA-38**); *Ivan Peter Busta and James Peter Busta v. The Czech Republic*, SCC Case No. V 2015/014, Final Award, 10 March 2017, para. 116 (**Ex. CLA-233**); *WNC Factoring Ltd (UK) v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017, para. 301 (**Ex. RLA-348**); *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, para. 165 (**Ex. CLA-5**) (“*Eastern Sugar*”).

⁴⁸¹ Claimant’s Reply on *Achmea*, para. 37, *referring to* *Marfin*, para. 589 (**Ex. CLA-295**).

VCLT “must be construed strictly, as requiring the ‘same level of generality’ between treaties”.⁴⁸² The Claimant rejects the Respondent’s position that investment treaties should be considered as part of the EU legal regime.⁴⁸³ Instead, it argues that investment treaties “generate a specific regime of international law” which gives investors access to a specific set of protection of the host State “foreign to the “European law regime””.⁴⁸⁴ Therefore, “[a]ny hypothetical conflict between the [ECT] and EU law must be resolved in favour of the [ECT]”.⁴⁸⁵ This follows from the *lex specialis* rule as well as from the Tribunal’s obligation to give precedence to the sub-regime to which it belongs in the event that another sub-regime, in this case EU law, claims absolute superiority.

411. For the Claimant, the Respondent also wrongly invokes Article 351 of the TFEU.⁴⁸⁶ First, the Claimant argues that, even if Article 351 of the TFEU was a special conflict rule, it would not apply to the present dispute because EU law does not form part of the applicable law.⁴⁸⁷ Second, the Claimant contends that the Tribunal need not rely on Article 351 of the TFEU, since the provision only applies to States, *i.e.*, not in relation to foreign investors and host States.⁴⁸⁸

6. The relevance of Articles 27 and 46 of the Vienna Convention on the Law of Treaties for the present arbitrations

(a) The Respondent’s Position

412. The Respondent contends that Articles 27 and 46 VCLT are of no relevance in this case, as the Respondent is not invoking its internal law to justify its position, but rather “a fundamental incompatibility between successive international treaties [...] between the same contracting parties” in accordance with Article 351 of the TFEU and Article 30 of the VCLT.⁴⁸⁹
413. In particular, the Respondent argues that the broad scope of EU law obligations, which also include “doctrines developed by the ECJ, such as primacy, direct effect, effectiveness” does not

⁴⁸² Claimant’s Comments on *Achmea*, paras. 84-85. *See also* Claimant’s Reply on *Achmea*, para. 38, referring to *Marfin*, para. 587 (**Ex. CLA-295**).

⁴⁸³ Claimant’s Reply on *Achmea*, paras. 5-6.

⁴⁸⁴ Claimant’s Reply on *Achmea*, para. 6.

⁴⁸⁵ Claimant’s Comments on *Achmea*, para. 217. *See also* Claimant’s Reply on *Achmea*, para. 29.

⁴⁸⁶ Claimant’s Reply on *Achmea*, para. 30.

⁴⁸⁷ Claimant’s Reply on *Achmea*, paras. 31-32.

⁴⁸⁸ Claimant’s Comments on *Achmea*, paras. 77-79, referring to *Wirtgen*, para. 256 (**Ex. CLA-232**); *AES*, paras. 7.6.10-7.6.11 (**Ex. RLA-41**). *See also* Claimant’s Reply on *Achmea*, paras. 33-35, referring to *Wirtgen*, para. 25 (**Ex. CLA-232**); *Vattenfall* Decision on the *Achmea* Issue, para. 226 (**Ex. RLA-425**).

⁴⁸⁹ Respondent’s Comments, para. 142.

transform the law created by EU treaties into national law.⁴⁹⁰ The Respondent highlights that the Claimant itself confirmed in its submission on *Achmea* the international nature of EU law.⁴⁹¹

(b) The Claimant's Position

414. According to the Claimant, Articles 27 and 46 of the VCLT are applicable in this case:

[Articles 27 and 46 of the VCLT] prohibit the Czech Republic from relying on EU law, *qua* domestic law, in order to escape its treaty obligations. In fact, EU law, despite its international character, is deeply integrated into the domestic law of the Czech Republic, of which it is an integral part.⁴⁹²

415. On this point, the Claimant contends that EU law can be characterized as either international or national law. Its national law character stems from the fact that “EU law gives rise to a special legal order deeply integrated into the one of its Member States.”⁴⁹³ Therefore, “for the purposes of Articles 27 and 46 VCLT, internal law includes [supranational] EC law.”⁴⁹⁴

416. The Claimant thus holds that the Respondent's position that “the “integration of the [...] TFEU into domestic legal systems is no ‘deeper’ than that of any other treaty-based international law” ignores the special features of EU law that make it a sub-regime of international law”,⁴⁹⁵ in particular “its primacy over, and direct effect on, the Member States’ internal laws.”⁴⁹⁶

7. How Swiss courts and Swiss scholarship have considered the position of EU law in a legal universe consisting of international law and domestic law

(a) The Respondent's Position

417. According to the Respondent, EU law is considered by Switzerland, which is not an EU Member State, as “public international law between third countries (*res inter alios acta*).”⁴⁹⁷ Nevertheless,

⁴⁹⁰ Respondent's Reply on *Achmea*, para. 7, referring to *Vattenfall* Decision on the *Achmea* Issue, para. 145 (Ex. RLA-425).

⁴⁹¹ Respondent's Reply on *Achmea*, para. 6.

⁴⁹² Claimant's Comments, para. 218.

⁴⁹³ Claimant's Comments, para. 93.

⁴⁹⁴ Claimant's Comments on *Achmea*, para. 95.

⁴⁹⁵ Claimant's Reply on *Achmea*, para. 7, referring to Respondent's Reply on *Achmea*, para. 7.

⁴⁹⁶ Claimant's Reply on *Achmea*, para. 7, referring to K. Schmalenbach, Article 27, in *Dörr/Schmalenbach*, p. 497 (Ex. CLA-209); A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 3rd ed., 2018, p. 180 (Ex. CLA-236); M. Huomo-Kettunen, Heterarchical Constitutional Structures in EU Legal Space, in *European Journal of Legal Studies*, 2013, p. 76 (Ex. CLA-244); *Blusun*, para. 283 (Ex. RLA-382).

⁴⁹⁷ Respondent's Comments on *Achmea*, para. 144.

given its close relationship with the EU, “EU law also plays an extremely significant role in the Swiss legal system.”⁴⁹⁸ For instance, more than one hundred international treaties that Switzerland concluded with the EU became part of Swiss domestic law once ratified.⁴⁹⁹ Additionally, on several occasions, Switzerland has unilaterally enacted domestic legislation based on EU law, a practice known as “autonomous adaptation”.⁵⁰⁰ The uniform interpretation of Swiss domestic law and EU law is thus necessary to ensure a level playing field,⁵⁰¹ and is actively pursued by Switzerland’s judicial and government institutions.⁵⁰² The Respondent concludes that “a consistent interpretation of the State’s obligations under EU law – one of the driving principles of the *Achmea* judgment – is thus a recognized public interest in Switzerland.”⁵⁰³

418. Regarding the applicability of EU law in Swiss arbitral proceedings, the Respondent discusses a decision of the Swiss Federal Tribunal concerning the role of EU competition law in Swiss-seated arbitration on “whether a Swiss arbitral tribunal was obliged to consider the validity of the disputed contract under Article 101 of the TFEU, which prohibits anti-competitive agreements.”⁵⁰⁴ The Respondent notes that the ECJ has decided in *Eco Swiss v. Benetton International* that EU competition law (*i.e.*, Article 101 of the TFEU) is “a matter of EU public policy to be applied by commercial arbitral tribunals”.⁵⁰⁵
419. According to the Respondent, the Swiss Federal Tribunal decided that fundamental provisions of

⁴⁹⁸ Respondent’s Comments on *Achmea*, para. 145.

⁴⁹⁹ Respondent’s Comments on *Achmea*, para. 146, referring to Swiss Federal Tribunal, BGE 105 II 49, Judgment, January 1979, para. 3 (**Ex. RLA-398**); Federal Tribunal, Case No 2C_842/2010, BGE 138 II 42, Judgment, 13 January 2012, para. 3.1 (**Ex. RLA-417**).

⁵⁰⁰ Respondent’s Comments on *Achmea*, para. 146, referring to Library of the European Parliament, Switzerland’s implementation of EU legislation, Library Briefing, 8 October 2012, p. 3 (**Ex. RLA-399**) (“**Switzerland’s Implementation of EU Legislation**”).

⁵⁰¹ Respondent’s Comments on *Achmea*, para. 147, referring to Switzerland’s Implementation of EU Legislation, p. 4 (**Ex. RLA-399**).

⁵⁰² Respondent’s Comments on *Achmea*, paras. 147-148, referring to Swiss Federal Tribunal, Case No 4A_16/2011, 137 III 226, Judgment, 18 March 2011, para. 2.2 (**Ex. RLA-402**); Swiss Federal Department of Foreign Affairs, Direction of European Affairs, Direction of European Affairs, Institutional Issues, May 2018, p. 2 (**Ex. RLA-403**).

⁵⁰³ Respondent’s Comments on *Achmea*, para. 149.

⁵⁰⁴ Respondent’s Comments on *Achmea*, para. 150, referring to Swiss Federal Tribunal, Case No. 4P.278/2005, BGE 132 III 389, Judgment, 8 March 2008 (**Ex. RLA-395**).

⁵⁰⁵ Respondent’s Comments on *Achmea*, para. 150, referring to *Eco Swiss China Time Ltd v. Benetton International NV*, ECJ judgment, Case C-126/97, paras. 35, 39 (**Ex. RLA-50**) (“**EcoSwiss**”).

EU competition law constitute relevant public policy considerations.⁵⁰⁶ As a result, a Swiss-seated arbitral tribunal must take these provisions into account, notwithstanding the fact that Swiss law is the governing law of the contract.⁵⁰⁷ Otherwise, the award would be susceptible to annulment by reason of the tribunal's failure to apply the applicable law in accordance with Articles 190(2)(b) and 187(1) of the Swiss Federal Code on Private International Law ("PILA").⁵⁰⁸ In determining the content of the relevant EU law, the Respondent asserts that the Swiss Federal Tribunal follows the decision of the ECJ.⁵⁰⁹

(b) The Claimant's Position

420. The Claimant's response to this question is as follows:

From the Swiss law perspective, EU law is *res inter alios acta*, and Switzerland has no interest in ensuring, through Swiss courts, its general harmonization or consistent application, any more than it has an interest in supporting the policy of other States. Instead, customary international law and general principles of law are part of Swiss law as international law within the meaning of Article 5(4) of the Swiss Constitution, and preclude giving primacy to EU law.

421. According to the Claimant, Article 5(4) of the Swiss Constitution provides that the Swiss Confederation and the Swiss cantons have to comply with international law norms that are binding upon Switzerland. Those norms do not include EU law, as Switzerland is not an EU Member State.⁵¹⁰ The fact that Switzerland has entered into several bilateral agreements with the EU, and that it has unilaterally enacted domestic laws based on EU law, does not "give EU law a special status in Swiss law."⁵¹¹ That said, the Claimant acknowledges that "interpretation [of Swiss law] in harmony with EU law has been understandably considered preferable where possible",⁵¹² as long as it would serve Switzerland's own economic interests in terms of its nationals' competitiveness within the EU market.⁵¹³ Accordingly, the Claimant submits that, in

⁵⁰⁶ Respondent's Comments on *Achmea*, para. 151, referring to Swiss Federal Tribunal, Case No. 4P.278/2005, BGE 132 III 389, Judgment, 8 March 2008, para. 3.3 (**Ex. RLA-395**).

⁵⁰⁷ Respondent's Comments on *Achmea*, para. 151, referring to Swiss Federal Tribunal, Case No. 4P.278/2005, BGE 132 III 389, Judgment, 8 March 2008, para. 3.3 (**Ex. RLA-395**).

⁵⁰⁸ Respondent's Comments on *Achmea*, para. 151, referring to Swiss Federal Tribunal, Case No. 4P.278/2005, BGE 132 III 389, Judgment, 8 March 2008, para. 3.3 (**Ex. RLA-395**).

⁵⁰⁹ Respondent's Comments on *Achmea*, para. 152, referring to Swiss Federal Tribunal, Case No. 4P.278/2005, BGE 132 III 389, Judgment, 8 March 2008, para. 3.3 (**Ex. RLA-395**); Swiss Federal Tribunal, Case No. 4A_34/2016, Judgment, 25 April 2016, para. 3.1. (**Ex. RLA-404**).

⁵¹⁰ Claimant's Comments on *Achmea*, paras. 127-129.

⁵¹¹ Claimant's Comments on *Achmea*, para. 130.

⁵¹² Claimant's Comments on *Achmea*, para. 130.

⁵¹³ Claimant's Comments on *Achmea*, para. 131.

general, “Switzerland takes no stance towards the general harmonization of EU law [as it is] not a policy concern for Switzerland.”⁵¹⁴

422. In sum, the Claimant argues that the Respondent’s position that the Tribunal must apply mandatory EU law, lest its award may be set aside, is wrong for two reasons.⁵¹⁵ First, pursuant to Article 19 of the PILA, “there is no basis for the assertion that an arbitral tribunal seated in Switzerland is obliged to apply foreign mandatory rules.”⁵¹⁶ Second, “it is undisputed that the failure of a Swiss-seated tribunal to apply such rules, or to apply them correctly, is not a ground for setting aside an award pursuant to Article 190(2)(b).”⁵¹⁷

8. The impact, if any, of Article 177(2) of the Swiss Federal Code on Private International Law

423. Article 177(2) of the PILA provides:

If a party to the arbitration agreement is a state or an enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.

(a) The Respondent’s Position

424. The Respondent points out that the goal of Article 177(2) of the PILA “is to prevent a State from abusing *its own* sovereign legislative or executive powers”.⁵¹⁸ The provision prohibits a State or its organ acting as a respondent before a Swiss-seated international arbitration tribunal from invoking its domestic law to contest the validity of the arbitration agreement on grounds of non-arbitrability or lack of capacity.⁵¹⁹ Against this background, the provision thus does not apply “where the relevant legal change is outside a Party’s control.”⁵²⁰ As the *Achmea* judgment is not

⁵¹⁴ Claimant’s Comments on *Achmea*, para. 131.

⁵¹⁵ Claimant’s Comments on *Achmea*, para. 134.

⁵¹⁶ Claimant’s Comments on *Achmea*, para. 150.

⁵¹⁷ Claimant’s Comments on *Achmea*, para. 150, referring to Swiss Federal Tribunal, Case No. 4P.115/1994, Judgment, December 30, 1994, para. 2c (Ex. CLA-261).

⁵¹⁸ Respondent’s Comments on *Achmea*, para. 155, referring to Swiss Federal Tribunal, Case No. 4P.126/1992, Judgment, 13 October 1992, pp. 68-78, para. 7b (Ex. RLA-408).

⁵¹⁹ Respondent’s Comments on *Achmea*, para. 154, referring to A. Bucher, *Die Neue Internationale Schiedsgerichtsbarkeit in der Schweiz*, 1st ed., Basel/Frankfurt am Main, 1988, para. 101 (Ex. RLA-406); R. Mabillard, R. Briner, Article 177 PILS, in *Basler Kommentar, Internationales Privatrecht*, A. K. Schnyder, N. P. Vogt et al. (eds.), 3rd ed., 2013, para. 22 (Ex. RLA-407).

⁵²⁰ Respondent’s Comments on *Achmea*, para. 156.

attributable to the Respondent, Article 177(2) of the PILA is not applicable.⁵²¹

425. The Respondent adds that, pursuant to Article 119 of the Swiss Code of Obligations, the arbitration clause contained in the ECT should be deemed extinguished and inoperative, as the performance of the obligation to arbitrate has become impossible due to circumstances not attributable to the party.⁵²²

(b) The Claimant's Position

426. The Claimant submits that Article 177(2) is applicable in this case.⁵²³

The arguments that are sought to be drawn from the *Achmea* judgment by the Czech Republic relate to the “arbitrability” of the dispute. This matter is governed by Article 177(1) PILA [Swiss Federal Code on Private International Law], which denies any role to non-Swiss law, including EU law, for arbitrability. Arbitrability is to be assessed exclusively pursuant to Swiss law, according to which the present dispute is fully arbitrable. As regards the arbitrability of the dispute under Swiss law, it is irrelevant that the award to be rendered by this Tribunal may be unenforceable within EU Member States. It follows that, from a Swiss law perspective, the *Achmea* judgment is completely irrelevant.

Article 177(2) PILA prohibits a State from relying on its “own law” to contest its “capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement”. In light of Article 177(1) PILA, which already deals with arbitrability *ratione materiae* and applies to both private and public parties, Article 177(2) PILA is generally considered superfluous. Be as it may, in the present case it precludes the Czech Republic from relying on EU law, which is clearly its “own law”.⁵²⁴

427. According to the Claimant, the Respondent's arguments are meritless. First, the relevant EU law is “internal law” of the Respondent. Thus, the Respondent cannot argue that the *Achmea* judgment is not attributable to itself.⁵²⁵ As for the impossibility argument under Article 119 of the Swiss Code of Obligations, the Claimant contends that “there is no physical impossibility to perform the arbitration agreement”. Also, the legal impossibility under the provision does not include the arbitrability issue, as such issue is “exclusively governed by the substantive rule of Article 177 [of the PILA]”.⁵²⁶

⁵²¹ Respondent's Comments on *Achmea*, paras. 157-158.

⁵²² Respondent's Comments on *Achmea*, paras. 156, 158, referring to Swiss Code of Obligations, 30 March 1911 (**Ex. RLA-410**). Article 119(1) provides: “An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor.”

⁵²³ Claimant's Comments on *Achmea*, para. 143.

⁵²⁴ Claimant's Comments on *Achmea*, para. 220.

⁵²⁵ Claimant's Comments on *Achmea*, para. 145.

⁵²⁶ Claimant's Comments on *Achmea*, paras. 146-147, referring to B. Dutoit, *Droit International Privé Suisse*, Commentaire de la loi fédérale du 18 décembre 1987, 5th ed., Helbing Lichtenhahn, 2016, p. 800 (**Ex. CLA-260**).

9. The role of waiver/estoppel, including in light of Article 186(2) of the Swiss Federal Code on Private International Law, in this context

428. Article 186(2) of the PILA provides:

Any objection to [the Tribunal's] jurisdiction must be raised prior to any defense on the merits.

(a) The Respondent's Position

429. The Respondent contends that Article 186(2) of the PILA “only applies to objectively arbitrable matters.”⁵²⁷ In cases where the subject matter of the dispute is non-arbitrable, the Respondent contends, the failure to raise a jurisdictional objection in a timely manner does not lead to the foreclosure of such objection and the arbitral tribunal should examine the question of arbitrability *ex officio*, given that “[a] party cannot waive a right that it did not have.”⁵²⁸ According to the *Achmea* judgment, which is an “expression of EU mandatory provisions”, intra-EU investor-State disputes are objectively non-arbitrable; such non-arbitrability cannot be waived and must therefore be considered *ex officio* by this Tribunal.⁵²⁹

430. In any case, the Respondent cannot be considered to have waived the intra-EU jurisdictional objection because, to be effective, such waiver must be “clear and unequivocal”.⁵³⁰ As the Respondent indicated in its Counter-Memorial that “it considered the intra-EU objection to ‘raise[] many complex and serious jurisdictional issues,’ which are more appropriately resolved by the ECJ”, there is no clear and unequivocal waiver.⁵³¹ The Respondent adds that it raises this jurisdictional objection in a timely manner following the issuance of the *Achmea* judgment.⁵³²

(b) The Claimant's Position

431. In relation to the concepts of waiver and estoppel under international law, the Claimant submits:

⁵²⁷ Respondent's Comments on *Achmea*, para. 159, referring to Swiss Federal Tribunal, Case No 4A_12/2107, Judgment, 19 September 2017, para. 3.2.2.1 (Ex. RLA-411).

⁵²⁸ Respondent's Comments on *Achmea*, para. 160-162, referring to Swiss Federal Tribunal, Case No 4A_12/2107, Judgment, 19 September 2017, para. 3.2.2.1 (Ex. RLA-411); G. Kaufmann-Kohler, A. Rigozzi, *International Arbitration: Law and Practice in Switzerland*, 1st ed., Oxford University Press, 2015, p. 99, para. 3.39 (Ex. RLA-412).

⁵²⁹ Respondent's Comments on *Achmea*, para. 163.

⁵³⁰ Respondent's Comments on *Achmea*, para. 164, referring to A. Bucher, *Commentaire Romand*, 1st ed., Helbing Lichtenhahn Verlag, 2011, para. 12 (Ex. RLA-414); B. Berger, F. Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed., Hart, 2015, paras. 1853 et seq. (Ex. RLA-415) (“Berger/Kellerhals”).

⁵³¹ Respondent's Comments on *Achmea*, para. 165, referring to Counter-Memorial, paras. 368-369.

⁵³² Respondent's Comments on *Achmea*, para. 166.

The principles of waiver and estoppel, which are firmly established in international law and are enshrined in Article 186(2) PILA, apply in this case. In addition to all the other reasons, the Respondent's request that these cases be dismissed on the basis of the intra-EU jurisdictional objection should be rejected because, under both international law and Swiss law, the Czech Republic (i) waived the right to raise such objection; and (ii) is estopped from raising it.⁵³³

432. The Claimant observes that “waiver is a well-established principle of international law which has been consistently been applied by the ICJ”.⁵³⁴ A waiver is effective if it meets these conditions:

(i) there must be a declaration or statement; (ii) made by a competent authority; (iii) of the State whose rights are affected by the waiver; (iv) made in the context of a claim/dispute; (v) not affected by individuality; and (vi) not revocable.⁵³⁵

433. In this regard, the Claimant argues that the Respondent's statement that it “does not raise (or intend to raise) the intra-European Union BIT objection” meets these six requirements and thus constitutes an enforceable waiver.⁵³⁶

434. In any event and separately, the Claimant contends that, pursuant to the well-established principle of estoppel,⁵³⁷ the Respondent would be precluded from raising the intra-EU objection.⁵³⁸ The relevant test is that “(i) the State must engage in a conduct or make a representation/declaration having a reasonable appearance that the State will be bound by it; and (ii) a third party relies in good faith.”⁵³⁹ Some tribunals have considered a third element, namely “a showing of detriment

⁵³³ Claimant's Comments on *Achmea*, para. 221.

⁵³⁴ Claimant's Comments on *Achmea*, paras. 156-160, referring to *Nuclear Tests Case* (New Zealand v. France), ICJ Judgment, 20 December 1974, para. 46 (**Ex. CLA-262**); *Nuclear Tests Case* (Australia v. France), ICJ Judgment, 20 December 1974, para. 43 (**Ex. CLA-263**); *Case Concerning the Frontier Dispute* (Burkina Faso v. Republic of Mali), ICJ Judgment, 22 December 1986, paras. 39-40 (**Ex. CLA-279**).

⁵³⁵ Claimant's Comments on *Achmea*, para. 161, referring to C. Tams, Waiver, acquiescence, and extinctive prescription, in J. Crawford, A. Pellet et al. (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 1037-1038 (**Ex. CLA-267**).

⁵³⁶ Claimant's Comments on *Achmea*, paras. 162-182.

⁵³⁷ Claimant's Comments on *Achmea*, para. 186, referring to *Pan American Energy LLC et al. v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objection, 27 July 2006, para. 159 (**Ex. CLA-288**) (“*Pan American*”); *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, para. 469 (**Ex. CLA-289**) (“*Mamidoil*”); *Canfor Corporation v. United States of America et al.*, Order of the Consolidation Tribunal, 7 September 2005, para. 168 (**Ex. CLA-290**); *Pope & Talbot Inc. v. The Government of Canada*, Interim Award, 26 June 2000, paras. 111-112 (**Ex. RLA-21**) (“*Pope & Talbot*”).

⁵³⁸ Claimant's Comments on *Achmea*, paras. 184-185, referring to J. Wass, Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals, *The British Yearbook of International Law*, Oxford, 2017, p. 157 (**Ex. CLA-270**).

⁵³⁹ Claimant's Comments on *Achmea*, paras. 187-189, referring to *Duke Energy v. Peru*, paras. 245-246 (**Ex. CLA-291**); *Mamidoil*, para. 469 (**Ex. CLA-289**).

for the party relying on the representation or declaration”.⁵⁴⁰ The Respondent’s statement that it “does not raise (or intend to raise) the intra-European Union BIT objection”, the Claimant asserts, satisfies these three requirements.⁵⁴¹

435. As for the Respondent’s argument that the Claimant’s waiver and estoppel arguments do not apply here, because “the *Achmea* judgment is the expression of EU mandatory provisions”, the Claimant submits that waiver and estoppel “are overriding principles of international law” in relation to the EU law sub-regime.⁵⁴² In any case, “estoppel operates irrespective of whether the representation of [the Respondent] is legal or correct.”⁵⁴³
436. In respect of Article 186(2) of the PILA, the Claimant argues that it is applicable and bars the Respondent’s “attempt to revive the intra EU-objections”.⁵⁴⁴ In the Claimant’s view, the Respondent “not only fail[ed] to contest the jurisdiction but expressly and unconditionally [undertook] not to raise a jurisdictional objection.” Such behavior “falls squarely under Article 186(2)”.⁵⁴⁵
437. The Respondent’s argument that Article 186(2) of the PILA does not apply to “objectively arbitrable matters” is considered flawed by the Claimant since this limit only applied to matters which are non-arbitrable under Swiss law.⁵⁴⁶ According to the Claimant, the question of arbitrability is determined by reference to the broad definition of arbitrability found in Article 177 of the PILA, which encompasses “any dispute of financial interest”. The present dispute is thus arbitrable under Swiss law, so says the Claimant, and whether it is arbitrable under EU law is irrelevant.⁵⁴⁷ With reference to academic commentary, the Claimant also rejects the

⁵⁴⁰ Claimant’s Comments on *Achmea*, para. 190, referring to *Government of Province of East Kalimantan v. PT Kaltim Prima Coal et al.*, ICSID Case No. ARB/07/3, Award on Jurisdiction, 28 December 2009, para. 111 (**Ex. CLA-275**); *Pope & Talbot*, para. 111 (**Ex. RLA-21**); *Pan American*, para. 159 (**Ex. CLA-288**).

⁵⁴¹ Claimant’s Comments on *Achmea*, paras. 191-197.

⁵⁴² Claimant’s Comments on *Achmea*, para. 198.

⁵⁴³ Claimant’s Comments on *Achmea*, para. 199, referring to *Duke Energy v. Peru*, para. 245 (**Ex. CLA-291**); A. Kulick, About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals, *The European Journal of International Law*, 2015, p. 109 (**Ex. CLA-265**).

⁵⁴⁴ Claimant’s Comments on *Achmea*, paras. 203, 211.

⁵⁴⁵ Claimant’s Comments on *Achmea*, para. 203.

⁵⁴⁶ Claimant’s Comments on *Achmea*, paras. 205-206, referring to Swiss Federal Tribunal, Case No. 4A_12/2017, Judgment, 19 September 2017, para. 3.2.2.1 (**Ex. RLA-411**).

⁵⁴⁷ Claimant’s Comments on *Achmea*, para. 207.

Respondent's argument that the Tribunal should consider arbitrability *ex officio*.⁵⁴⁸

10. The Tribunal's Decision

438. Having carefully considered the arguments presented by both sides, the Tribunal finds itself in agreement with the Claimant. It holds that the *Achmea* judgment has no impact on this Tribunal's jurisdiction, as the Respondent is foreclosed from raising this objection at this stage of the proceedings.
439. The seat of this arbitration is Geneva, Switzerland.⁵⁴⁹ Importantly, the Tribunal is seated outside the EU.
440. It is well accepted that the seat of arbitration determines the procedural law governing the arbitration, and will likely impose procedural rules by which all parties must comply. Equally, the arbitration law at the seat will dictate the extent to which domestic courts will involve themselves, or may intervene, in the arbitral process, the degree to which an arbitral award may be affirmatively challenged (*i.e.*, set aside or annulled) and the grounds for such a challenge. The Tribunal therefore cannot agree with the Respondent's submission that the seat of arbitration is irrelevant to the Tribunal's analysis.⁵⁵⁰ On the contrary, the Tribunal is called upon to satisfy itself that all Parties to this arbitration have complied with all relevant legal requirements at the seat of the arbitration throughout the arbitral process, and that there is no issue with respect of its jurisdiction as far as its seat is concerned.
441. It is for this reason that the Tribunal deems it appropriate to consider both the conduct of the Respondent in raising its jurisdictional objection based upon the *Achmea* judgment, and the impact of the *Achmea* judgment itself on the Tribunal's jurisdiction from the perspective of Swiss law and the likely approach of the Swiss courts.
442. Under the applicable Swiss procedural law, objections to an arbitral tribunal's jurisdiction must be brought in a timely manner. Article 186(2) of the PILA, codifying the principle of foreclosure, specifies that "[a]ny objection to [the Tribunal's] jurisdiction must be raised prior to any defense on the merits." This provision does not spell out the consequences of a failure to contest

⁵⁴⁸ Claimant's Comments on *Achmea*, paras. 208-210, referring to P. Lalive, J.F. Poudret, C. Reymond, *Le droit de l'arbitrage interne et international en Suisse*, 1st ed., Payot Lausanne, 1989, p. 309 (**Ex. CLA-294**); B. Berger, Article 186 PIL, M. Arroyo (ed.), *Arbitration in Switzerland*, 1st ed., Kluwer Law International BV, 2013, p. 154 (**Ex. CLA-258**); Berger/Kellerhals, para. 691 (**Ex. CLA-253**).

⁵⁴⁹ Procedural Order No. 2 dated 27 February 2015.

⁵⁵⁰ Respondent's Comments on *Achmea*, para. 83.

jurisdiction before dealing with the merits, but it is generally accepted that where a respondent enters an unconditional appearance and makes submissions on the merits, such behaviour constitutes an irrevocable waiver of its right to contest the arbitral tribunal's jurisdiction.⁵⁵¹

443. Similarly, Article 21(3) of the UNCITRAL Rules provides that “[a] plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.”
444. In this case, there is nothing to which the Respondent can point to satisfy the requirement in both Article 186(2) of the PILA and Article 21(3) of the UNCITRAL Rules that the jurisdictional objection in question was raised no later than the statement of defence, or any defence on the merits. Rather, as detailed below, the Respondent specifically and repeatedly stated throughout these proceedings that it would not object to the Tribunal’s jurisdiction on the basis of the intra-EU nature of the dispute.
445. In the Response to the Notice of Arbitration, the Respondent noted that “the Czech Republic does not raise (or intend to raise) the intra-European Union BIT objection”.⁵⁵²
446. In its Counter-Memorial, the Respondent stated that “the Czech Republic does not plead a fundamental incompatibility between investment treaties and EU law”.⁵⁵³
447. At the Hearing, the Respondent submitted that the “Czech Republic, as you know, does not advance an intra-EU jurisdictional objection in this case”.⁵⁵⁴
448. The Tribunal notes the Respondent’s contention that any waiver of rights under Article 186(2) of the PILA, to be effective, must be expressed in “clear and unequivocal” terms.⁵⁵⁵ In this regard, the Respondent has drawn the Tribunal’s attention to what it considers to be qualifying language in its submissions that would make any alleged waiver neither clear nor unequivocal. For instance, in its Counter-Memorial the Respondent noted that “the intra-EU objection raise[d] many complex and serious jurisdictional issues’, which are more appropriately resolved by the

⁵⁵¹ Berger/Kellerhals, para. 638 (**Ex. CLA-253**); SFT, Case No. 120 II 155, Judgment, 19 April 1994, para. 3b)bb) (**Ex. CLA-292**); SFT, Case No. 128 III 50, Judgment, 16 October 2001, para. 2c)aa) (**Ex. CLA-293**).

⁵⁵² Response, para. 228.

⁵⁵³ Counter-Memorial, paras. 296, 363.

⁵⁵⁴ Hearing Transcript (27 February 2017), 188:9-10 and the Respondent’s Opening Presentation, slide No. 67.

⁵⁵⁵ Respondent’s Comments on *Achmea*, para. 164.

ECJ”.⁵⁵⁶

449. Having carefully reviewed each of these statements, the Tribunal disagrees with the Respondent. In the Tribunal’s view, none of the Respondent’s referenced qualifications changes the nature of its representations, and indeed undertakings, repeated at different stages throughout these proceedings, that no jurisdictional objection would be raised with respect to the intra-EU issue (*i.e.*, the same issue that has now been decided in *Achmea*). In all the circumstances, the Tribunal therefore concludes that the Respondent waived any intra-EU jurisdictional objection. Had the Respondent intended to reserve its rights, it could have done so by including express language to this effect. The Tribunal considers that the Respondent’s waiver was “clear and unequivocal” and therefore valid under Article 186(2) of the PILA.
450. There is then the question whether there is anything about the nature of the *Achmea* judgment and the principle for which it stands that changes this analysis as a matter of Swiss law.
451. According to the Respondent, Article 186(2) of the PILA “only applies to objectively arbitrable matters” and the *Achmea* judgment as an “expression of EU mandatory provisions” renders any intra-EU dispute, including the present one, objectively non-arbitrable. In other words, the mandatory nature of the rule of EU law identified in the *Achmea* judgment is such that the Respondent is free to raise an objection based upon this rule in Swiss arbitral proceedings at any stage, whether before, during or after defending on the merits, and without regard to the Swiss rules on waiver.
452. The Tribunal does not agree. As both Parties have submitted, EU law is considered by Switzerland as public international law between third countries (“*res inter alios acta*”).⁵⁵⁷ Pursuant to Article 5(4) of the Swiss Constitution, the Swiss Confederation and the Cantons shall respect international law that is binding upon them. Similarly, Article 190 of the Swiss Constitution provides that the Swiss Supreme Court and other judicial authorities are bound to apply international law. These references to international law comprise only those norms of international law that are binding upon Switzerland. This includes, for example, customary international law, the general principles of law and the treaties signed and ratified by Switzerland. However, since Switzerland is not an EU Member State, nor a member of the European Economic Area, it cannot be said that EU law strictly forms part of international law within the meaning of the Swiss Constitution, or enjoys a special status or primacy over other rules of international law. The Tribunal is unpersuaded by the Respondent’s arguments that the policy of Swiss courts to

⁵⁵⁶ Respondent’s Comments on *Achmea*, para. 165, Counter-Memorial, paras. 368-369.

⁵⁵⁷ See Respondent’s Comments on *Achmea*, para. 144; Claimant’s Comments on *Achmea*, para. 129.

interpret Swiss statutes in harmony with EU law or the extensive network of treaties between Switzerland and the EU have a bearing on the status of EU law within the Swiss legal order. While these developments may be evidence of a growing economic integration between Switzerland and the EU, they cannot, in and of themselves, fundamentally change the legal character of EU law in Switzerland, or indeed the fact that Swiss courts are under no obligation to follow the ECJ's jurisprudence.⁵⁵⁸ The Tribunal therefore concludes that EU law does not enjoy primacy in Switzerland. Accordingly, the question of objective arbitrability must be determined from the perspective of Swiss law.

453. The applicable Article 177(1) of the PILA provides that “[a]ny dispute of financial interest may be the subject of an arbitration”. This is a self-sufficient substantive provision of Swiss international arbitration law, as opposed to a conflict of laws rule.⁵⁵⁹ As such, the Tribunal must only apply this rule, to the exclusion of any potentially stricter foreign rules (even if closely connected to the dispute). The Tribunal notes, in this regard, the *Fincantieri* judgment, in which the Swiss Federal Tribunal upheld a partial award on jurisdiction, finding that the commercial embargo imposed by the United Nations against Iraq did not affect the arbitrability under Swiss law of a dispute involving an agency agreement for the conclusion of contracts with the Republic of Iraq, and that the fact that an award rendered in Switzerland might not be enforceable in other jurisdictions pursuant to Article V(2) of the New York Convention was not a relevant factor for the purposes of Article 177(1) PILA.⁵⁶⁰
454. It bears mention here that there is a consensus amongst commentators on Swiss law that foreign law has no bearing on arbitrability in Switzerland, even if it is considered part of the public policy of the foreign system at issue – unless it is also part of Swiss international public policy within the (restrictive) meaning of Article 190(2)(e) PILA.⁵⁶¹ But the Tribunal has seen nothing to justify a conclusion that the principle identified in the *Achmea* judgment constitutes Swiss international public policy (as this notion has been defined). On the contrary, as the Claimant has noted, Switzerland has signed and ratified numerous BITs with different States, including EU Member States, providing for investor-State arbitration, and has manifested a clear pro-arbitration policy.

⁵⁵⁸ See e.g. SFT, Case No. 124 II 193, Judgment, 19 March 1998, para. 6a (**Ex. CLA-251**); SFT, Case No. 124 III 495 Judgment, 13 November 1998, para. 2a (**Ex. CLA-252**).

⁵⁵⁹ Berger/Kellerhals, para. 217 (**Ex. CLA-253**).

⁵⁶⁰ SFT, Case No 118 II 353, Judgment, 23 June 1992 (**Ex. CLA 254**).

⁵⁶¹ Berger/Kellerhals, para. 272-274 (**Ex. CLA-253**); J.F. Poudret, S. Besson, *Comparative law of international arbitration*, 2nd ed., Sweet & Maxwell, 2007, para. 333 (**Ex. CLA-255**).

455. In so far as the Respondent relies on the decision in *Eco Swiss*,⁵⁶² the Tribunal considers this of no assistance. This decision concerned the law applicable to the merits of the dispute, whereas the *Achmea* judgment (as the Respondent itself has asserted) raises an issue of objective arbitrability, which in this case – unlike in *Eco Swiss* – is governed exclusively by Article 177(1) of the PILA.
456. It follows that applying Article 177(1) of the PILA, the present dispute, which clearly involves financial interests, is objectively arbitrable under Swiss law. Whether the dispute is also arbitrable under EU law need not be decided by this Tribunal. More specifically, whether the award is enforceable outside Switzerland, or within the EU, has no impact on objective arbitrability within Switzerland.
457. It also follows that the *Achmea* judgment and the principle of EU law for which it stands cannot have the effect of ignoring the procedural rules applicable to this Swiss arbitration.
458. Further, Article 177(2) of the PILA precludes a State, which is a party to an arbitration agreement, from invoking its own law in order to contest the arbitrability of a dispute covered by such an arbitration agreement. It applies squarely to the present arbitration. To the extent that the Respondent argues that Article 177(2) of the PILA is not applicable in the present circumstances as the *Achmea* judgment is not attributable to the Respondent, the Tribunal disagrees. EU law, including the obligation to comply with judgments from the ECJ, forms part of the domestic legal system of the Czech Republic.⁵⁶³
459. In light of these considerations, the Tribunal does not deem it necessary or appropriate to pronounce itself on the application of the *Achmea* judgment to an arbitration brought under the ECT.
460. The Tribunal concludes that, in the particular circumstances of this case, the *Achmea* judgment cannot be relied upon by the Respondent. It has no impact on this Tribunal's jurisdiction.

⁵⁶² Respondent's Comments on *Achmea*, para. 150, referring to *Eco Swiss China Time Ltd v. Benetton International NV*, ECJ Judgment, Case C-126/97, 1 June 1999 (**Ex. RLA-50**); Swiss Federal Tribunal, Case No. 4P.278/2005, BGE 132 III 389, Judgment, 8 March 2008 (**Ex. RLA-395**).

⁵⁶³ The same conclusion flows from the application of Articles 27 and 46 of the VCLT.

VI. MERITS

A. WHETHER THE RESPONDENT VIOLATED THE FAIR AND EQUITABLE TREATMENT STANDARD

1. Whether the Respondent Failed to Provide a Stable Legal Framework

(a) The Claimant's Position

461. The Claimant argues that the Respondent violated its obligation to accord the Claimant and its investment fair and equitable treatment (“FET”) under the ECT by changing the legal framework applicable to investments in the photovoltaic power plant market.⁵⁶⁴ In the present case, the Claimant submits that the obligation to provide FET is contained in Article 10(1) of the ECT.⁵⁶⁵

462. Article 10(1) of the ECT provides as follows:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security [...].⁵⁶⁶

463. According to the Claimant, FET is a flexible standard, breaches of which may be established by reference to several types of host States' conducts, which may partially overlap.⁵⁶⁷ Such conduct includes (1) the failure to provide a stable and predictable investment framework; and (2) the failure to protect a foreign investor's legitimate expectations; and (3) the failure to act in a reasonable manner.⁵⁶⁸

464. First, the Claimant submits that the Respondent failed to provide a stable and predictable investment framework by introducing the Solar Levy, removing the Income Tax Exemption, and changing the Shortened Depreciation Period.⁵⁶⁹

465. For the Claimant, the obligation to provide a stable and predictable investment framework may be distinguished from the obligation to protect an investor's legitimate expectations.⁵⁷⁰ The

⁵⁶⁴ Memorial, paras. 331, 332, 335.

⁵⁶⁵ Memorial, paras. 356-358.

⁵⁶⁶ Memorial, para. 336.

⁵⁶⁷ Memorial, para. 346.

⁵⁶⁸ Memorial, paras. 347, *referring to* Dolzer/Schreuer, p. 133 (Ex. CLA-29). *See also* Reply, paras. 625-628.

⁵⁶⁹ Memorial, para. 384; Reply, paras. 676-678.

⁵⁷⁰ Reply, para. 627.

former enshrines a host State's general obligation not to change its investment framework retroactively to the detriment of a foreign investor, while the latter requires an examination of an individual investors' expectations. Accordingly, the Tribunal may determine that the host State violated the obligation to provide a stable and predictable legal framework "without a specific consideration of the individual investors' expectations."⁵⁷¹ Accordingly, the obligation to provide a stable and predictable investment framework should be examined from an objective perspective, regardless of whether a host State has provided a specific assurance or whether an investor has acknowledged such a specific assurance.⁵⁷²

466. According to the Claimant, the obligation to provide a stable and predictable investment framework stems from two sources in the present case: first, from the inherent nature of the incentive legislation and, secondly, from the specific treaties that are presently applicable, *i.e.*, the ECT.⁵⁷³
467. First, the Claimant argues that the Act on Promotion, the relevant ERO regulations and the Act on Income Tax jointly established the Incentive Regime, which offered investments in the photovoltaic sector the FiT, the 5% rule,⁵⁷⁴ the Income Tax Exemption and the Shortened Depreciation Period.⁵⁷⁵ In the Claimant's view, it was the Incentive Regime's purpose to attract foreign investment in the RES markets by granting them sufficiently profitable returns in order to meet the 8% EU Indicative 2010 Target.⁵⁷⁶ According to the Claimant, it follows from the described nature and the purpose of the Incentive Regime that the Respondent was not allowed to change the regime before foreign investors obtained the promised benefits.⁵⁷⁷

⁵⁷¹ Reply, paras. 629-631, *see also* Memorial, para. 310-327, *Duke Energy v. Ecuador*, para. 340 (**Ex. CLA-46**); *Electrabel Decision on Jurisdiction*, para. 7.75 (**Ex. RLA-39**); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004, paras. 63-64 (**Ex. CLA-14**); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 259 (**Ex. CLA-127**) ("**Lemire**"), *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 827 (**Ex. CLA-3**) ("**Micula**"); *Enron Corporation Ponderosa Assets, L.P v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 268 (**Ex. CLA-47**) ("**Enron**").

⁵⁷² Hearing Transcript (27 February 2017), 51:11-21.

⁵⁷³ Reply, paras. 640, 670.

⁵⁷⁴ Hearing Transcripts (27 February 2017), 21:24 to 22:8.

⁵⁷⁵ Reply, paras. 6-10.

⁵⁷⁶ Reply, paras. 640, 670.

⁵⁷⁷ Reply, paras. 645, 656, *referring to* EC 1997 White Paper setting out a "*Strategy and Action Plan*" (**Ex. C-203**); EC Proposal of 31 May 2000 for a directive on the promotion of electricity from renewable energy sources in the internal electricity market (**Ex. C-206**); 2001 Directive (**Ex. C-20**); EC Communication of

468. Second, the Claimant argues that the object and purpose of the ECT is (a) to promote investments between the Contracting States, for example, by providing a long-term incentive regime, and (b) to require host States to protect investors from legislative changes for a reasonable period of time.⁵⁷⁸
469. In particular, the Claimant refers to Article 10(1) of the ECT which expressly requires host States to “encourage and create stable [...] conditions for investors.”⁵⁷⁹ The Claimant emphasises that this provision should be interpreted in accordance with the object and purpose of the ECT as set out in its introductory note, namely strengthening “the rule of law” on energy matters which, according to the Claimant, strictly prohibits retroactive regime changes.⁵⁸⁰
470. The Claimant rejects the Respondent’s argument that a stabilization clause would be necessary to stabilize the Incentive Regime.⁵⁸¹
471. First, the Claimant points out that the Respondent acknowledges that the Act on Promotion provided a promise of stabilization when it stated that investors were entitled to expect the 15-year simple payback and the 7% return under the Act, even if the Act does not entail any specific stabilization clause.⁵⁸²
472. Second, the Claimant argues that an express contractual stabilization clause is not necessary to prohibit a host State from changing its investment scheme, considering that, in the RES market, direct contracts with the Government are unusual, as RES producers typically are small businesses and the RES electricity produced is sold directly to the network operators.⁵⁸³ Accordingly, in the Claimant’s view, it is unreasonable to require a specific contractual clause to impose an obligation on the host State to stabilize its investment regime.⁵⁸⁴ In this regard, the Claimant notes that its position is in line with relevant regulatory practice in the RES market,

7 December 2005, *The support of electricity from renewable energy sources (Ex. C-207)*; 2009 Directive, **(Ex. C-23)**.

⁵⁷⁸ Memorial, para. 382; Reply, para. 675.

⁵⁷⁹ Memorial, para. 379, *observing inter alia* that the ECT’s aim to ensure regulatory stability is confirmed by the context and circumstances of its conclusion, which are relevant under the VCLT rules on treaty interpretation. *See also* Reply, para. 673.

⁵⁸⁰ Reply, para. 674.

⁵⁸¹ Reply. paras. 635, 641, 642.

⁵⁸² Reply, paras. 644-646.

⁵⁸³ Reply, paras. 647-653, 661, *referring to AES*, para. 9.3.30 **(Ex. RLA-41)**; *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2012, p. 69 **(Ex. CLA-128)**; and *Micula*, para. 529 **(Ex. CLA-3)**.

⁵⁸⁴ Reply, para. 655.

according to which agencies usually do not review an incentive mechanism once it is set.⁵⁸⁵

473. To support this argument, the Claimant refers to an ERO report which provides that the Act on Promotion was “bringing a guarantee of long-term and stable promotion necessary for decision-making by businesses”, without mentioning contractual stabilization clauses.⁵⁸⁶ The Claimant rejects the position advanced by Professor Cameron that it would not be recommendable for investors to enter foreign markets without an express stabilization commitment, since this analysis allegedly failed to consider the RES market’s specific background.⁵⁸⁷ Additionally, the Claimant notes that, even if the Respondent unintentionally promised stabilization without a contractual negotiation, it should not be able to rely on its own misunderstanding.⁵⁸⁸

474. Lastly, in support of its position, the Claimant refers to prior decisions by investment tribunals, submitting that the tribunals in *Tecnicas Medioambientales Tecmed S.A. The United Mexican States*,⁵⁸⁹ *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*,⁵⁹⁰ *Occidental Exploration and Production Company v. The Republic of Ecuador*,⁵⁹¹ and *CMS Gas Transmission Company v. The Argentine Republic*⁵⁹² required host States to act in a stable and consistent manner.⁵⁹³ In addition, the Claimant submits that the tribunals in *LG&E Energy Corp., LG&E Capital Corp, LG&E International Inc. v. Argentine Republic*,⁵⁹⁴ *Enron*,⁵⁹⁵ and *Eureko v.*

⁵⁸⁵ Reply, para. 654, referring to Expert Report by Pablo T. Spiller and Anton Garcia, dated 28 March 2016, para. 3.23, 3.25, 3.27, 4.17-19.

⁵⁸⁶ Reply, para. 657, referring to Report on the Fulfilment of the Indicative Target for Electricity Production from Renewable Energy Sources for 2008, Ministry of Industry and Trade, 1 November 2009, p. 22, para. 5.1 (Ex. C-109).

⁵⁸⁷ Reply, para. 660, referring to P. Cameron, *International Energy Investment Law*, 1st ed., Oxford University Press, 2010, pp. 3-5 (Ex. RLA-174).

⁵⁸⁸ Reply, paras. 658-659.

⁵⁸⁹ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154 (Ex. RLA-20) (“*Tecmed*”).

⁵⁹⁰ *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 114 (Ex. CLA-42) (“*MTD*”).

⁵⁹¹ *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, para. 191 (Ex. CLA-32) (“*Occidental*”).

⁵⁹² *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 275, 276 (Ex. RLA-44) (“*CMS*”).

⁵⁹³ Reply, paras. 662-666, referring to *Tecmed*, para. 154 (Ex. RLA-20); *MTD*, para. 114 (Ex. CLA-42); *Occidental*, paras. 183, 191 (Ex. CLA-32); *CMS*, paras. 134, 137, 275, 276 (Ex. RLA-44).

⁵⁹⁴ *LG&E Energy Corp., LG&E Capital Corp, LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 124 (Ex. CLA-44) (“*LG&E Decision on Liability*”).

⁵⁹⁵ *Enron*, paras. 259, 260 (Ex. CLA-47).

Republic of Poland,⁵⁹⁶ decided that the requirement of stability is fundamental to the FET standard.⁵⁹⁷ Finally, the Claimant contends that the tribunal in *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*⁵⁹⁸ found that a mere change of a host State's investment policy can constitute a breach of the FET standard.⁵⁹⁹

475. The Claimant accepts the Respondent's definition of the term "retroactive", conceding that "from a legal perspective, a law affecting only future situations is not technically retroactive".⁶⁰⁰ Nevertheless, the Claimant maintains that the term "retroactive" should be used vis-à-vis existing investments, stating that such language would be appropriate from a business perspective, and that the EC used the term in the same manner in its letter of 11 January 2011.⁶⁰¹

(b) The Respondent's Position

476. The Respondent rejects the Claimant's argument that the Respondent failed to provide a stable and predictable investment framework by introducing the Solar Levy and repealing the Tax Incentives.⁶⁰²

477. First, the Respondent emphasizes the presumption that a host State does not violate its treaty obligation by simply changing its domestic law, noting that a State must be free to serve the public interest through legislative modifications.⁶⁰³

478. Second, the Respondent criticizes the Claimant's use of the word "retroactive", stating that the Claimant in substance claims that "retroactive" implies that the Respondent may not change the future treatment of any existing investment, while the term in fact implies the withdrawal of a treatment granted in the past.⁶⁰⁴

479. Third, the Respondent alleges that a mere change of the legal framework applicable to the

⁵⁹⁶ *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, paras. 231-235 (**Ex. RLA-148**) ("*Eureko Partial Award*").

⁵⁹⁷ Reply, para. 667, referring to *LG&E Decision on Liability*, para. 124 (**Ex. CLA-44**); *Enron*, para. 259-260 (**Ex. CLA-47**); *Eureko Partial Award*, paras. 231-235 (**Ex. RLA-148**).

⁵⁹⁸ *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, para. 240 (**Ex. CLA-24**) ("*Bayindir*").

⁵⁹⁹ Reply, paras. 668-669, referring to *Bayindir*, para. 240 (**Ex. CLA-24**).

⁶⁰⁰ Hearing Transcript (3 March 2017), 48:15-19.

⁶⁰¹ Hearing Transcript (3 March 2017), 48:17-49:6 referring to Letter from Ms. Hedegaard and Mr. Oettinger to Mr. Kocourek (Czech Minister of Trade and Industry), 11 January 2011 (**Ex. C-120**).

⁶⁰² Counter-Memorial, para. 454.

⁶⁰³ Hearing Transcript (27 February 2017), 203:4-206:3.

⁶⁰⁴ Rejoinder, para. 524; Hearing Transcript (27 February 2017), 206:14-208:7.

Claimant's investment does not amount to a violation of its treaty obligation to provide FET in the absence of a specific stabilization arrangement.⁶⁰⁵ According to the Respondent, the Claimant confuses the notion of stability with the distinct concept of stabilization, explaining that a guarantee of stabilization prohibits a host State entirely from changing its legislation, while a mere obligation to provide stability does not.⁶⁰⁶ Referring to the decisions in *Total S.A. v. Argentine Republic*, *Parkerings-Compagniet AS v. Lithuania*, and *Ioan Micula, Viorel Micula and others v. Romania*,⁶⁰⁷ the Respondent argues that an investment treaty does not, as a general matter, limit a State's discretion to change or modify its national legislation unless the treaty contains a specific stabilization provision or other specific mechanisms to this effect.⁶⁰⁸ In the Respondent's view, this is particularly true in the energy sector where regulators often intervene to address market failures such as, for example, monopolies or the abuse of market power.⁶⁰⁹ According to the Respondent, this view is shared by certain Middle and South American countries, which enacted legislation that provides for the possibility of contractual stabilization clauses.⁶¹⁰ The Respondent argues that such express stabilization arrangements must clearly stipulate that existing laws "continue to apply to the beneficiary even in the face of legislative or regulatory change, and/or identification of a remedy in the event the beneficiary is subjected to

⁶⁰⁵ Counter-Memorial, para. 454; Rejoinder, paras. 509, 523.

⁶⁰⁶ Rejoinder, para. 515, referring to *Philip Morris Brands SÁRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 423 (**Ex. RLA-273**) ("*Philip Morris*"); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, para. 629, (**Ex. CLA-110**) ("*TECO*"); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 164 (**Ex. RLA-28**) ("*Total Decision on Liability*"); *Micula*, para. 529 (**Ex. CLA-3**); *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 332 (**Ex. RLA-32**) ("*Parkerings*"); *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, para. 586 (**Ex. RLA-173**) ("*Perenco*").

⁶⁰⁷ *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 23 September 2008 (**Ex. RLA-213**).

⁶⁰⁸ Counter-Memorial, paras. 457, 460, referring to *Total Decision on Liability*, para. 115 (**Ex. RLA-28**); *Plama*, para. 219 (**Ex. RLA-5**); *Parkerings*, paras. 332, 333 (**Ex. RLA-32**); *Perenco*, para. 586 (**Ex. RLA-173**); *Duke Energy International Peru Investments No. 1 Ltd. v. Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, para. 190 (**Ex. RLA-236**) ("*Duke Energy v. Peru*"); *Noble Energy Inc. and Machalapower Cia. Ltda. v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para. 161 (**Ex. RLA-170**) ("*Noble Energy*").

⁶⁰⁹ Counter-Memorial, para. 460, referring to *Duke Energy v. Peru*, para. 190 (**Ex. RLA-236**); *Noble Energy*, para. 161 (**Ex. RLA-170**).

⁶¹⁰ Counter-Memorial, para. 460, referring to *Duke Energy v. Peru*, para. 190 (**Ex. RLA-236**); *Noble Energy*, para. 161 (**Ex. RLA-170**).

adverse changes”.⁶¹¹ The Respondent further submits that the tribunals in *Duke Energy v. Peru*,⁶¹² *Noble Energy*,⁶¹³ *Oxus v. The Republic of Uzbekistan*,⁶¹⁴ *Occidental*⁶¹⁵ and *Nations Energy Inc. and others v. The Republic of Panama*,⁶¹⁶ required evidence of specific and express arrangements to protect investors from legislative changes in order to establish a treaty violation.⁶¹⁷

480. On the other hand, the Respondent submits that the obligation to provide FET, in the absence of express language to the contrary, does not usually entail such a rigorous requirement of stabilization.⁶¹⁸ Moreover, even if an investment treaty were to use the term “stability”, the treaty should not be interpreted as incorporating a stabilization arrangement in the absence of other express indications.⁶¹⁹
481. In the present case, the Respondent alleges that it did not provide a guarantee of stabilization to photovoltaic investors.⁶²⁰ In particular, the Explanatory Report did not contain a promise of stabilization. To the extent that the Explanatory Report mentions that the Act purported to achieve a “stable promotion”, the Respondent argues that the simple use of the term “stable” or

⁶¹¹ Rejoinder, para. 518, referring to *Oxus Gold v. The Republic of Uzbekistan*, Final Award, 17 December 2015, para. 823 (**Ex. RLA-276**) (“*Oxus Gold*”); *Occidental*, paras. 103, 111 (**Ex. CLA-32**); *Nations Energy Inc. and others v. The Republic of Panama*, ICSID Case No. ARB/06/19, Award, 24 November 2010, para. 102 (**Ex. RLA-277**) (“*Nations Energy*”).

⁶¹² *Duke Energy v. Peru*, para. 190 (**Ex. RLA-236**).

⁶¹³ *Noble Energy*, para. 161 (**Ex. RLA-170**).

⁶¹⁴ *Oxus Gold*, para. 823 (**Ex. RLA-276**).

⁶¹⁵ *Occidental*, para. 103 (**Ex. CLA-32**).

⁶¹⁶ *Nations Energy*, para. 102 (**Ex. RLA-277**).

⁶¹⁷ Rejoinder, paras. 517-518, referring to *Total Decision on Liability*, para. 101 (**Ex. RLA-28**); *Duke Energy v. Peru*, paras. 189, 190, 190(b) (**Ex. RLA-236**); *Noble Energy*, para. 161 (**Ex. RLA-170**); *Oxus Gold*, para. 823 (**Ex. RLA-276**); *Occidental*, para. 103, 111 (**Ex. CLA-32**); *Nations Energy*, para. 102 (**Ex. RLA-277**).

⁶¹⁸ Counter-Memorial, para. 458, referring to *AES*, para. 9.3.25 (**Ex. RLA-41**); *Micula*, para. 529 (**Ex. CLA-3**); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/03/23, Award, 8 October 2009, para. 218 (**Ex. RLA-146**) (“*EDF*”).

⁶¹⁹ Counter-Memorial, paras. 458-459; referring to *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Final Award, 5 September 2008, para. 258 (**Ex. RLA-34**) (“*Continental Casualty*”); *AES*, para. 9.3.29 (**Ex. RLA-41**).

⁶²⁰ Counter-Memorial, para. 461; Rejoinder, paras. 510-511, referring to *Total Decision on Liability*, para. 115 (**Ex. RLA-28**); *Plama*, para. 219 (**Ex. RLA-5**); *Parkerings*, para. 332 (**Ex. RLA-32**); *Eastern Sugar*, para. 272 (**Ex. CLA-5**); *Iberdrola Energía S.A. v. Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, paras. 350-373 (**Ex. RLA-269**); *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB06/3, Award, 6 May 2013, para. 174 (**Ex. RLA-270**); *GAMI Investments Inc. v. Mexico*, Final Award, 15 November 2004, para. 97 (**Ex. RLA-151**) (“*GAMI*”); *ADF Group, Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 190 (**Ex. RLA-271**).

“maintain” is not sufficient to conclude that stabilization was intended.⁶²¹ The language only meant to indicate that the tax relief would continue even after the complete opening of the electricity market. In contrast, the wording did not intend to stabilize the legislation.⁶²² The Respondent also notes that since the Explanatory Report was neither a law, regulation, nor decree, these wordings are not binding upon the Czech Republic in any event.⁶²³ Similarly, the wording “[the Act on Promotion] [...] bring[s] a guarantee of long-term and stable promotion” in the ERO report of 2009 was not sufficient to stabilize legislation.⁶²⁴

482. In response to the Claimant’s argument that a contractual stabilization clause is not necessary to stabilize the legislation, since the investors in the present case were unable to enter into a contractual relationship with the Respondent to obtain a stabilization guarantee and that it would therefore be unreasonable to require a contractual stabilization clause, the Respondent concedes that a stabilization clause does not always have to be a contractual provision, but can also be a legislative arrangement. However, the conditions for such a legislative stabilization are not fulfilled in the present case.⁶²⁵
483. Finally, in response to the Claimant’s allegation that the Respondent admits that the Incentive Regime provided a promise of stabilization, the Respondent agrees that the Incentive Regime was designed to provide a 15-year simple payback and a 7% return, but maintains that no further, or other, promise was given.⁶²⁶

2. Whether the Respondent Failed to Protect the Claimant’s Legitimate Expectations

(a) Whether the Respondent Made Any Promises as to a Stable and Predictable Legal Framework

(1) The Claimant’s Position

484. The Claimant further alleges that the Respondent violated the Claimant’s legitimate expectations as to the stability of the Incentive Regime.⁶²⁷
485. As a preliminary matter, the Claimant notes that a general right of host States to regulate markets

⁶²¹ Rejoinder, paras. 519-520.

⁶²² Rejoinder, para. 536, *referring to* Explanatory Report, p. 4 (Ex. C-27).

⁶²³ Hearing Transcript (27 February 2017), 215:10-216:2.

⁶²⁴ Hearing Transcript (27 February 2017), 217:13-18.

⁶²⁵ Rejoinder, para. 546.

⁶²⁶ Rejoinder, paras. 521-523.

⁶²⁷ Reply, paras. 679, 684.

and to enact legislation for the public benefit exists, and that the FET standard does not interfere with this general right.⁶²⁸ However, the Claimant argues that this right is not limitless and that the host State's regulatory autonomy may, in fact, be constrained by an applicable investment treaty.⁶²⁹ Relying on the decisions in *Micula*,⁶³⁰ *Duke Energy v. Ecuador*,⁶³¹ *LG&E v. Argentina*,⁶³² *CMS v. Argentina*,⁶³³ *Enron*,⁶³⁴ and *Occidental*,⁶³⁵ the Claimant submits that a host State must protect an investor's legitimate expectations that pertinent legislation applicable to its business environment will remain stable.⁶³⁶

486. According to the Claimant, the decision in *Tecmed*⁶³⁷ most clearly articulates that one element of the FET standard is the protection of an investor's legitimate expectations.⁶³⁸ The Claimant notes, referring to several subsequent decisions by investment tribunals, that this aspect of the *Tecmed* decision has repeatedly been confirmed.⁶³⁹
487. The Claimant submits that the protection of an investor's legitimate expectations should be examined by reference to whether a host State has violated its specific assurance to an investor.⁶⁴⁰

⁶²⁸ Memorial, paras. 365-368, referring to *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB 03/15, Award, 31 October 2011, para. 517 (**Ex. RLA-31**) ("*El Paso*").

⁶²⁹ Memorial, paras. 369-370, referring to *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 423 (**Ex. CLA-45**).

⁶³⁰ *Micula*, para. 529 (**Ex. CLA-3**).

⁶³¹ *Duke Energy v. Ecuador*, para. 340 (**Ex. CLA-46**).

⁶³² *LG&E Decision on Liability*, para. 124 (**Ex. CLA-44**).

⁶³³ *CMS*, para. 274 (**Ex. RLA-44**).

⁶³⁴ *Enron*, paras. 259-260, 268 (**Ex. CLA-47**).

⁶³⁵ *Occidental*, para. 191 (**Ex. CLA-32**).

⁶³⁶ Memorial, paras. 371-375, 377, referring to *Micula*, paras. 529, 666 (**Ex. CLA-3**); *Duke Energy v. Ecuador*, para. 340 (**Ex. CLA-46**); *LG&E Decision on Liability*, paras. 124-125 (**Ex. CLA-44**); *CMS*, para. 274 (**Ex. RLA-44**); *Enron*, para. 259-260, 268 (**Ex. CLA-47**); *Occidental*, para. 191 (**Ex. CLA-32**).

⁶³⁷ *Tecmed*, para. 154 (**Ex. RLA-20**).

⁶³⁸ Memorial, para. 385, referring to *Tecmed*, para. 154 (**Ex. RLA-20**).

⁶³⁹ Memorial, paras. 386-391, referring to *Occidental*, paras. 184-192 (**Ex. CLA-32**); *LG&E Decision on Liability*, para. 127 (**Ex. CLA-44**); *Int'l Thunderbird Gaming Corp. v. United Mexican States*, Award, 26 January 2006, para. 147 (**Ex. CLA-48**); *Enron*, paras. 259-262 (**Ex. CLA-47**); *Suez Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 207 (**Ex. RLA-19**); *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, paras. 241, 250, 254 (**Ex. CLA-33**) ("*PSEG*"); *Plama*, paras. 176, 178 (**Ex. RLA-5**); *El Paso*, para. 348 (**Ex. RLA-31**); *Electrabel Decision on Jurisdiction*, para. 7.75 (**Ex. RLA-39**); *Micula*, para. 667 (**Ex. CLA-3**).

⁶⁴⁰ Hearing Transcript (27 February 2017), 51:22-52:7 referring to *Lemire*, para. 259 (**Ex. CLA-127**).

Accordingly, the reasonableness of a host State's measures is irrelevant to this standard.⁶⁴¹ According to the Claimant, the following three-pronged test has been developed in investment arbitration to establish whether a violation of an investor's legitimate expectations has occurred:

- “(i) The Respondent made a promise, assurance or representation of regulatory stability;
- (ii) the Claimant relied on such promise, assurance or representation; and
- (iii) such reliance (and expectation) was reasonable.”⁶⁴²

488. In relation to the first step, the Claimant argues that the decisive question is “whether [a host State] acted in a manner that would reasonably be understood to create such an appearance”.⁶⁴³ Conversely, the host State's actual intent is said to be irrelevant.⁶⁴⁴ However, the Claimant agrees with the Respondent's view that, objectively considered, an investor's expectations must have been objectively legitimately formed at the time of the investment and that minor expectations are not protected.⁶⁴⁵ The latter restriction is immaterial in the present circumstances, however, since according to the Claimant its expectations as to the stability of the Investment Scheme were fundamental to its investment decision and therefore not minor.⁶⁴⁶
489. Additionally, the Claimant argues that the notion of legitimate expectations is closely related to the notion of transparency, which entails an obligation to provide information as to potential legislative changes, noting that Article 10(1) of the ECT contains both obligations.⁶⁴⁷
490. With respect to the first limb of the above test, the Claimant alleges that the Respondent made the following promises of regulatory stability: (1) the FiT level would be stable for 20 years pursuant to Article 6(1)(b)(2) of the Act on Promotion, and the relevant ERO regulations; (2) the Income Tax Exemption would continue to apply for six years, pursuant to Section 19(1)(d) of the Act on Income Tax; and (3) the Shortened Depreciation Period, ranging between five to ten years, would be available, pursuant to Section 30 of the Act on Income Tax.⁶⁴⁸
491. The Claimant argues that the promised legislative stability as detailed above stems from (1) the

⁶⁴¹ Hearing Transcript (27 February 2017), 51:22-52:7.

⁶⁴² Memorial, para. 392, *referring to Micula*, para. 178 (**Ex. CLA-3**).

⁶⁴³ Reply, para. 687, *referring to Micula*, para. 669 (**Ex. CLA-3**).

⁶⁴⁴ Reply, para. 687, *referring to Micula*, para. 669 (**Ex. CLA-3**).

⁶⁴⁵ Reply, paras. 680, 681, 685,

⁶⁴⁶ Reply, paras. 680-681, *referring* First Chroustovský Statement, para. 57.

⁶⁴⁷ Reply, paras. 682-683, *referring to Dolzer/Schreuer*, p. 133-134 (**Ex. CLA-29**); *Electrabel Decision on Jurisdiction*, para. 7.79 (**Ex. RLA-39**).

⁶⁴⁸ Memorial, para. 401.

legislation which established the Incentive Regime; (2) the very purpose of the Incentive Regime itself; (3) the Respondent's promotional activities surrounding the Incentive Regime, and (4) the particularities of the licensing process to operate the Claimant's plants.⁶⁴⁹

492. First, the Claimant alleges that the Respondent's promise of stability is apparent, since the Incentive Regime contained clear rules through the Act on Promotion, the 2007 Technical Regulation, the 2009 Pricing Regulation, and the Act on Income Tax.⁶⁵⁰ With regard to the Act on Promotion, the Claimant notes that Article 6(1)(b)(2), and the relevant provisions under the Technical Regulation and the Pricing Regulation, established that the FiT would be payable for 20 years.⁶⁵¹ According to the Claimant, the promised stability was not limited to a 15-year simple payback and a 7% return rate.⁶⁵² In this regard, the Claimant objects to the Respondent's argument that Article 6(1)(b)(1) of the Act on Promotion, which allows investors to recover investment costs within 15 years, supersedes Article 6(1)(b)(2), arguing that Article 6(1)(b)(1) is only meant to specify the criteria for establishing the FiT level.⁶⁵³ The irrelevance of the return rate in setting FiT is supported by the fact that the ERO did not review the return rates annually.⁶⁵⁴ The Claimant emphasizes that Mr. Jones, the Respondent's industry expert, agreed at the hearing that the 15-year simple payback would not have attracted investments in the Czech RES market.⁶⁵⁵ Similarly, the WACC, as set by the ERO at 7%, was not sufficient to achieve the 8% EU target for 2010.⁶⁵⁶ In addition, the Claimant submits that a WACC was no more than an indicative technical parameter to calculate FiT under the Technical Regulation.⁶⁵⁷ Moreover, the Respondent's argument ignores the importance of stability from a business perspectives.⁶⁵⁸
493. The Claimant further submits that the Act on Income Tax provided the promise of legislative stability jointly with the Act on Promotion.⁶⁵⁹ As evidence for this, the Claimant points to the

⁶⁴⁹ Memorial, para. 395; Reply, para. 690.

⁶⁵⁰ Memorial, para. 394; Reply, para. 692, *referring to* First Chroustovský Statement, para. 27, 33.

⁶⁵¹ Memorial, para. 401.

⁶⁵² Reply, paras. 693-695.

⁶⁵³ Memorial, para. 402.

⁶⁵⁴ Hearing Transcript (3 March 2017), 68:20-69:5.

⁶⁵⁵ Hearing Transcript (3 March 2017), 25:13-25, *referring to* Hearing Transcript (2 March 2017), 112:1-5.

⁶⁵⁶ Hearing Transcript (2 March 2017), 18:17-19:7.

⁶⁵⁷ Hearing Transcript (27 May 2017), 23:20-22; *referring to* ERO Regulation No. 364/2007 Coll. (**Ex. C-29**).

⁶⁵⁸ Memorial, para. 402, *referring to* Response, para.155.

⁶⁵⁹ Memorial, paras. 403-404, *referring to* Explanatory Report, p. 4 (**Ex. C-78**), p. 1 (**Ex. C-27**).

Explanatory Report, which mentioned that the Incentive Regime is “based [...] [o]n maintaining the tax reliefs to the extent set out in the Acts on Income Tax”.⁶⁶⁰ In addition, the Claimant states that a general legal framework is likely to create legitimate expectations when it offers long-term benefits to attract investors, adding that the legislative expectations may arise even if the legal framework does not address individual investors.⁶⁶¹ Similarly, the Claimant states that, even if the Shortened Depreciation Period was not specifically designed for photovoltaic energy producers, the solar energy producers could legitimately expect that the Shortened Depreciation Period would be stable, because it was a part of the Incentive Regime.⁶⁶²

494. Lastly, according to the Claimant, the decision of the tribunal in *Charanne B.V., Construction Investments S.A.R.L. v. The Kingdom of Spain*,⁶⁶³ which found that the claimants, who were Spanish RES investors, could not rely on legitimate expectations, may be distinguished from the case at hand because in *Charanne* the alleged guaranteed period amounted to 30-50 years, and therefore was unreasonably longer than in the case at hand.⁶⁶⁴
495. Second the Claimant argues that it was the Incentive Regime’s purpose to create legitimate expectations, because its ultimate goal was to help the Respondent to meet its EU targets, especially the 8% Indicative 2010 Target under the 2001 Directive.⁶⁶⁵ The Incentive Regime did so by offering stable incentives to prospective investors.⁶⁶⁶ With regard to the FiT, the Claimant alleges that the Explanatory Report expresses this purpose well, providing that: “[it was] necessary to create a support system which, given the well-known high investment costs, will create the necessary climate for investors with a long-term guarantee of return on investments made”.⁶⁶⁷
496. With regard to the Income Tax Exemption and the Shortened Tax Period (collectively “**Tax Incentives**”) the Claimant states that its purpose was closely related to the Act of Promotion to

⁶⁶⁰ Memorial, para. 403, referring to Explanatory Report, p. 4 (Ex. C-78), p. 1 (Ex. C-27).

⁶⁶¹ Reply, para. 705, referring to *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2012, p. 69 (Ex. CLA-128).

⁶⁶² Reply, para. 707.

⁶⁶³ *Charanne B.V., Construction Investments S.A.R.L. v. The Kingdom of Spain*, SCC Case No. 062/2012, 21 January 2016 (Ex. CLA-101) (“*Charanne*”).

⁶⁶⁴ Reply, paras. 696-697, referring to *Charanne* (Ex. CLA-101) and Dissenting opinion of Professor G. S. Tawil in *Charanne*, para. 5 (Ex. CLA-130).

⁶⁶⁵ Memorial, paras. 396-398.

⁶⁶⁶ Memorial, paras. 396-398.

⁶⁶⁷ Reply, para. 709, referring to Explanatory Report, pp. 2-3 (Ex. C-78).

jointly provide a long-term incentive scheme.⁶⁶⁸ To support this argument, the Claimant submits that the Explanatory Report states that “the promotion system is based [...] on maintaining the tax reliefs to the extent set out in the Act[s] on Income Tax” to meet the EU target for the year 2010.⁶⁶⁹ In response to the Respondent’s assertion that the 8% target was not binding, the Claimant submits that Mr. Jones, the Respondent’s industry expert, also admitted that “[the Czech Republic] wished to achieve the 8% [target]”.⁶⁷⁰ In addition, the Respondent’s argument that a significant contribution of solar energy was not expected, is at odds with a number of items of evidence, including the ERO’s report of 2009, which provided that “[photovoltaic energy was] of key importance for the fulfilment of the indicative target.”⁶⁷¹

497. In the Claimant’s view, the decision of the Tribunal in *PSEG*,⁶⁷² which held that the legislative purpose of a State measure in that case was insufficient to support the argument that the host State’s government actively attracted foreign investments, may be distinguished from the present case, as the purpose of the Incentive Regime is sufficiently clear.⁶⁷³
498. Contrary to what the Respondent alleges, the Claimant argues that the Explanatory Report constitutes a sufficient basis for legitimate expectations.⁶⁷⁴ Although the report is not a source of law, it is evidence of the Czech Republic’s intention to attract photovoltaic investors.⁶⁷⁵ The Claimant further argues that the fact that the Explanatory Report does not mention the Shortened Depreciation Period is due to the fact that the Act on Income Tax already provided a clear promise of stability in the period.⁶⁷⁶ That the Explanatory Report does not address the Claimant individually is also irrelevant, because individual knowledge is not necessary for legitimate expectations to arise.⁶⁷⁷ Moreover, the Claimant alleges that it had actual knowledge of the 2010 Action Plan, which mentioned that financial support was available to RES investments.⁶⁷⁸

⁶⁶⁸ Reply, para. 711, *referring to* Explanatory Report, p. 4 (**Ex. C-78**).

⁶⁶⁹ Reply, para. 711, *referring to* Explanatory Report, p. 4 (**Ex. C-78**).

⁶⁷⁰ Hearing Transcript (3 March 2017), 7:1-19.

⁶⁷¹ Hearing Transcript (3 March 2017), 3:17-6:15, *referring to* Report on the Fulfilment of the Indicative Target for Electricity Production from Renewable Energy Sources for 2008, prepared by the Ministry of Industry and Trade, November 2009 (**Ex. C-118**).

⁶⁷² *PSEG*, para. 243 (**Ex. CLA-33**).

⁶⁷³ Reply, para. 710.

⁶⁷⁴ Reply, para. 712.

⁶⁷⁵ Reply, para. 712.

⁶⁷⁶ Reply, para. 712.

⁶⁷⁷ Reply, para. 713.

⁶⁷⁸ Reply, para. 713.

499. Third, the Claimant argues that the Czech Government and the ERO officials launched an intense marketing campaign to promote the FiT offered under the Act on Promotion, submitting several examples of this campaign.⁶⁷⁹
500. According to the Claimant, its representative attended a number of conferences in which the Czech Republic's officials explained that the FiT would be stable for 20 years for plants commissioned by the end of 2010.⁶⁸⁰ In response to the Respondent's argument that these presentations were to highlight the possibility of retroactive changes, the Claimant submits that such an argument is at odds with the text of the presentation slide. In addition, the official did not mention the possibility of a retroactive regime change.⁶⁸¹
501. In support of its argument that the Respondent intended to attract foreign investors, the Claimant submits that the "Q&A tool" was translated, and published specifically for foreign investors.⁶⁸² With respect to the "Q&A tool", the Claimant notes that it explained that the FiT would apply for 20 years.⁶⁸³ Moreover, the Claimant submits that the 2010 Action Plan did not provide for a cap on the total volume of electricity for the FiT, and that the plan forecasted a significant rise of photovoltaic installations for the year 2010.⁶⁸⁴
502. With respect to the fact that the Respondent did not advertise the Tax Incentives together with the Act on Promotion, the Claimant explains that it was merely because the Respondent promoted only the new portion of the Incentive Regime.⁶⁸⁵
503. Fourth, the Claimant argues that the complex licensing process for the construction and operation of photovoltaic installations turned the Respondent's general promises into specific promises.⁶⁸⁶ The Claimant explains that it completed the licensing process before becoming aware of the risk of retroactive change and that the licensing process played an important role in increasing its expectations as to the stability.⁶⁸⁷ Finally, in response to the Respondent's argument that the

⁶⁷⁹ Memorial, para. 407; Reply, para. 714.

⁶⁸⁰ Memorial, para. 408, *referring to* First Chroustovský Statement, para. 34.

⁶⁸¹ Memorial, para. 396, Reply, paras. 360, 715, *referring to* "Legislative Environment and Promotion of the Electricity Produced from Photovoltaic Power Plants 2009", ERO Presentation, 15 October 2009, slide No. 15-16, 20, and 4 (**Ex. R-156**); Second Chroustovský Statement, para. 16-17.

⁶⁸² Memorial para. 397; Reply, para. 714, *referring to* Q&A from ERO website available in 2009 (**Ex. C-247**).

⁶⁸³ Reply, para. 714, *referring to* Q&A from ERO website available in 2009 (**Ex. C-247**).

⁶⁸⁴ Memorial, para. 409; Reply, para. 716, *referring to* 2010 Action Plan, pp. 58-59 (**Ex. C-69**).

⁶⁸⁵ Reply, para. 717.

⁶⁸⁶ Memorial, paras. 405-406.

⁶⁸⁷ Reply, paras. 719-720.

licensing process did not address the stability of the Incentive Regime, the Claimant states that the licensing process itself does not necessarily need to refer to the source of the stability to create an expectation of stability.⁶⁸⁸

504. Lastly, the Claimant alleges that the May 2012 Constitutional Court Judgment, in which the Czech Constitutional Court denied the petitioner's expectations as to the stability of the Incentive Regime, is irrelevant to the present case.⁶⁸⁹ As a threshold matter, as indicated in the *Case concerning Elettronica Sicula S.p.A.* (United States of America v. Italy) judgment and the *TECO* decision, a domestic court decision does not shield a host State from international liability arising out of a treaty provision.⁶⁹⁰ In addition, the decision is distinguishable from the case at hand, because the Czech Constitutional Court employed the domestic standard of legitimate expectations, under which the court focussed on the Solar Levy's impacts on the investor's property right, instead of on a promise provided for by the Czech Republic.⁶⁹¹ The Claimant also notes that the Constitutional Court's loyalty to the State might have affected its decision.⁶⁹²

(2) The Respondent's Position

505. The Respondent submits that the Tribunal should adopt a three-step analysis to establish whether the Respondent failed to protect the Claimant's legitimate expectations. In particular, the Tribunal should analyse (1) whether the Claimant had legitimate expectations; (2) whether the Claimant reasonably relied on those legitimate expectations; and (3) whether the violation amounts to a breach of the investment treaties.⁶⁹³ In relation to the last element, the Respondent states that minor expectations do not trigger a treaty violation.⁶⁹⁴ Additionally, according to the Respondent, the Tribunal should analyse the relevant circumstances objectively, and it should

⁶⁸⁸ Reply, para. 720.

⁶⁸⁹ Hearing Transcript (27 February 2017), 73:17-78:20.

⁶⁹⁰ Hearing Transcript (27 February 2017), 73:17-74:16, *referring to* May 2012 Constitutional Court Judgment (**Ex. CLA-12/R-110**); *Case concerning Elettronica Sicula S.p.A.* (United States of America v. Italy), ICJ Judgment, 20 July 1988 (**Ex. CLA-104**); *TECO* (**Ex. CLA-110**).

⁶⁹¹ Hearing Transcript (27 February 2017), 73:17-74:16, *referring to* May 2012 Constitutional Court Judgment (**Ex. CLA-12/R-110**).

⁶⁹² Hearing Transcript (27 February 2017), 76:14-77:8.

⁶⁹³ Counter-Memorial, para. 462, *referring to* *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 154 (**Ex. RLA-35**) ("*Mobil Canada*"); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/2, Award, 8 April 2013, para. 536 (**Ex. RLA-168**) ("*Arif*").

⁶⁹⁴ Counter-Memorial, para. 462, *referring to* *Mobil Canada*, para. 154 (**Ex. RLA-35**); *Arif*, para. 536 (**Ex. RLA-168**).

ensure that any expectations were formed at the time of investment.⁶⁹⁵ In respect of the threshold question whether legitimate expectations objectively existed, the Respondent refers to a four-step test:⁶⁹⁶ First, the host State must have given a clear and unequivocal assurance.⁶⁹⁷ Second, the State's assurance must apply to individual investors.⁶⁹⁸ Third, the investor must have relied on the State's assurance.⁶⁹⁹ Fourth, the investor's reliance must have been reasonable.⁷⁰⁰

506. In its analysis of the reasonableness of the investor's reliance, the Respondent argues that the Tribunal should also take account of social and economic circumstances.⁷⁰¹ In this regard, the Respondent submits that an investor's expectations as to a stable investment regime are not "reasonable", unless the host State gives a specific assurance of stabilization. This is especially true in the energy sector, where regulatory changes are frequent.⁷⁰² Further, the Respondent alleges that legitimate expectations can only derive from specific legislative provisions.⁷⁰³ Since the Claimant does not refer to any specific provisions of the Act on Income Tax on which it allegedly relied in making its investment decision, no legitimate expectations could arise in the first place.⁷⁰⁴

507. In response to the Claimant's allegation that the legitimate expectations may be derived from the purpose of the Incentive Regime, the Respondent argues that a legislative purpose is not sufficient, viewed in isolation, to create legitimate expectations, even if the purpose itself is clear.⁷⁰⁵ In addition, the Respondent notes that the Claimant does not discuss the purposes of

⁶⁹⁵ Counter-Memorial, para. 463, referring to *Arif*, para. 533 (Ex. RLA-168); *Perenco*, para. 560 (Ex. RLA-173).

⁶⁹⁶ Counter-Memorial, paras. 464-465, referring to *Waste Management Inc. v. Mexico [II]*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 (Ex. RLA-191) ("*Waste Management*"); *CMS*, para. 277 (Ex. RLA-44); *EnCana*, para. 173 (Ex. RLA-22); *PSEG*, para. 241 (Ex. CLA-33); *Duke Energy v. Ecuador*, para. 340 (Ex. CLA-46); *Plama*, para. 176 (Ex. RLA-5).

⁶⁹⁷ Counter-Memorial, paras. 464-465, referring to *Duke Energy v. Ecuador*, para. 351 (Ex. CLA-46); *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 148 (Ex. RLA-163); *GAMI*, para. 76 (Ex. RLA-151); *Mobil Canada*, para. 169 (Ex. RLA-35).

⁶⁹⁸ Counter-Memorial, para. 466, referring to *PSEG*, para. 243 (Ex. CLA-33); *El Paso*, paras. 395-396 (Ex. RLA-31); *EDF*, para. 217 (Ex. RLA-146).

⁶⁹⁹ Counter-Memorial, para. 467, referring to *Waste Management*, para. 98 (Ex. RLA-191); *PSEG*, para. 241 (Ex. CLA-33); *AES*, para. 9.3.16-9.3.17 (Ex. RLA-41); *Duke Energy v. Ecuador*, para. 340 (Ex. CLA-46).

⁷⁰⁰ Counter-Memorial, para. 468.

⁷⁰¹ Counter-Memorial, para. 468, referring to *Duke Energy v. Ecuador*, para. 340 (Ex. CLA-46).

⁷⁰² Counter-Memorial, para. 468.

⁷⁰³ Rejoinder, para. 545 referring to *Arif*, para. 535 (Ex. RLA-168).

⁷⁰⁴ Rejoinder, para. 545.

⁷⁰⁵ Counter-Memorial, para. 488 referring to *PSEG*, para. 243 (Ex. CLA-33).

specific provisions, but only refers to an alleged overall purpose.⁷⁰⁶ Moreover, the Respondent argues that the Claimant has failed to provide any evidence that the Incentive Regime purported to attract photovoltaic investors by providing stable incentives in order to achieve the 8% Indicative 2010 Target.⁷⁰⁷ The Respondent emphasizes that the 8% target was non-binding on the EU Member States.⁷⁰⁸ Moreover, no evidence shows that the WACC was set to achieve the 8% target or that the Czech Republic employed the solar boom to achieve the 8% target.⁷⁰⁹ The extension of the estimated lifetime of photovoltaic plants from 15 years to 20 years was introduced to lower the FiT.⁷¹⁰ According to the Respondent, while the Act on Promotion was designed to promote all forms of RES investments, a substantial contribution from photovoltaic energy was not expected.⁷¹¹ The Respondent further submits that, because more than half of the solar capacity was installed in the last three months of 2011, solar energy did not in fact contribute significantly in achieving the 8% target, which measures RES consumption during the full calendar year.⁷¹² The Respondent also rejects the Claimant's assertion that the ČEZ's active investments in 2009 and 2010 demonstrate the caretaker government's positive view as to the solar boom, stating that the ČEZ's management is independent from the Czech Government and that the ČEZ in fact repeatedly expressed negative comments on the solar boom.⁷¹³

508. In relation to the Claimant's argument that a 7% post-tax return rate as WACC, would have been insufficient to attract investors to the Czech photovoltaic market, the Respondent submits that the WACC is considered as the "minimum amount necessary to induce investment"⁷¹⁴ – an understanding also shared by Dr. García, the Claimant's expert.⁷¹⁵ The Respondent emphasizes that in the present arbitration, the Claimant does not challenge the ERO's calculation of WACC at 7%.⁷¹⁶ Moreover, the Respondent points out that Mr. Senogles, the Claimant's expert,

⁷⁰⁶ Counter-Memorial, paras. 485-486.

⁷⁰⁷ Counter-Memorial, para. 487.

⁷⁰⁸ Hearing Transcript (27 February 2017), 139:12-17.

⁷⁰⁹ Hearing Transcript (3 March 2017), 81:11-17, 82:8-16.

⁷¹⁰ Hearing Transcript (3 March 2017), 81:17-82:4.

⁷¹¹ Hearing Transcript (27 February 2017), 139:8-19, *referring to* Explanatory Report on the bill of the Act on Promotion (extended version), 12 November 2003 (**Ex. C-78**).

⁷¹² Hearing Transcript (27 February 2017), 142:5-143:5.

⁷¹³ Hearing Transcript (3 March 2017), 83:15-85:5.

⁷¹⁴ Hearing Transcript (3 March 2017), 105:23-106:6.

⁷¹⁵ Hearing Transcript (3 March 2017), 105:23-106:6.

⁷¹⁶ Hearing Transcript (3 March 2017), 106:7-17.

calculated WACC for the Claimant as below 7%.⁷¹⁷ The Respondent further submits that a 7% post-tax rate is within the range of WACCs set in other States.⁷¹⁸ The Respondent also submits that the adequacy of the 7% WACC for attracting investments is supported by a steady increase during the period from 2003 to 2005.⁷¹⁹

509. With respect to the Claimant's argument that the legislation of the Incentive Regime and the relevant political discussions during the enactment process of the Act on Promotion created the Claimant's legitimate expectations, the Respondent contends that the Explanatory Report does not support the Claimant's argument.⁷²⁰ First, the report is not a source of law and was submitted two years before the Act of Promotion's text was even finalized.⁷²¹ Second, the report is irrelevant to the incentives under the Act on Income Tax and does not even refer to the Shortened Depreciation Period.⁷²² Moreover, the Respondent argues that, although the Explanatory Report briefly mentions the Income Tax Exemption, the drafters did not intend to maintain it in light of the rapid increase in solar installations, which was not expected at the time of drafting.⁷²³ In this regard, the Respondent states that even if Article 19(1)(d) of the Act on Income Tax contained the 5-year Income Tax Exemption, the Tax Exemption would still be subject to any changes for these 5 years.⁷²⁴ Similarly, the Respondent posits that even if the Act on Income Tax established the Shortened Depreciation Period, it should not be considered as an assurance to freeze the depreciation period.⁷²⁵ Third, the Respondent contends that the Explanatory Report only contains general explanations and no specific assurances which would be necessary to create a promise of stability in the energy sector.⁷²⁶ Fourth, the Respondent observes that the Claimant offers no evidence that it actually relied on the Explanatory Report.⁷²⁷

⁷¹⁷ Hearing Transcript (3 March 2017), 133:6-7.

⁷¹⁸ Hearing Transcript (3 March 2017), 106:18-23.

⁷¹⁹ Hearing Transcript (3 March 2017), 106:24-107:10.

⁷²⁰ Counter-Memorial, para. 489.

⁷²¹ Counter-Memorial, para. 490.

⁷²² Counter-Memorial, para. 491; Rejoinder, para. para. 531.

⁷²³ Counter-Memorial, para. 491.

⁷²⁴ Rejoinder, paras. 540-541.

⁷²⁵ Rejoinder, para. 531.

⁷²⁶ Counter-Memorial, para. 492, *referring to Total Decision on Liability*, para. 122 (**Ex. RLA-28**); *Continental Casualty*, para. 261 (**Ex. RLA-34**).

⁷²⁷ Counter-Memorial, para. 493, *referring to PSEG*, para. 241 (**Ex. CLA-33**); Rejoinder, para. 534.

510. The Respondent further relies on the decision by the tribunal in *Charanne*,⁷²⁸ which was faced with a similar explanatory report published in that case by the Spanish National Energy Commission. In that case, the tribunal found that while the explanatory report contained specific language that the expected legislative changes would not affect existing investors, this still did not constitute sufficient evidence to support the claimants' argument that stabilization was intended.⁷²⁹ The Respondent also finds support for its position in the May 2012 Constitutional Court Judgment, in which the court concluded that the introduction of the Solar Levy and withdrawal of the Tax incentives did not constitute a violation of investors' legitimate expectations.⁷³⁰
511. Furthermore, the Respondent argues that the licensing process could not create a promise of stability for the Tax Incentives, because the issued license did not specifically refer to the Income Tax Provisions.⁷³¹
512. With regard to the Income Tax Provisions, the Respondent makes a number of points.⁷³² First, the Respondent contends that the Claimant has submitted no basis for its expectations as to the Income Tax Provisions.⁷³³ Indeed, according to the Respondent, the alleged governmental campaigns did not make any reference to the Income Tax Provisions.⁷³⁴ Second, the Respondent submits that the Czech Ministry of Finance had already started to contemplate the abolition of the Tax Exemption as early as November 2009. The Ministry of the Environment expressly discussed the enactment of the Solar Levy in July 2010, with the Ministry of Finance becoming involved in September 2010.⁷³⁵ As to the Shortened Depreciation Period, the Respondent alleges that it is unreasonable to expect that it would be stable only in relation to solar power plants, since it did not constitute photovoltaic specific legislation.⁷³⁶ In addition, the Respondent submits that the Czech Technical University, in its study for ERO of 2007, already expected that the Income

⁷²⁸ *Charanne*, para. 496 (**Ex. CLA-101**).

⁷²⁹ Rejoinder, paras. 537-539.

⁷³⁰ Hearing Transcript (27 February 2017), 176:20-177:7, *referring to* May 2012 Constitutional Court Judgment (**Ex. CLA-12/Ex. R-110**).

⁷³¹ Counter-Memorial, paras. 494, 495.

⁷³² Counter-Memorial, paras. 478-482.

⁷³³ Counter-Memorial, paras. 496-501

⁷³⁴ Counter-Memorial, paras. 496, 501.

⁷³⁵ Counter-Memorial, para. 497.

⁷³⁶ Counter-Memorial, para. 500

Tax Provisions would be modified.⁷³⁷

513. In the face of the influx of investors, the Czech caretaker government stated that measures would be put in train after the elected government took office – which was done. In its public statements, ERO only described the present investment regime and gave no guarantees that it would be maintained in view of the solar panel investment influx.

(b) Whether the Claimant Relied on the Respondent's Promise

(1) The Claimant's Position

514. The Claimant argues that it relied on the Respondent's promise that the Incentive Regime would be available for the lifetime of its plants at the time of its investment decision.⁷³⁸ In particular, the Claimant argues that its business model was based on the assumption that the stable inflation-adjusted FiT would be available for 20 years for plants commissioned by the end of 2010.⁷³⁹ Lastly, and so as to explain the background of its investment decision, the Claimant adds that the Incentive Regime and the drop in solar panel prices jointly made the Czech market particularly attractive for investors.⁷⁴⁰

(2) The Respondent's Position

515. The Respondent argues that the Claimant does not provide any evidence of its reliance on the Explanatory Report or any other alleged assurance by the Respondent and therefore denies that any legitimate expectations could have been violated.⁷⁴¹

(c) Whether the Claimant's Reliance on the Respondent's Promise was Reasonable

(1) The Claimant's Position

516. The Claimant submits that its reliance on the Respondent's promise was reasonable considering that the Claimant was entitled to expect that a host State would exercise its general right to change its investment legislation in a reasonable manner.⁷⁴² In particular, it is reasonable for investors to expect that the promised scheme would not be changed in an irrational manner.⁷⁴³

⁷³⁷ Hearing Transcript (27 February 2017), 148:10-16.

⁷³⁸ Memorial, para. 411; Reply, paras. 721, 724.

⁷³⁹ Memorial, para. 413; Reply, para. 722.

⁷⁴⁰ Memorial, paras. 413, 414.

⁷⁴¹ Counter-Memorial, para. 493; Rejoinder, paras. 534, 535.

⁷⁴² Memorial, paras. 426-429.

⁷⁴³ Memorial, paras. 426-429.

517. In the present case, the Claimant alleges that it reasonably relied on the Respondent's promise, because of the following three factors: first, the inherent nature of the Incentive Regime was such as to encourage reliance on it; second, the Respondent continuously provided assurance that any changes in the Incentive Regime would apply only to new investors; and, third, investors and banks widely believed that the legal framework would remain stable.⁷⁴⁴ Relying on a judgment of the English Court of Appeal, which decided that retroactive measures were unlawful,⁷⁴⁵ the Claimant further asserts that its reliance was reasonable, even though there was no explicit commitment to stabilize the Incentive Regime.⁷⁴⁶
518. Elaborating on the above reasons, the Claimant submits that the Incentive Regime is designed to attract RES investments, which requires long-term guarantees and a promise of stability.⁷⁴⁷ The Claimant emphasizes that the Act on Promotion did not set any cap on RES electricity entitled to FiT.⁷⁴⁸ With regard to the Tax Incentives, the Claimant submits that, even if businesses in general should expect possible tax scheme changes, the Claimant's reliance on the Tax Incentives was reasonable, because, unlike ordinary corporate income taxes, the Tax Incentives featured a promise of stability for a certain duration.⁷⁴⁹
519. In support of its argument, the Claimant points to Professor JUDr. Aleš Gerloch's comment that the Act on Income Tax promised that the incentives would be available for a certain period of time and that, therefore, the Czech Government was not allowed to repeal the incentives in relation to investors that already made use of them.⁷⁵⁰ The Claimant also argues that the same rationale applies to the FiT contained in the Act on Promotion.⁷⁵¹
520. Second, according to the Claimant, investors received a number of reassurances that the changes in the Incentive Regime would not affect investments made by the end of 2010.⁷⁵² For instance, when discussing the change of the 5% rule, the Czech Government and the ERO expressed their

⁷⁴⁴ Reply, para. 726.

⁷⁴⁵ Judgment of the English Court of Appeals (Civil Division), Case No. C1/2012/0023, 25 January 2012, sections 48 et seq. (**Ex. CLA-103**).

⁷⁴⁶ Reply, paras. 725, 729.

⁷⁴⁷ Memorial, paras. 415, 416; Reply, paras. 727, 728.

⁷⁴⁸ Hearing Transcript (27 February 2017), 32:4-5.

⁷⁴⁹ Reply, para. 730.

⁷⁵⁰ Reply, para. 731, *referring to* Prof. JUDr. Aleš Gerloch, CSc's Opinion, 3 December 2010, pp. 10, 11 (**Ex. C-213**).

⁷⁵¹ Reply, para. 731.

⁷⁵² Memorial, para. 417; Reply, para. 733.

concern about negative effects on existing investors.⁷⁵³ The Claimant further alleges that its belief was strengthened by the moratorium period on new applications for grid connections as of February 2010; the 2010 National Renewable Action Plan published in July 2010⁷⁵⁴; and Act No. 330/2010 and the Explanatory Report⁷⁵⁵ published in mid-September 2010.⁷⁵⁶ Furthermore, the Claimant points out that the ERO's 2010 report explained that "investors expected a change to the law [...] for new plants".⁷⁵⁷ The Czech Government's proposal of an amendment of the Act on Promotion of 13 October 2010 stated that the Government, instead of existing investors, would provide new finance to the Incentive Regime.⁷⁵⁸ With regard to the Ministry of Industry and Trade's press release of 24 August 2009, by which it informed the public that it was planning to introduce amendments to the Act on Promotion, the Claimant submits that only four days after the press release, the Ministry proposed that the abolition of the 5% rule be introduced to plants commissioned as of 2011 without affecting existing investments.⁷⁵⁹

521. In this regard, the Claimant emphasizes that its investment was made well before the introduction of the amendment measures, and that accordingly it was not able to anticipate these measures.⁷⁶⁰ The Claimant further notes that its investment became "sunk" upon acquiring the SPV and entering an Engineering, Procurement and Construction contract.⁷⁶¹ Accordingly, in the Claimant's view, the reasonableness of the Claimant's reliance should be examined at this point, after which it was not able to cancel its project.⁷⁶²
522. The Claimant submits that it was not officially informed that the Respondent intended to modify the Incentive Regime in relation to existing investors.⁷⁶³ In fact, no warning at all was given to

⁷⁵³ Reply, para. 734.

⁷⁵⁴ 2010 Action Plan (**Ex. C-69**).

⁷⁵⁵ Explanatory Report to Draft Act No. 330/2010 Coll., 15 September 2010 (**Ex. R-193**).

⁷⁵⁶ Reply, para. 715.

⁷⁵⁷ Reply, para. 736, *referring to* 2010 Report on the Activities and Finances of the Energy Regulatory Office, p. 7 (**Ex. C-224**).

⁷⁵⁸ Hearing Transcript (3 March 2017), 16:25-17:7, *referring to* Government Document No. 145/10, Government proposal of an act amending the Act on Promotion, 13 October 2010 (**Ex. R-317**).

⁷⁵⁹ Hearing Transcript (3 March 2017), 12:5-15, *referring to* Letter from R. Portužak to B. Němeček, 28 August 2009 (**Ex. R-145**).

⁷⁶⁰ Hearing Transcript (27 February 2017), 39: 22-41:7.

⁷⁶¹ Hearing Transcript (27 February 2017), 39: 22-41:7.

⁷⁶² Hearing Transcript (27 February 2017), 41:8-12.

⁷⁶³ Reply, para. 737.

existing investors about possible changes to the regime.⁷⁶⁴

523. In this regard, the Claimant emphasizes that, in the solar sector, investors are usually small businesses and that accordingly it is unreasonable to expect them to conduct extensive legal due diligence.⁷⁶⁵
524. Third, the Claimant argues that the widespread belief among investors and banks in the stability of the Incentive Scheme shows that the Claimant's reliance was reasonable,⁷⁶⁶ submitting that the Tribunal in *CMS v. Argentina* recognized the relevance of widespread expectations, as it was unlikely that several professionals make the same mistake at the same time.⁷⁶⁷ In particular, not only investors, but also Czech banks believed that the FiT level would be stable.⁷⁶⁸ The Claimant further points out that the Respondent itself believed in such stability, since it gave licenses to energy experts, which conducted "energy audits" for banks in advance of their approval of investments.⁷⁶⁹ Moreover, the Claimant notes that the Czech banks and auditors also understood that the FiT level would apply to plants commissioned by the end of 2010 without considering the 15-year simple payback and the 7% rate of return.⁷⁷⁰ In this regard, the Claimant submits that the ČEZ, a State-owned entity, also significantly invested in the photovoltaic market in 2009 and 2010.⁷⁷¹
525. With regard to the Czech Constitutional Court's decision, which held that the Solar Levy was permissible, the Claimant states that no investor could reasonably have anticipated that decision at that time.⁷⁷² As evidence for this, the Claimant submits that the ERO officials repeatedly assured the FiT level would remain stable for the plants' lifetime.⁷⁷³
526. Lastly, the Claimant alleges that the fact that a caretaker government was in place between May 2009 and July 2010 is irrelevant.⁷⁷⁴ In the Claimant's view, the caretaker government's lack of

⁷⁶⁴ Reply, para. 737.

⁷⁶⁵ Hearing Transcript (3 March 2017), 32:19-33:4.

⁷⁶⁶ Reply, para. 738, 744.

⁷⁶⁷ Reply, para.739 *referring to CMS*, para. 137 (**Ex. RLA-44**).

⁷⁶⁸ Memorial, para. 425; Reply, para. 741.

⁷⁶⁹ Reply, para. 741.

⁷⁷⁰ Reply, paras. 742, 743.

⁷⁷¹ Hearing Transcript (3 March 2017) 21:18-22:3.

⁷⁷² Memorial, para. 419.

⁷⁷³ Memorial, para.419.

⁷⁷⁴ Hearing Transcript (3 March 2017), 29:10-17.

power to change governmental policies did not amount to a “political crisis or political instability” under which investors could not reasonably expect that a legal framework would be stable.⁷⁷⁵ The Claimant submits that unelected caretaker governments existed frequently in European and other countries.⁷⁷⁶ Contrary to the Respondent’s assertion, the Claimant alleges that it was a political decision by the caretaker government to keep the support for the solar industry in 2010 at the 2009 level.⁷⁷⁷ The caretaker government’s positive view of the solar boom is demonstrated in the Czech police report of 3 October 2013, which suspended criminal proceedings against the ERO Direction. Those proceedings had been instituted based upon a suspected abuse of power arising out of the ERO’s extension of the life period of photovoltaic facilities from 15 to 20 years, and its failure to alter the parameters for 2009.⁷⁷⁸ The fact that the ČEZ, a State-owned entity, significantly invested in the photovoltaic market in 2009 and 2010 also supports the assumption that a revocation of the incentive regime was not expected.⁷⁷⁹

(2) The Respondent’s Position

527. The Respondent alleges that the Claimant’s reliance on any alleged promises was unreasonable for a number of reasons.⁷⁸⁰
528. First, in its analysis of the reasonableness of the investor’s reliance, so argues the Respondent, the Tribunal should also take account of social and economic circumstances. The Respondent alleges that the Claimant entered into the market, notwithstanding that it knew, or should have known, that the RES Scheme was financially not sustainable for the year 2010.⁷⁸¹ In fact, since July 2009, the ERO and the Ministry of Industry and Trade, in their consultations, presentations and press releases, had warned of possible changes to the Act on Promotion. They considered the 7% WACC was an original target under the Act on Promotion.⁷⁸² Moreover, the Respondent submits that on 24 August 2009, before the Claimant made its investment, the Ministry of

⁷⁷⁵ Hearing Transcript (3 March 2017), 30:21-31:9.

⁷⁷⁶ Hearing Transcript (3 March 2017), 77:16-19.

⁷⁷⁷ Hearing Transcript (3 March 2017), 77:16-78:3.

⁷⁷⁸ Hearing Transcript (3 March 2017), 78:4-9.

⁷⁷⁹ Hearing Transcript (3 March 2017), 22:4-20.

⁷⁸⁰ Rejoinder, para. 544.

⁷⁸¹ Rejoinder, paras. 546, 549, 551, 552.

⁷⁸² Hearing Transcript (27 February 2017) 148:20-155:22, *referring to* Minutes of the meeting regarding the proposal of the changes in technical economic parameters of small hydroelectric power plants and photovoltaic power plants for 2010, ERO, 14 July 2009 (**Ex. R-126**); “An Overview of the Methodology of the Calculation of Minimum Prices of RES Electricity,” ERO Presentation, 13 July 2009 (**Ex. R-127**); “Legislative Environment and the Promotion of the Electricity Produced from Photovoltaic Power Plants in 2009,” ERO Presentation, 15 October 2009 (**Ex. R-156**).

Industry and Trade issued a press release that it was planning to amend the Act on Promotion.⁷⁸³ In addition, several other sources at the time of the solar “bubble” indicated that a regime change might be in the offing.⁷⁸⁴ As evidence of this, the Czech Technical University, in its study for ERO of 2007, already expected that the Income Tax Provisions would be modified.⁷⁸⁵

529. Reliance on the assumption that the regime would not change in the face of the dramatic influx of investments, was unreasonable – especially for investors who entered into the market in the fall of 2010, as Claimant did for its second investment project Sluneční. As evidence for this, the Respondent points out that Mr. Chroustovský, a shareholder and board member of SolarOne, recognized the possibility of legislative changes in the feasibility study prepared for the Claimant in October 2008.⁷⁸⁶ Mr. Chroustovský also acknowledged that media sources used the term “solar boom” and that legislation might be amended so as to react to the growth of the photovoltaic market.⁷⁸⁷ The Respondent argues that if tariffs are too beneficial, as in the present case, reasonable investors should expect so called-retroactive changes.⁷⁸⁸
530. The Respondent submits that the tribunals in *AES Summit Generation Limited and AES-Tisza Erömi Kft v. The Republic of Hungary*⁷⁸⁹ and *Electrabel v. Hungary*⁷⁹⁰ concluded that Hungary’s re-introduction of administrative pricing for electricity generators was permissible.⁷⁹¹ In the Respondent’s view, these cases provide useful context in the present case, because the challenged State measure was also meant to reduce excessive profits to the originally intended level.⁷⁹² In response to the Claimant’s argument that these cases are distinguishable from the case at hand,

⁷⁸³ Hearing Transcript (27 February 2017), 152:4-8, referring to “Ministry of Industry and Trade Equalizes Support for Renewable Energy Sources,” Ministry of Industry and Trade Press Release (mpo.cz), 24 August 2009 (**Ex. R-138**).

⁷⁸⁴ Rejoinder, para. 548, referring to “Super income from the sun,” *Ekonom*, 1 July 2009, p. 1 (**Ex. R-104**); “Legal Aspects of Photovoltaic Power Plant Implementation,” *Schönherr*, 25 June 2009, p. 9 (**Ex. R-142**); “Ministry of Industry and Trade equalises support for renewable energy sources,” Ministry of Industry and Trade Press Release (www.mpo.cz), 24 August 2009 (**Ex. R-138**); and “Photovoltaic Power Plants – Installed Capacity in 2009, Preliminary Estimate,” Czech RE Agency, September 2009, p. 2 of the English translation (**Ex. R-141**).

⁷⁸⁵ Hearing Transcript (27 February 2017), 148:10-16.

⁷⁸⁶ Rejoinder, para. 546, referring to Second Chroustovský Statement, para.19.

⁷⁸⁷ Hearing Transcript (3 March 2017), 131:24-132:5; Respondent’s Closing Statement Slides, 97-99.

⁷⁸⁸ Hearing Transcript (3 March 2017), 124:24-125:7.

⁷⁸⁹ *AES*, paras. 10.3.20, 10.3.31, 10.3.44 (**Ex. RLA-41**).

⁷⁹⁰ *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, paras. 8.33-8.34 (**Ex. CLA-131**) (“*Electrabel Award*”).

⁷⁹¹ Rejoinder, para. 553.

⁷⁹² Rejoinder, para. 553.

because the termination of the administrative pricing was predictable, the Respondent alleges that the issue in those cases was not the termination, but the re-imposition of the administrative pricing.⁷⁹³

531. Second, the Respondent argues that legitimate expectations must exist at the time the contract to supply energy is concluded.⁷⁹⁴ In the present case, with respect to the Tomsan plant, the Respondent argues that the Claimant was or should have been aware of the possibility of legislative changes before it was connected to the grid. With regard to the Sluneční plant, the Respondent observes that this connection actually was made after the amendment measures became known.⁷⁹⁵
532. Third, in response to the Claimant's argument that the Respondent's regulation in the RES sector had a contractual aspect to it, with the Respondent offering a promise of stability in exchange for foreign investment, so as to achieve the 8% Indicative EU Target for the year 2010, the Respondent denies that any "*quid pro quo*" existed between the Parties.⁷⁹⁶ The Respondent adds that the reimbursement of investment costs is not at issue in the present case.⁷⁹⁷
533. Fourth, the Respondent objects to the Claimant's argument that the ČEZ's active investments in the photovoltaic market in 2009 and 2010 support the reasonableness of the Claimant's reliance.⁷⁹⁸ The Respondent submits that the ČEZ repeatedly expressed its negative view as to the solar boom and that it purchased existing projects instead of building a new plant.⁷⁹⁹
534. Finally, the Respondent states that the Tribunal should not base its decisions on the Claimant's subjective comments.⁸⁰⁰

⁷⁹³ Rejoinder, para. 553.

⁷⁹⁴ Rejoinder, para. 555, referring to *Ulysseas, Inc. v. Ecuador*, Final Award, 12 June 2012, para. 252 (**Ex. RLA-281**) ("*Ulysseas*").

⁷⁹⁵ Rejoinder, para. 556.

⁷⁹⁶ Rejoinder, para. 557.

⁷⁹⁷ Rejoinder, para. 558.

⁷⁹⁸ Hearing Transcript (3 March 2017), 83:5-9.

⁷⁹⁹ Hearing Transcript (3 March 2017), 83:21-86:5.

⁸⁰⁰ Rejoinder, para. 543 referring to *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/6, Decision on Jurisdiction, 30 June 2011, para. 560 (**Ex. RLA-172**).

(d) Whether the Respondent Violated the Claimant's Legitimate Expectations

(1) The Claimant's Position

535. The Claimant alleges that the Respondent violated the Claimant's legitimate expectations by introducing the Solar Levy and eliminating the Income Tax Exemption and the Shortened Depreciation Period.⁸⁰¹
536. In relation to the Act on Promotion, the Claimant objects to the Respondent's position that, since the Solar Levy only affects after-tax profits, it did not violate the Claimant's legitimate expectations.⁸⁰² The Claimant explains that the Act on Promotion guaranteed "revenue" at the stable FiT level, which is affected when the Solar Levy deducts a certain percentage from the revenue deriving from the FiT.⁸⁰³ In this regard, the Claimant points out that the Respondent itself defined the Solar Levy as "a tax 'imposed on revenue' of solar installations".⁸⁰⁴ Moreover, the Claimant observes that, although its expert, Mr. Senogles, used the same revenue figure in both actual and counterfactual scenarios in his calculation tables, this was just meant to show how the Solar Levy deducts the revenue.⁸⁰⁵
537. Second, the Claimant notes that its legitimate expectations were not limited to the 7% return rate or the 15-year simple payback.⁸⁰⁶ Rather, the relevant parameter is whether a stable FiT level for the 20-year lifetime of the project was guaranteed.⁸⁰⁷
538. Third, the Claimant argues that the reasoning of the arbitral awards relied upon by the Respondent is not applicable in the present case. With respect to *Toto Costruzioni*,⁸⁰⁸ which held that the FET standard does not entail a guarantee of stability of a tax law regime, the Claimant alleges that the case dealt with the specific circumstance in Lebanon.⁸⁰⁹ With respect to *AES* and *Electrabel*, which found that Hungary's change in its investment scheme was lawful under the ECT, the Claimant argues that investors in those cases were able to forecast Hungary's repeal of the

⁸⁰¹ Memorial, paras. 430-433.

⁸⁰² Reply, para. 745.

⁸⁰³ Reply, paras. 746-749.

⁸⁰⁴ Reply, para. 750.

⁸⁰⁵ Reply, para. 749.

⁸⁰⁶ Reply, paras. 752, 753.

⁸⁰⁷ Reply, para. 754.

⁸⁰⁸ *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, para. 242 (Ex. RLA-33) ("*Toto Costruzioni*").

⁸⁰⁹ Reply, para. 755.

administrative price regime.⁸¹⁰ In addition, the relevant legislation contained the language “profit necessary for ongoing operation”, which is more restrictive than the language “revenue” used in the Act on Promotion.⁸¹¹ Further, the increase in the return rate that investors in the *Electrabel v. Hungary* case received (from 10.7% in 1997 to 39% in 2005) significantly differs from the increase in the case at hand.⁸¹²

539. In response to the Respondent’s argument that a memorandum in 2009 notified the Claimant that the Respondent’s measures would impact on its project’s “profitability”, the Claimant argues that the memorandum did not mention that the measures would affect existing investors.⁸¹³

(2) The Respondent’s Position

540. The Respondent alleges that the legitimate expectations as to the stability of the Incentive Regime the Claimant may have had, were not violated by the Respondent.
541. With regard to the Solar Levy, the Respondent first alleges that it did not change the level of the FiT, because the levy did not reduce either the FiT price set in the ERO price regulations or the total revenue from the FiT; it only affected after-tax profits.⁸¹⁴ Accordingly, in the Respondent’s view, the Solar Levy is consistent with Article 6(1)(b)(2) of the Act on Promotion, which allegedly provides, together with the relevant ERO regulations, that the FiT will remain stable for 20 years.⁸¹⁵ In addition, the Respondent states that even if there was a violation of Article 6(1)(b)(2), this would only amount to a breach of local law, which does not rise to the level of a violation of FET, FPS, or Non-Impairment standards.⁸¹⁶
542. Referring to *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*,⁸¹⁷ the Respondent submits that a host State violates the FET obligation only if it makes a “drastic or discriminatory change in the essential features of the transaction.”⁸¹⁸ In the present case, however, there was no such radical change.⁸¹⁹ In fact, the amendment measures only decreased overall returns for plants

⁸¹⁰ Reply, para. 756.

⁸¹¹ Reply, para. 757, referring to *Electrabel* Decision on Jurisdiction, para. 7.139 (Ex. RLA-39).

⁸¹² Reply, para. 757, referring to *Electrabel* Decision on Jurisdiction, para. 7.38 (Ex. RLA-39).

⁸¹³ Reply, para. 751.

⁸¹⁴ Counter-Memorial, para. 470; Rejoinder, paras. 508, 525-528.

⁸¹⁵ Rejoinder, para. 528.

⁸¹⁶ Rejoinder, para. 529.

⁸¹⁷ *Toto Costruzioni*, para. 242 (Ex. RLA-33).

⁸¹⁸ Counter-Memorial, para. 473, referring to *Toto Costruzioni*, para. 244 (Ex. RLA-33).

⁸¹⁹ Counter-Memorial, paras. 471, 472.

commissioned in 2009 and 2010 by 1.4% (8.4% to 7%) and 3% (11.4% to 8.4%) respectively.⁸²⁰ In the Respondent's view, the Act on Promotion was meant to provide for a 7% lifetime return and a 15-year payback and the implementation measures did not repeal these. The Act on Promotion did not contain a promise of good "profitability" of investments.⁸²¹ In fact, a memorandum by Worthald Partners (of which Mr. Chroustovský, one of the shareholders of SolarOne, was CEO) presented in the summer of 2009 acknowledged that the investment's "profitability" was not guaranteed and that it might be threatened by legislative changes during the planned project period.⁸²² In support of this position, the Respondent also relies on the award in *AES*⁸²³ and the decision in *Electrabel*,⁸²⁴ which concluded that Hungary's reduction of profits to the originally purposed level, covering costs and reasonable return only, was permissible under the ECT.⁸²⁵

3. The Tribunal's Analysis

(a) Analysis of the Incentive Regime and of the Facts

543. Before embarking upon its FET analysis, the Tribunal finds it useful to set out its understanding of the Incentive Regime that is at the core of the Parties' dispute, and to summarize the relevant chronology of the facts in light of the Claimant's respective investments in the Tomsan and Sluneční projects.
544. According to the Claimant, the part of the Incentive Regime relating to taxation dates back to the introduction of the Act on Income Tax in the year 1992, which provided for the Tax Holiday and the Shortened Depreciation Period for different types of RES - producers.⁸²⁶ The Tribunal observes that the withdrawal of the Tax Incentives is not covered by the ECT because of the exclusion under Article 21 ECT.
545. In March 2005, the Respondent adopted the Act on Promotion, with the legislative objective of promoting renewable energy sources and which, important for present purposes, introduced the FiT. The FiT system obliged grid operators to purchase all electricity produced from RES on a priority basis at a price annually determined by the ERO – the Czech Energy Regulatory Office

⁸²⁰ Hearing Transcript (3 March 2017), 132:11-132:5; Respondent's Closing Statement Slide, 105.

⁸²¹ Counter-Memorial, paras. 470-474.

⁸²² Counter-Memorial, para. 471.

⁸²³ *AES*, paras. 4.3-4.4, 4.10-4.11, 4.15-4.23, 9.1.1-9.1.5, 10.3.20 (**Ex. RLA-41**).

⁸²⁴ *Electrabel* Decision on Jurisdiction, paras. 8.19, 8.2, 8.7 (**Ex. RLA-39**).

⁸²⁵ Counter-Memorial, para. 475.

⁸²⁶ Article 19(1)(d), Act No. 586/1992 (**Ex. C-18/R-1**).

– pursuant to Article 6 of the Act on Promotion, which has been set out earlier in this Award.⁸²⁷

546. It is important to note that the Act on Promotion does not contain all details of the Incentive Regime. Article 6(1) provides that the ERO will define the FiT for solar electricity one calendar year in advance. Article 6(1)(a) specifies that the FiT must be set so as to allow the Respondent to meet the 8% Indicative 2010 Target and Article 6(1)(b)(1) provides that the FiT must be such that the investment in certain PV plants can be paid back within 15 years.
547. By the Technical Regulation dated 30 November 2005 and amended in 2007 and 2009, the ERO set out the general technical and economic parameters in order for newly installed plants to achieve the 15-year payback period provided by Article 6(1)(b)(1) of the Act on Promotion.⁸²⁸ Again as set out earlier in this Award, section 4 of the Technical Regulation stated that:

In order for the 15-year pay-back period to be assured through the support by Purchase Prices [*FiT*] of electricity produced from renewable sources, technical and economic parameters of an installation producing electricity from renewable sources must be satisfied, where the producer of electricity from renewable sources shall achieve, with the given level of Purchasing Prices

- b) **an adequate return** on invested capital during the total life of the installation, such return to be determined by the weighted average cost of capital (WACC), and
- c) the net present value of the cash flows after tax over the total life of the installation, using a discount rate equal to WACC, at least equal to zero.⁸²⁹ (emphasis added)

548. The Technical Regulation thus confirmed that the FiT was fixed to obtain a 15-year payback regime with an adequate return on the investment during its lifetime as determined by the WACC. The after-tax WACC in turn was set by the ERO at 7%. In other words, the Act on Promotion guaranteed a FiT that led to a 15-year payback of the investment costs with WACC (or a profit) of 7% per year over 15 years. In light of the foregoing, the Tribunal finds that these were the Act on Promotion's primary targets.
549. This conclusion is not altered by the fact that Article 6(1)(b)(2) of the Act on Promotion stipulated that the "amount of the revenues stays unchanged for the unit of the electricity from renewable sources with the support of the buy-out prices for the period of 15 years since the year, when the device was put into operation as minimum amount". The Tribunal is of the opinion that one

⁸²⁷ See above paras. 140, 144.

⁸²⁸ ERO Regulation No. 475/2005 Coll. (**Ex. C-28**); ERO Regulation No. 364/2007 Coll. (**Ex. C-29**); ERO Regulation No. 409/2009 Coll. (**Ex. C-30**); Technical Regulation (**Ex. R-6**); Hearing Transcript (27 February 2017), 22:18-22.

⁸²⁹ Technical Regulation (**Ex. R-6**).

cannot read the first part of that provision in isolation from the remainder of the clause. Notably, Article 6(1)(b)(2) makes reference to the FiT, or “buy-out prices”, previously mentioned in Article 6(1)(b)(1) and provides that the FiT is to “support” the “amount of the revenues” generated by renewable sources. Article 6(1)(b) refers to the FiT and buy-out prices. It does not provide an abstract guarantee of revenues, but makes those revenues dependent on the buy-out prices. Moreover, it indicates that the buy-out prices had to be established following the criteria contained in the Technical Regulation. The promised revenue is therefore necessarily linked to the FiT. The FiT in turn was set by the ERO, pursuant to the Technical Regulation and, as explained above, it guaranteed a 15-year payback with a 7% WACC. No other independent revenue was promised to investors.

550. The Tribunal notes that the same conclusion was reached by the Czech Constitutional Court in its May 2012 decision.⁸³⁰

551. In addition, the Tribunal considers that the modalities of the Incentive Regime were not set in stone. On the contrary, the implementation of the Act on Promotion through the Technical Regulations was amended in the course of time. This was confirmed by the Explanatory Note to the 2007 ERO regulation which stated that the economic and technical parameters would have to change over the course of time and would not remain fixed:

Given the constant development and improvements of the technology using renewable resources on the one hand and the changes in input prices on the other, these technical and economic parameters need to be changed over the course of time.⁸³¹

552. While the 2005 Technical Regulation estimated the useful life of a PV installation at 15 years, the 2007 Technical Regulation extended the latter period to 20 years.⁸³² Through the extension of the life span from 15 to 20 years and the maintenance of the 15-year payback criterion, the 2007 Technical Regulation in fact confirmed the increased profitability of the photovoltaic investments. The ERO further added that a post-tax 7% WACC for 20 years would be a reasonable compensation.⁸³³

553. Afterwards, the 2009 ERO Regulation introduced a 2% annual increase of the FiT, although the Act on Promotion, Article 6(b)(2), only states that the FiT would be affected by the Index for Industrial Products.

⁸³⁰ May 2012 Constitutional Court Judgment, para. 68 (**Ex. CLA-12/R-110**).

⁸³¹ Explanatory note to the draft ERO Regulation No. 364/2007 (**Ex. C-83**).

⁸³² ERO Regulation No. 364/2007 Coll. (**Ex. C-29**).

⁸³³ Methodology for Determination of Purchasing Prices and Green Bonuses (**Ex. C-218/R-62**).

554. Between 2008 and 2010, when the Claimant entered into the PV plant business, the effect of the 5% limitation and the 2% annual increases was to limit the decrease in the FiT to about 9%.⁸³⁴ However, the price of PV panels had decreased by more than 40% in the same time period. This meant that by 2010, the level of compensation attributable to the FiT was some 30% more than had originally been intended and was considered efficient and fair. These conditions naturally attracted many investors, who wanted to invest in PV RES. Because the investments became extremely attractive, the number of PV plants and their capacity increased between 1 January 2008 and 1 October 2009 from 249 / 3.4 MW to 2,900 / 116.72 MW.⁸³⁵ In June 2009, the payback was said to be 6 years instead of 20 years⁸³⁶, and in July 2010 still 8 years instead of 20 years.⁸³⁷
555. Already in 2009, political and energy sector circles in the Czech Republic were aware that the then current Incentive Regime was problematic and, because of the solar boom, would become even more problematic with time. Political action was difficult, because in March 2009, the Czech Government had resigned. On 19 June 2009, a newspaper reported that the authorities wanted to end the solar boom, but noted that the changes would not be introduced in 2009, because of the political situation in the Czech Republic.⁸³⁸ Indeed, the caretaker government had declared that it would leave all controversial matters for the newly elected government, once it took office. Elections were expected before the end of 2009, but had to be postponed until 28-29 May 2010. A new government only assumed office on 13 July 2010.
556. In the meantime, in early July 2009, the ERO suggested an amendment to the Act on Promotion to cope with the solar boom and indicated that in some parts of the country, connections of PV plants to the grid were effectively refused.⁸³⁹ On 24 August 2009, *i.e.* ten days before the Tomsan investment was made, the Ministry of Industry issued a press release to draw attention to the fact that the subsidy system had become untenable and announced that it would abolish the 5%

⁸³⁴ See ERO Price Decision No. 7/2007, 20 November 2007 (**Ex. R-32**) (FiT for 2008=13,460) and ERO Price Decision No. 5/2009, 23 November 2009 (**Ex. R-34**) (FiT for 2010=12,150).

⁸³⁵ Letter from electricity companies (ČEZ, E.ON and PRE) to the Chamber of Deputies, 12 March 2010, p. 9 (**Ex. R-152**).

⁸³⁶ “E15: ERO wants to significantly decrease feed-in tariffs for solar energy,” *finance.cz*, 19 June 2009 (**Ex. R-311**).

⁸³⁷ “1st PV Legal Status Report,” *PV Legal*, July 2010, p. 9 (**Ex. R-137**).

⁸³⁸ “State wants to stop solar power plants boom,” (*e15.cz*), 19 June 2009 (**Ex. R-310**). *See also* Hearing Transcript (27 February 2017), 150:4-22.

⁸³⁹ Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009 (**Ex. C-115**). *See also* Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Hüner (Deputy Minister of Industry and Trade), 4 July 2008 (**Ex. C-114**).

limitation rule as of 1 January 2010.⁸⁴⁰

557. Further intimations of change were evident before the Sluneční investment was made in April 2010. In November 2009, the ERO predicted substantial problems with other RES producers, which were disadvantaged, and with consumers, who had to bear ancillary costs. In February 2010, a moratorium was put in place, which precluded future connections to the grid. In March 2010, the PV sector had sent an open letter to the Czech Parliament about the problem.⁸⁴¹
558. After the investments were made, more signals of imminent and required change were given, but by then the investments had already been made. On 22 July 2010, a newsletter highlighted the problem, indicating that the Government was intent upon “cut[ting] the absurdly lucrative revenues of the solar barons” and that the Minister of Finance was considering the withdrawal of the Tax Holiday.⁸⁴² In a July 2010 Action Plan, the Ministry of Industry and Trade described the regime as it stood, but the Tribunal does not consider that an investor could possibly have relied on this report as a basis for an expectation that the regime would not change in the future, especially when considered jointly with other contemporaneous events.⁸⁴³
559. On 1 January 2011, the following amendments came into force: (1) the abolition of the 5% limitation for FiT reductions for new plants as of 2011; (2) the withdrawal of the Tax Incentives; and (3) the introduction of the Solar Levy. The Tribunal notes that these changes were already foreshadowed before the Claimant made its investments.
560. The possibility that the 5% rule would be abolished had been mentioned already in June 2009,⁸⁴⁴ and in August 2009, this change was announced.⁸⁴⁵
561. As for the Tax Incentives, the Tribunal notes that the withdrawal is not covered by the ECT because of the exclusion under Article 21 ECT. Besides, the Tribunal considers that they had no

⁸⁴⁰ “Ministry of Industry and Trade will Equalize the Support of Renewable Energy Sources,” Ministry of Industry and Trade Press release, 24 August 2009 (**Ex. R-138**).

⁸⁴¹ Hearing Transcript (3 March 2017), 83:21-84:10.

⁸⁴² “Commentary: Solar Boom Will Cost Us Dearly. There is Still Time for Changes” (IDNES.cz), 22 July 2010 (**Ex. R-205**).

⁸⁴³ National Renewable Energy Action Plan, published by the Ministry of Industry and Trade, July 2010 (**Ex. C-69**).

⁸⁴⁴ *See, e.g.*, “Super income from the sun,” *Ekonom*, 1 July 2009, p. 9 (**Ex. R-142**); “State wants to stop solar power plants boom” (e15.cz), 19 June 2009 (**Ex. R-310**); “E15:ERO wants to significantly decrease feed-in tariffs for solar energy,” *finance.cz*, 19 June 2009 (**Ex. R-311**).

⁸⁴⁵ “Ministry of Industry and Trade will Equalize the Support of Renewable Energy Sources,” Ministry of Industry and Trade Press release, 24 August 2009 (**Ex. R-138**).

structural link to the incentives stemming from the Act on Promotion, which makes no mention of tax exemptions. Only the Explanatory Report drafted two years prior to the Act on Promotion, mentioned tax benefits as part of the Incentive Regime. The Tribunal is of the view that the relevance of the Explanatory Report is negligible, since it does not have the status of legislation and only depicts the general context. Moreover, when the Government campaigned to encourage PV investments, the tax incentives were not mentioned. On the contrary, a 2007 study of the Czech Technical University for ERP expected that the tax regime would be modified. Although it is not established that the Claimant was aware of this study, it is plain that the study reflects the thinking in 2007 about tax incentives and is therefore pertinent in this context. In November 2009, the abolition of the tax incentives was contemplated by the Ministry of Finance. On 23 July 2010, the Minister of Environment stated that he intended to cut the Tax Holiday.⁸⁴⁶ Thereafter, Act 346/2010 amending the Income Tax Act was introduced, and on 12 November 2010, approved.

562. While the Tribunal is aware that the introduction of the Solar Levy occurred after the Claimant made its investments, it observes that the Claimant was already informed by the 2007 ERO regulation that the economic and technical parameters would have to change over the course of time and would not remain fixed.⁸⁴⁷ Moreover, Mr. Chroustovský, one of the board members and shareholders of SolarOne, had already warned SolarOne and the Claimant of the risk of legislative change which would reduce the investment's profitability.⁸⁴⁸
563. Overall, the Tribunal concludes that it was already clear towards the end of 2009 that the 5% limitation would be abolished. Amendments in the tax regime were foreshadowed as early as 2007. In November 2009, they were under consideration by the Minister of Finance and a decision to implement them was made in July 2010. As of June 2010, there was concrete speculation about the introduction of a Solar Levy. On the basis of this understanding, the Tribunal now turns to the different heads of claim put forward by the Claimant.

(b) Discussion of the Claims

564. As already set out earlier in this Award, the Parties are divided as to whether the Respondent, by implementing the Solar Levy and withdrawing the Tax Incentives, has violated the Claimant's right to FET under Article 10(1) of the ECT:

⁸⁴⁶ P. Novotný, "The Minister of Environment Wants to Tax Solar Power Plants," *Mlada Fronta Dnes*, 23 July 2010 (**Ex. R-206**).

⁸⁴⁷ *See above* para. 551.

⁸⁴⁸ Memorandum prepared by Worthald Partners in summer 2009 to secure a senior debt facility, p. 102 (**Annex XII to First Chroustovský Statement**).

565. Article 10(1) of the ECT provides, in relevant part:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security [...].

566. In essence, again as noted earlier, the Claimant asserts three heads of claim under the FET standard: (1) the Respondent's violation of its obligation to provide a stable and predictable legal framework; and (2) the Respondent's violation of the Claimant's legitimate expectations. The Tribunal will consider the arguments pertaining to each of the two in turn. In a last step, the Tribunal will examine (3) whether the Respondent's actions were taken in a non-transparent manner in violation of the FET standard.

(1) Stable and Predictable Legal Framework

567. As for the alleged violation of the Respondent's obligation to provide a stable and predictable legal framework as part of the FET standard, as set out in more detail earlier, the Claimant submits that the Respondent failed to provide such a framework by introducing the Solar Levy, removing the Income Tax Exemption and abolishing the Shortened Depreciation Period.⁸⁴⁹ In the Claimant's view, the Incentive Regime established by the Act on Promotion, ERO regulations and the Act on Income Tax between them created the Incentive Regime, which the Respondent was precluded from changing before foreign investors could obtain the promised benefits. The Respondent rejects the Claimant's characterization of the Incentive Regime as guaranteeing stability. It maintains that mere changes to the legal framework applicable to the Claimant's investment do not give rise to a breach of the ECT or BIT.

568. As the Tribunal has already noted, the Act on Promotion provided for a 15-year payback and the maintenance for a period of 15 years of the amount of revenue per unit of RES electricity. The question, however, is whether the introduction of the Solar Levy and the Tax measures were in breach of the Respondent's obligation to provide a stable and predictable framework.

569. Having carefully considered all materials before it, the Tribunal agrees with the Respondent that it did not expressly undertake any agreed stabilization commitment, be it contractual, legislative, individual or otherwise, vis-à-vis the Claimant's investment.⁸⁵⁰ Had the Tribunal found that such

⁸⁴⁹ The Tribunal has decided that the Income Tax Exemption and the Shortened Depreciation Period are excluded from the ambit of ECT pursuant to its Article 21 (*see* para. 309).

⁸⁵⁰ *See* paras. 546 to 550.

stabilization commitment existed in the present circumstances, there would obviously have been a solid basis to allege that changes in the law applicable to the foreign investment in question were unlawful. In the absence of such express commitment, however, the Tribunal must now turn to the question whether an obligation to provide a stable and predictable legal framework for foreign investment is, in any event, a separate and distinguishable part of the treaty obligation to accord FET.

570. In this regard, the Tribunal agrees with the Claimant that such a separate obligation exists as part of the FET standard. While there is a certain overlap between the two, this obligation is legally distinct from the protection of an investor's legitimate expectations. This is apparent from the wording of Article 10(1) of the ECT, according to which "[e]ach Contracting Party [...] shall create stable, equitable, favourable and transparent conditions for Investors". Investment tribunals have consistently decided, and this Tribunal agrees, that the obligation to guarantee a stable and predictable investment framework forms part of the FET standard. Compelling reasons to deviate from this established jurisprudence have not been put forward by the Respondent.
571. The obligation to provide a stable and predictable investment framework is to be considered objectively. It is a general obligation of host countries under investment treaties and does not require the demonstration of any reliance on the host State's conduct on the part of the foreign investor. This said, the Tribunal finds itself in agreement with the line of cases that have held that the requirement of stability is not absolute and must not be interpreted overly broadly.⁸⁵¹ In particular, it does not in all circumstances affect the state's inherent right to exercise its sovereign power to respond to changing circumstances, for example with revisions in its legislation or legal system. As aptly put by the Tribunal in *Total*, in words with which the Tribunal is in full agreement, "changes to general legislation, in the absence of specific stabilization promises to the foreign investor, reflect a legitimate exercise of the host state's governmental powers that are not prevented by a BIT's fair and equitable treatment standard".⁸⁵²
572. The next issue is whether the Respondent violated its obligation in the circumstances of the present case.
573. The Tribunal disagrees with the Claimant's argument that the fact that the Incentive Regime was intended to attract foreign investment, in and of itself, meant that it also offered a commitment of stability and predictability to foreign investors. To support its argument, the Claimant points not only to the Act on Promotion, but also to the Explanatory Report and the implementing

⁸⁵¹ See, e.g., *Continental Casualty*, para. 258 (Ex. RLA-34) and *AES*, para. 9.3.29 (Ex. RLA-41).

⁸⁵² *Total* Decision on Liability, para. 164 (Ex. RLA-28).

regulations. While the Tribunal acknowledges that the Explanatory Report in particular used terms such as “stable” and “maintain”, the Tribunal considers that such language, in the absence of an express stabilization commitment, is insufficient to ground the obligation for which the Claimant contends. In particular, the use of such words in the context in which they appear did not, in the Tribunal’s considered view, signal an undertaking by the Respondent, much less a specific undertaking to this Claimant, that there would be no changes whatsoever to the legal framework created by the Act on Promotion – in particular in the event of radically changed circumstances (such as the solar boom in 2009-2010, which fundamentally changed the financial soundness of the support regime). On any view, this would have been a far-reaching undertaking, with potentially extreme consequences for the Respondent and its citizens. No such agreement can be inferred from the few words or other matters relied upon by the Claimant.

574. Moreover, the Tribunal observes that the Solar Levy did not, in fact, repeal the fundamental features of the Incentive Scheme, as described earlier. The Claimant still received a stable FiT. The Solar Levy had either to be paid quarterly by the energy producer or it could be withheld by the energy distributor.
575. Further, and in any event, the Tribunal points out that the Tax Statute did not contain a reference to stability or to the maintenance of the Income Tax Exemption and the Shortened Depreciation Period.
576. The Tribunal finds that the changes introduced by the Respondent to the Incentive Regime were part of the exercise of the Respondent’s sovereign right to regulate tariffs – in particular in the context of the solar boom and its substantial adverse consequences as described earlier. They did not violate the Respondent’s obligation to provide a stable and predictable legal framework for foreign investment.
577. The Tribunal is confirmed in this conclusion by the fact that, even after the Solar Levy reduced excessive profits, PV investors still secured a more than reasonable return. Without the legislative amendments, the reference plant would have received a full payback in 7.8 years. Following the amendments, the payback could still be achieved in 9.9 years, and was therefore well below the promised 15 years.⁸⁵³ The return for the reference plant without the amendments would have been 11.4%, while - with the amendments - the return amounted to 8.4%, and hence remained well

⁸⁵³ First Expert Report by Mr. Michael Peer, dated 14 October 2015 (“**First Peer Report**”), para. 4.8.1: the pay back for the Claimant would have been 6.6 or 7.8 years respectively without amendments, and was 8 or 10.1 years respectively with the amendments, *i.e.*, also well below the promised 15 years.

above the promised 7% return rate.⁸⁵⁴ In other words, despite the amendment measures, PV investments were as profitable - and in fact more profitable - than envisaged when the support system was created.

(2) Legitimate Expectations

578. As for the second claim, the Claimant argues that the Respondent violated the Claimant's legitimate expectations by repealing the Tax Incentives and introducing the Solar Levy.

579. As a preliminary matter, the Tribunal considers that little, if any, guidance on the question of legitimate expectations may be gleaned from the May 2012 Constitutional Court Judgment. The Court in that case held that the petitioners did not have legitimate expectations as to the stability of the Incentive Regime. The Tribunal shares the Claimant's view that domestic court decisions cannot shield a State from international liability arising out of a treaty violation. Therefore, while certainly informative, the Tribunal does not consider it appropriate to engage with, or adopt, the reasoning of the Czech Constitutional Court.

580. As regards the relationship between regulatory autonomy of host States and the FET standard, especially in the context of legitimate expectations, the Tribunal subscribes to the view expressed by the Tribunal in *Micula*, which held that:

The fair and equitable treatment standard does not give a right to regulatory stability per se. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability. Thus, the Claimants' "regulatory stability" argument must be analyzed in the context of the protection of an investor's legitimate expectations.⁸⁵⁵

581. The Tribunal is also entirely in agreement with the following reasoning of the *Micula* Tribunal:

When the alleged legitimate expectation is one of regulatory stability, the reasonableness of the expectation must take into account the underlying presumption that, absent an assurance to the contrary, a state cannot be expected to freeze its laws and regulations. As noted by the Saluka tribunal, '[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host state's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.' Accordingly, for a state to violate the fair and equitable treatment standard by changing the regulatory framework, the investor must have received a legitimate assurance that the

⁸⁵⁴ First Peer Report, para. 4.8.3: The return for the Claimant would have been 14.4% or 11.5% respectively without the amendments and was 8% or 8.2% respectively with the amendments, *i.e.*, also well above the promised 7% return rate. All the measures together reduced the return for the 2009 reference plant from 8.4% to 7%; Hearing Transcript (2 March 2017), 230:8-18.

⁸⁵⁵ *Micula*, para. 666 (Ex. CLA-3).

relevant laws and regulations would not be changed in his or her respect.⁸⁵⁶

582. Additionally, the Tribunal finds guidance in the approach of the Tribunal in *Duke Energy v. Ecuador*, which stated that:

The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.⁸⁵⁷

583. The Parties essentially agree on the applicable test in this case to establish whether there has been a violation of an investor's legitimate expectations, namely: (a) whether the Respondent gave an assurance as to regulatory stability; (b) whether the Claimant effectively relied on such assurance; (c) whether this reliance was reasonable, taking into account the prevailing social and economic circumstances⁸⁵⁸ in the energy sector and at the time; (d) whether the Respondent violated the Claimant's legitimate expectations, bearing in mind that *de minimis* violations do not meet the necessary threshold for treaty violations.⁸⁵⁹ This test is consistent with the elements considered by other international tribunals.⁸⁶⁰
584. Each of these elements is considered in turn below, in light of all the matters set out earlier in this Award.

- a) The Respondent did not give any assurance as to regulatory stability.

585. First, having carefully considered all materials and submissions before it, the Tribunal accepts that no assurance was ever given by the Respondent that the support system from which the Claimant benefitted would never change. The relevant tax legislation did not state for how long the favourable tax regime would be applicable. Equally, the Act on Promotion only provided that the revenues would depend on buy-out prices, which were established on the basis of criteria to

⁸⁵⁶ *Micula*, para. 673 (Ex. CLA-3).

⁸⁵⁷ *Duke Energy v. Ecuador*, para. 340 (Ex. CLA-46).

⁸⁵⁸ As pertinently expressed by the tribunal in *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 20.37 (Ex. CLA-51): "it is relevant to consider the vicissitudes of the economy of the state that is host to the investment in determining the investor's legitimate expectations".

⁸⁵⁹ Memorial, para. 392; Counter-Memorial, para. 462.

⁸⁶⁰ See, e.g., *Micula*, para. 668 (Ex. CLA-3).

be determined by ERO. It did not indicate that the FiT would remain unchanged for the duration of a plant's operation. Moreover, the ERO 2005 Technical Regulation, which implemented the determination of the FiT, had already been amended only two years later, in 2007, thus illustrating that in the energy sector, and certainly the Czech energy sector, regulatory changes were frequent. Moreover, the Tribunal fails to see how the Claimant could draw an assurance of legislative stability from a prospective 2003 Explanatory Report to the 2005 Act on Promotion, which stated that the forthcoming Act purported to achieve "a stable promotion" of investments. Nor does the Tribunal see how a mere mention in a 2009 ERO Report that the Act on Promotion brought a guarantee of long-term and stable promotion, could be understood as a confirmation of the Czech Republic's obligation not to alter the legislative framework. The Tribunal agrees with the Respondent that in the absence of a stabilization provision, the Incentive Regime could be altered whenever there was economic justification to do so.

586. As stated above with regard to the Respondent's treaty obligation to maintain a stable and predictable legal framework, in the absence of an express stabilization commitment, changes to address the solar boom were within the Respondent's regulatory power. And this all the more so, given that, ultimately, the changes in issue did not significantly undermine the actual support as originally envisaged.

587. As for the tax incentives in particular, contrary to the Claimant's position, the Tribunal considers that, fairly judged, the Respondent never created the impression that these incentives, which had already existed since 1992, could never be withdrawn. Moreover, these measures were not an integral part of the Incentive Regime in any event. They were only sporadically mentioned in the 2003 Explanatory Note issued two years before the Act on Promotion was promulgated. And they were not included in the presentations on, and descriptions of, the incentives for PV investments.

588. In all the circumstances, in the absence of any assurance by the Respondent, the Tribunal concludes that the Claimant cannot have had a legitimate expectation that the Incentive Regime on which it relies would always remain in place and unchanged, and that the Respondent would be precluded from exercising its usual regulatory power in this regard.

b) The Claimant did not rely upon any such assurance

589. Second, even if an assurance had been given by the Respondent, the Tribunal concludes that it was not, or would not have been, relied upon by the Claimant at the relevant time.

590. In the Tribunal's view, the relevant moment to assess whether the Claimant relied upon any alleged assurance as to the stability of the Incentive Regime is when the actual investment was

made, *i.e.*, on 27 August to 7 September 2009, when SolarOne purchased from Mr. Szolony 90% of the share capital of Tomsan for CZK 74,350,⁸⁶¹ Tomsan entered into the EPC contract,⁸⁶² and the solar panels were bought.⁸⁶³ For the Tribunal, the Claimant's crucial investment commitments in the first project, Tomsan, occurred in the brief period of late August/early September 2009. It was then that, for the purpose of the present arbitration, the Claimant's investments were "sunk" in the first project.

591. On 29 December 2009, SolarOne purchased from Union Lesní Brána a.s. the entire share capital of Sluneční park Dubí for CZK 2,200.⁸⁶⁴ However, it took over three months before the contract for the installation of the solar panels was concluded on 8 April 2010.⁸⁶⁵ Comparing the relatively low costs for the acquisition of the SPV Sluneční and its solar license (CZK 2,200,000) with the costs for the installation works (EUR 262,000) and the acquisition of the solar panels (EUR 2,044,880.60), the Tribunal considers that the Claimant's investment in the second project, Sluneční, was "sunk" in April 2010.
592. The Claimant appears to agree that the latter two points in time are relevant for the Tribunal's assessment.⁸⁶⁶
593. The actual date on which the operations were started was later, upon connection to the grid, and is obviously of less importance for the purposes of determining the basis upon which the investment was made.
594. Therefore, the relevant time period for the Tribunal's enquiry is between late August/early September 2009 and April 2010 respectively.
595. The Tribunal has seen no evidential basis that either (a) when the investment decision was made on 29 October 2008 or (b) when it actually acquired the share capital of Tomsan s.r.o. 27 August 2009 and of Sluneční on 29 December 2009, or (c) during the period from late August/early September 2009 and April 2010, the Claimant was, in fact, aware of the statements of the Czech

⁸⁶¹ Agreement on transfer of a part of business share between Mr. Szolony, as seller, and SolarOne, as buyer, 27 August 2009 (**Ex. C-94**).

⁸⁶² Nový Jičín – EPC Contract, 4 September 2009 (**Ex. C-101**).

⁸⁶³ Agreement for the purchase of PV modules between ROAD International Co. Ltd. and TOMSAN s.r.o., 7 September 2009 (**Ex. R-231**).

⁸⁶⁴ Agreement on transfer of business share between Union Lesní Brána, as seller, and SolarOne, as buyer, 3 November 2009 (**Ex. C-98**).

⁸⁶⁵ Dubí – EPC contract, 8 April 2010 (**Ex. C-106**).

⁸⁶⁶ Hearing Transcript (27 February 2017), 41:8-11 (Claimant's opening statement).

Authorities to which it now refers, or that it actually relied upon them.

596. The Claimant did not investigate public statements before it invested in either the first project, Tomsan, or in the second, Sluneční. Instead, it relied upon a feasibility study from Worthald and Partners of October 2008, as it was “actively involved in the process of selecting the most attractive investment opportunities” in the Czech Republic. It was the consultancy firm which actually identified which investments in solar energy production would be the most beneficial after having “reviewed hundreds of prospective prospects”.⁸⁶⁷ The Claimant fully relied on this feasibility study as confirmed by one of its shareholders, Mr. Chroustovský, who also happened to be the managing partner of “Worthald and Partner.”⁸⁶⁸ The consultants, upon which the Claimant relied to make its investments, envisaged the possibility of a change in the legal system (FiT), although they still considered it “not probable” in October 2008. Nevertheless, the consultants, i.a. Mr. Chroustovský, in his capacity as a board member and shareholder of SolarOne, continued to warn SolarOne and the Claimant of the risk of legislative changes in the summer of 2009.⁸⁶⁹ For the consultants this imponderability could simply be addressed: in the event of a change in the law, its advice was “stop project and suit [sic] Czech Republic upon investment protection agreement”.⁸⁷⁰ There is no indication that the Claimant has done anything more than rely on the feasibility study of its experts and their advice to claim compensation under an investment treaty in case of legal change. Such strategy goes squarely against the allegation that the Claimant made its investments in reliance upon relevant assurances it received from the competent authorities.
597. Moreover, the Tax Opinion the Claimant obtained on 15 July 2009, *i.e.*, well before the investment in the first project, indicated that the then-applicable provisions on depreciation “may at any time change. The prepared new act on income tax already features some stricter provisions”.⁸⁷¹ Consequently, even before the investment in the first project was made, Solar One and the Claimant as its shareholder, were warned that the subsidy regime would change.
598. In any event, the promotional activities, upon which the Claimant allegedly relies, contained a warning that the legislation may change.

⁸⁶⁷ First Chroustovský Statement, para. 24.

⁸⁶⁸ First Chroustovský Statement, para. 24.

⁸⁶⁹ Memorandum prepared by Worthald Partners in summer 2009 to secure a senior debt facility, p. 102 (**Annex XII to First Chroustovský Statement**).

⁸⁷⁰ Feasibility study prepared by Worthald Partners in October 2008, p. 38 (**Annex IX to Statement First Chroustovský Statement**).

⁸⁷¹ Tax Analysis of the Operation of Photovoltaic Power Plants, 15 July 2009 (**Ex. R-228**).

c) Any such reliance would not have been reasonable

599. Third, even if the Claimant relied on some alleged “stabilization” assurances from the Czech Authorities – *quod non* – any such reliance would not have been reasonable.
600. In particular, the Tribunal considers that the 3 November 2008 letter from ERO, which explained how the Incentive Regime worked, could not form the basis for a legitimate expectation one and a half years later in a drastically changed situation.
601. Equally, the Tribunal does not consider that the 2009 ERO Report, which hinted that the Act on Promotion guaranteed a long-term and stable promotion, was sufficient a basis upon which the Claimant could form a legitimate expectation, given the legal status of this document (merely a report from an administrative body) and the vague nature of its wording.
602. Further still, and as explained at some length above, the Tribunal finds that already at the relevant times (late August/early September 2009 and April 2010) there had been an accumulation of apparent warning signs that ought to have precluded any such expectation on the part of the Claimant and, objectively viewed, did preclude the possibility that the Claimant might be said reasonably to have relied on any such alleged assurances.
603. It was manifest in 2009-2010 that the FiT could no longer be maintained unchanged. It was clear that, for this purpose, the 5% limitation rule would be abandoned for future plants. Moreover, it became evident that the abolition of the 5% limitation for future plants would not, of itself, be sufficient to address what had become an unreasonable and unsustainable support system for plants which entered into operation in 2009 and 2010. The Tribunal therefore finds that the Claimant was not reasonably entitled to expect that no measures would be taken with regard to the FiT for plants in operation before 2011. The changes that were promulgated were within the reasonable discretion of the State.
604. In all the circumstances, the Tribunal concludes that the Claimant could not have had a reasonable or legitimate expectation concerning the continuation of the support regime without any modification, and it could not reasonably have purported to rely on any alleged assurances to that effect.

d) No violation of legitimate expectations because of EU law

605. The Tribunal observes additionally that the law of the European Union on State Aid precluded, in any event, any legitimate expectation that plants which entered into operation in 2009-2010 would necessarily maintain the benefit of the support system as it then existed, as long as this support system was not duly notified.

606. Notably the very first line of the Act on Promotion, which is the cornerstone of the solar support regime, explicitly referred to the EU legislation, which prevails over the provisions of the Act. Indeed, under the heading “Object of Regulation” the first line of Article 1(1) reads: “This Act regulates, in accordance with the legislation of the European Communities, the method of promoting the production of electricity from renewable energy sources...”. The legislation of the European Communities includes crucial sections on competition law, among which are provisions on State Aid. The fact that this explicit reference to the legislation of the European Communities was accompanied by a footnote mentioning Directive 2001/77 on the promotion of electricity produced by renewable energy sources does not alter the fact that the Act on Promotion referred to the whole body of Community Law, including its mandatory provisions on State aid.
607. It is undisputed by the Parties that within each of the Member States, including, of course, the Czech Republic, EU law forms part of the domestic law. Its mandatory rules, including its mandatory provisions on State aid, apply therein. Moreover, it is clear that mandatory rules of EU law have primacy over even mandatory rules of domestic law.
608. The argument has been made that the profits, which the Claimant would have drawn from the production of solar electricity (in the absence of the Solar Levy or the Tax Amendments), were prohibited under Article 107(1) of the TFEU. This provides:

any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.⁸⁷²

609. The Tribunal, however, does not itself need to dwell on the compatibility of the support system with the EU internal market, given that the EC, by its Decision of 28 November 2016, concluded that the subsidies under the RES Scheme for plants commissioned between 1 January 2006 and 31 December 2012 constituted State aid under Article 107(3) TFEU.⁸⁷³ In the Tribunal’s view, that Decision provides the authoritative answer to the detailed debate between the Parties as to whether the EU provisions on State aid were engaged here.⁸⁷⁴

⁸⁷² Counter-Memorial, para. 247.

⁸⁷³ EC, State aid decision SA.40171 (2015/NN) — “Czech Republic — Promotion of electricity production from renewable energy sources”, Decision, 28 November 2016, paras. 11, 84, 94, 126 (**Ex. R-411**).

⁸⁷⁴ Relying on *PreussenElektra AG v. Schleswag AG*, ECJ Judgment, Case C-378/98, 13 March 2001 (**Ex. CLA-1**) the Claimant argued that “an economic advantage benefiting certain undertakings does not constitute State aid within the meaning and scope of Article 107(1) TFEU where the advantage in question is not financed through State resources but is instead financed by private undertakings pursuant to a purchase obligation imposed by the State”. The Claimant alleged that this principle had not been overruled by subsequent cases. With respect to the RES support scheme set out in the original Act on Promotion, the

610. For the present case, it is also irrelevant that the EC decided in 2016 that – at that time – the return yielded by the solar support regime, based upon the Act on Promotion, but corrected by a Solar Levy of 26% for the years 2011-2013 and 10% as of 2014, had brought the return back to a reasonable level, so that the support was no longer illegal State aid under EU law. The enquiry for present purposes concerns the period before this, in 2009-2010. Nor is it significant that the Decision did not spell out in express terms that the solar support regime without the Solar Levy would, on the contrary, constitute illegal aid.⁸⁷⁵
611. Further still, as will be apparent from the discussion below, the question whether the support regime, if State aid, would be exempted under Article 108 TFEU (again an issue much debated by the Parties) is immaterial for the present case.
612. The basic rule with regard to State aid under EU law is that State aid is only permitted when it has been approved by the EC. As summarized by Ms. Bacon in her First Expert Report, it is “very well established that, in principle, undertakings to which aid has been granted may not entertain any legitimate expectation that is lawful, unless it has been granted in accordance with the

Claimant explained that the original funding scheme did not involve any transfer of State resources because the legislation required the grid operators to pay both the FiT and the Green Bonuses from their own private budget. With respect to the new RES support scheme introduced by Act No. 402/2010 and the 2013 New Act on Promotion, the Claimant argued as follows: First, the Claimant did not make its investment under these new schemes, therefore their compliance with EU law is irrelevant to the present case. Second, the new funding mechanism did not involve State resources. With respect to Act No. 402/2010, which introduced the Solar Levy, the Claimant alleged that “even if the amendments introduced by Act No. 402/2010 entailed State aid, such aid would in any event not be granted to solar producers” since the resources from the levy were paid to transmission and grid system operators.

The Respondent, from its side, observed that the law regarding EU State aid rules for RES schemes has developed since the famous decision in *PreussenElektra*, which is applicable when “the purchase obligation in question was financed entirely from the private resources of the grid operators themselves” (Rejoinder, para. 292; Counter-Memorial, para. 282, referring to *Essent Netwerk Noord*, ECJ Judgment, Case C-206/06, 17 July 2008 (Ex. RLA-70); *Association Vent De Colère!*, ECJ Judgment, Case C-262/12, 19 December 2013 (Ex. RLA-71); *Austria v. Commission*, Judgment of the Tribunal of the European Union, Case T-251/11, 18 May 2011 (Ex. RLA-72); Counter-Memorial, paras. 274-284; Rejoinder, paras. 291-293). The Respondent further referred to the EC’s January 2014 Draft Notice on the Notion of State aid, which comprehensively reflects the EC’s current position on public support schemes (Counter-Memorial, para. 283, referring to Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, 17 January 2014, para. 66 (Ex. RLA-73)). This Draft Notice provides as follows: surcharges imposed by law on private persons can be qualified as State resources. It is the case even where a private company is appointed by law to collect such charges on behalf of the State and to channel them to the beneficiaries, without allowing the collecting company to use the proceeds from the charges for purposes other than those provided for by the law. In this case, the sums in question remain under public control and are therefore available to the national authorities, which is sufficient reason for them to be considered State resources.

⁸⁷⁵ EC, State aid decision SA.40171 (2015/NN) — “Czech Republic — Promotion of electricity production from renewable energy sources”, Decision, 28 November 2016 (Ex. R-411).

procedure set out in Article. 108 TFEU.”⁸⁷⁶

613. Consequently, the relevant question is whether, at the time the investment was made, the EC had, upon due notification, positively decided that the solar support regime was compatible with EU law. In the absence of due notification and any such decision, the investor – as in the present case – was not entitled to hold any legitimate expectations that the un-notified support system would not be changed. The Tribunal is aware that the Czech Republic had stated in the Explanatory Report of November 2003 that the future Act on Promotion would be “compatible with the public aid law of the European Union”.⁸⁷⁷ The Republic repeated that view in a few instances up to 2009. However, statements from domestic authorities cannot give rise to legitimate expectations when they are counter to mandatory EU law. In its 2016 Decision, the EC formally confirmed that the Incentive Regime, as applicable to installations commissioned between 1 January 2006 and 31 December 2012, constituted State aid. Statements from domestic authorities cannot alter this. Given that it is not for a Member State to declare its own aid schemes compatible with EU law, any such declaration cannot be a basis for a legitimate expectation.
614. Neither can legitimate expectations be based upon the letter of 27 July 2004 from the EC (the “**27 July 2004 Letter**”), which was written in response to a complaint of 16 December 2003 from the Czech Society of Wind Energy and EUROSOLAR. In that letter, the EC stated – on the basis of the 2003 draft of the Act – that incentives under the Act on Promotion did not constitute State aid because the Investment Regime did not involve State resources.⁸⁷⁸
615. The Claimant argues that the 27 July 2004 Letter was a sufficient basis for its legitimate expectations.⁸⁷⁹ An EC decision can create legitimate expectations, even if it does not address specific individuals as long as the decision is widely disseminated and known.⁸⁸⁰ In the present case, the decision was widely disseminated and known, because it was sent to the two main industry associations in the RES sector, *i.e.*, the Czech Society of Wind Energy and EUROSOLAR.⁸⁸¹ Referring to *Athinaiki Techniki v Commission*, the Claimant further submits

⁸⁷⁶ First Expert Report by Ms. Kelyn Bacon QC, dated 5 October 2015 (“**First Bacon Report**”), para. 113, citing *Commission v. Germany*, Case C-5/89, 20 September 1990, para. 14 (**Ex. RLA-89**); *France Télécom v. Commission*, Case C-81/10 P, 8 December 2011, para. 59 (**Ex. RLA-90**), both holding that a “diligent [businessman/business operator] should normally be able to determine whether that procedure has been followed”

⁸⁷⁷ Explanatory Report on the bill of the Act on Promotion, 12 November 2003, p. 6 (**Ex. C-78**).

⁸⁷⁸ Reply, para. 443.

⁸⁷⁹ Reply, paras. 443-446.

⁸⁸⁰ Reply, para. 444.

⁸⁸¹ Reply, paras. 442-444.

that the Court of Justice of the European Union has held that the EC's letter by which it decided that there was no breach of EU law and that no further investigations would be conducted, amounts to a formal decision on which the Claimant can rely.⁸⁸²

616. According to the Claimant:

The right to rely on the principle of legitimate expectations constitutes one of the fundamental principles of EU State aid law. It extends to any person who is in a situation in which it is clear that the EU authorities have, by giving precise assurances, led him to entertain legitimate expectations. Regardless of the form in which it is communicated, information that is precise, unconditional and consistent and comes from an authorised and reliable source constitutes such assurance.⁸⁸³

617. The Respondent denies that the Claimant could have had legitimate expectations as to the compatibility of the Respondent's incentive scheme with EU State aid law.⁸⁸⁴ According to the Respondent, such legitimate expectations may only arise if "precise, unconditional and consistent assurances originating from authorised, reliable sources [were] given to the person concerned by the competent authorities of the European Union".⁸⁸⁵ Contrary to the Claimant's argument, the Respondent maintains that the EC's 27 July 2004 Letter was insufficient to create legitimate expectations.⁸⁸⁶ The 27 July 2004 Letter only addressed a 2003 draft (on the basis of information provided by EUROSOLAR) which differed substantially from the 2005 Act on Promotion. Neither the draft, nor the information provided by EUROSOLAR explained – nor indeed could have explained – the precise funding mechanism of the RES Scheme and the amount of the FiT. They were, after all, only put in place in 2005.⁸⁸⁷

618. Moreover, the 27 July 2004 Letter was not intended to bring an end to the investigation. Nor did it constitute a formal decision.⁸⁸⁸ To this end, the decision of the Court of Justice in *Athinaiki*⁸⁸⁹ is to be distinguished, since in that case it was held that a letter issued by the EC, which did, in

⁸⁸² Reply, para. 448, *referring to Athinaiki Techniki v. Commission*, Case C-521/06P, 17 July 2008 (**Annex X to Quigley Report**) ("*Athinaiki*").

⁸⁸³ Reply, para. 441, *referring to* Quigley Report, para. 149.

⁸⁸⁴ Rejoinder, paras. 320-329.

⁸⁸⁵ Rejoinder, para. 319, *referring to* First Bacon Report, para. 121, *which in turns cites to HGA v Commission*, Case C-630–633/11 P *HGA v Commission* EU: C: 2013:387, 13 June 2010, para. 132 (**Ex. RLA-94**).

⁸⁸⁶ Rejoinder, para. 315, 316.

⁸⁸⁷ Counter-Memorial, para. 272-273; Rejoinder, para. 323.

⁸⁸⁸ Rejoinder, para. 320.

⁸⁸⁹ *Athinaiki* (**Annex X to Quigley Report**).

fact, close the file on a complaint, constituted a formal decision.⁸⁹⁰ Furthermore, the EC was entitled to change its initial assessment, which was based on the reasoning in *PreussenElektra*, in light of subsequent developments in European case law after 2004.⁸⁹¹ Finally, according to the Respondent, the Claimant did not directly rely on the 27 July 2004 Letter in any event.⁸⁹² In response to the Claimant's allegation that it "relied on the [27] July 2004 Letter indirectly, because that letter was 'relied on by the Respondent'" in, for example, the drafting of the Explanatory Report on the Act on Promotion, the Respondent notes that the Explanatory Report was drafted nine months before the 27 July 2004 Letter.⁸⁹³

619. With regard to the EC's subsequent enquires, it is the Respondent's position that the EC did not take any formal decision by which it would be bound in respect of the applicability of the State aid rule on the Incentive Regime.⁸⁹⁴ Hence, when it confirmed that the exemption of "ecological tax" did not amount to State aid in a different case, the EC expressly noted that such a decision did not bind its future position.⁸⁹⁵
620. The Tribunal is persuaded by the Respondent's analysis on this issue. The Tribunal does not consider that the 27 July 2004 Letter constitutes a basis for legitimate expectations, since it addressed no more than a legislative draft, and it did so in response to a general complaint from professional organisations that the envisaged act would favour particular energy producers and state companies.⁸⁹⁶ For the purposes of its analysis, the EC did not have – and could not have had – information about the exact funding mechanism of the RES Scheme and the amount of the FiT, as these modalities were only put in place in 2005.⁸⁹⁷ Moreover, by definition, the decision of the EC with respect to a draft of possible future legislation could only be preliminary. The provisional scope of the 27 July 2004 Letter is well illustrated by its last paragraph: "Should you learn of any new particulars that might demonstrate the existence of an infringement of the State aid rules, I would be grateful if you would inform my department as soon as possible"⁸⁹⁸ In all the

⁸⁹⁰ Counter-Memorial, paras. 270-273; Rejoinder, para. 320.

⁸⁹¹ Rejoinder, para. 324.

⁸⁹² Rejoinder, paras. 325-328.

⁸⁹³ Rejoinder, paras. 341-343.

⁸⁹⁴ Counter-Memorial, paras. 274, 275.

⁸⁹⁵ Counter-Memorial, para. 275.

⁸⁹⁶ Letters from the Czech Society of Wind Energy EUROSOLAR respectively to Mr. Monti and Mr. Loyola de Palacio, 16 December 2003 (**Ex. C-75**).

⁸⁹⁷ Counter-Memorial, para. 273; Rejoinder, para. 324.

⁸⁹⁸ Letter from the EC to EUROSOLAR, 27 July 2004 (**Ex. C-77**).

circumstances, it is clear that the EC did not intend to render a final and binding decision on the future Act on Promotion on the basis of the limited information it had received with regard to the 2003 draft of that law. And as held by the Court of Justice in the *Athinaiki* judgment, a formal Decision by the EC would require an intention on its part to state a definitive position.

621. It follows that, in the Tribunal's view, the 27 July 2004 Letter was not a Decision. Furthermore, even if it could be construed as such in 2004 when it was rendered, under the *Athinaiki* judgment, this still does not mean that the Decision could have given rise to legitimate expectations in 2009 or 2010. As was pointed out in the *Athinaiki* judgment, the Decision would only remain applicable for so long as no new information became available.⁸⁹⁹ Here, new and significant information did become available after 2004 (namely the final text of the Act on Promotion and the specific financial incentives thereby established).
622. Given the Tribunal's conclusion that the 27 July 2004 Letter and other statements discussed above could not have led to legitimate expectations, there is no need for the Tribunal to inquire into the question of reasonable reliance by the Claimant upon the matters in question when it made its investment.
623. In summary, when the investments were made, the Incentive Regime, although State aid, had not been notified to, and approved by, the EC. Under EU law, it therefore follows that as at that time, there could not have been any legitimate expectations as alleged by the Claimant.

(3) Transparency

624. In a third step, the Tribunal must next consider whether the Respondent breached its obligation towards the Claimant to act in a transparent manner.
625. It is clear that the FET standard entails a transparency component – as confirmed by the text of Article 10(1) of the ECT, which refers in terms to “transparent conditions for Investors”.
626. The concept of transparency is closely related to an investor's legitimate expectations. Dolzer and Schreuer define transparency as follows: “Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced back to that legal framework.”⁹⁰⁰ In addition, the Tribunal considers that transparency must include a requirement that information about relevant changes in the investment framework are communicated well in advance.

⁸⁹⁹ *Athinaiki*, paras. 48-51 (**Annex X to Quigley Report**).

⁹⁰⁰ Dolzer/Schreuer, p. 149 (**Ex. CLA-29**).

627. As noted above, it is the investor's expectations at the time of the investment that are relevant for the Tribunal's assessment, *i.e.*, in the period between 27 August to 7 September 2009 for the Tomsan investment and in April 2010 for the Sluneční investment.⁹⁰¹
628. The possibility that a Solar Levy would be introduced by 1 January 2011 was considered on 23 July 2010⁹⁰² and was formally announced on 20 October 2010.⁹⁰³ As noted earlier in this Award, the Tribunal has no doubt that it was already obvious at the time of the investment that the sharp increase in the number of PV power plants connecting to the grid would lead to a crisis. Because of the rush of new investments made in the PV sector in the last months of 2010, the introduction of measures as of 2011 became an inevitability. On the other hand, investors knew that the caretaker government that was in place in the Czech Republic at that time would not take substantial policy decisions as it did not have the necessary political support. Parliamentary elections were substantially delayed. A viable and politically sustainable government was only established in July 2010.
629. Considering (1) that there was an obvious and transparent need for the Incentive Regime to be changed; (2) that there was a political vacuum until July 2010; and (3) the dramatic increase of PV plant grid connections in the last months of 2010, the Tribunal holds that the Czech Republic was as transparent as it could have been in the circumstances.
630. In all the circumstances, as detailed earlier in this Award, the Tribunal therefore does not consider that the Respondent violated its obligation under the FET standard to act in a transparent manner.

B. WHETHER THE RESPONDENT VIOLATED THE OBLIGATION TO GRANT FULL PROTECTION AND SECURITY

1. The Claimant's Position

631. The Claimant argues that the Respondent breached its obligation to grant full protection and security ("FPS") by introducing the Solar Levy and repealing the Tax Exemption and the Shortened Depreciation Period.⁹⁰⁴ The obligation to provide FPS is contained in Article 10(1) of the ECT.⁹⁰⁵

⁹⁰¹ See above paras. 590-591.

⁹⁰² See P. Novotný, "The Minister of Environment Wants to Tax Solar Power Plants," *Mlada Fronta Dnes*, 23 July 2010 (**Ex. R-206**) and T. Zavadilova, "Solar boom is over," *E15*, 30 July 2010 (**Ex. R-207**).

⁹⁰³ See Government of the Czech Republic, "Electricity prices will increase by 5.5% at maximum" (*vlada.cz*), 20 October 2010 (**Ex. R-219**).

⁹⁰⁴ Memorial, paras. 331, 332; Rejoinder, para. 634.

⁹⁰⁵ Memorial, paras. 335-337.

632. Article 10(1) of the ECT provides as follows:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security [...].⁹⁰⁶

633. The Claimant submits that while, historically, the FPS standard was restricted to mere physical protection, its scope has been extended over time to encompass legal protection.⁹⁰⁷ In particular, referring to *CME Czech Republic B.V. v. Czech Republic*,⁹⁰⁸ *Azurix Corp. v. Argentine Republic*,⁹⁰⁹ *National Grid P.L.C. v. Argentina Republic*,⁹¹⁰ and *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*,⁹¹¹ the Claimant submits that the FPS standard requires host States to provide a secure and stable investment environment to protect investors.⁹¹²

634. Since the FPS and the FET standards substantially overlap in this regard, the Claimant submits that the FPS standard is violated for the same reasons as set out in greater detail above.⁹¹³

2. The Respondent's Position

635. The Respondent argues that the introduction of the Solar Levy and the repeal of the Tax Exemption and the Shortened Depreciation Period did not constitute a violation of the FPS standard for the same reasons that they did not constitute a violation of the FET standard.⁹¹⁴

3. The Tribunal's Analysis

636. Given the way this particular allegation has been framed, it can be addressed briefly.

⁹⁰⁶ Memorial, para. 336.

⁹⁰⁷ Memorial, para.348, referring to Dolzer/Schreuer, p. 149 (Ex. CLA-29).

⁹⁰⁸ *CME Czech Republic B.V. v. Czech Republic*, Partial Award, 13 September 2001, para 613 (Ex. CLA-38).

⁹⁰⁹ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12. Award, 14 July 2006, para. 408 (Ex. CLA-34).

⁹¹⁰ *National Grid P.L.C. v. Argentina Republic*, Award, 3 November 2008, para. 189 (Ex. RLA-17).

⁹¹¹ *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 730 (Ex. CLA-22).

⁹¹² Memorial, paras. 349-352.

⁹¹³ Memorial, para. 338, 353 referring to *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 89 (Ex. CLA-31); *Occidental*, para. 187 (Ex. CLA-32); *PSEG*, para. 258 (Ex. CLA-33); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 334 (Ex. CLA-35); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 1 December 2011, para. 321 (Ex. RLA-25); *Rupert Binder v. Czech Republic*, Award, 15 July 2011, para. 477 (Ex. CLA-36).

⁹¹⁴ Counter-Memorial, paras. 455-461.

637. The Parties agree that a guarantee of “constant” or “full” protection and security is afforded to foreign investments under Article 10(1) of the ECT. The Parties also agree that the legal test as to whether a violation of this standard has occurred in the present case largely overlaps with the test applicable to violations of the FET standard. This is because the Claimant puts its case in terms of the “legal”, and not the “physical”, dimension of the FPS standard as interpreted by international tribunals, which it has articulated in terms of the host country’s obligation to guarantee a secure and stable investment environment to protect foreign investments.
638. Given the overlap in standards, the Tribunal refers simply to its earlier analysis. For the reasons that have been fully explored above in the context of the FET standard, the Tribunal finds that no violation of the FPS standard has occurred in this case.

C. WHETHER THE RESPONDENT VIOLATED THE PROHIBITION OF IMPAIRMENT THROUGH ARBITRARY AND DISCRIMINATORY TREATMENT

1. Whether the Claimant’s Investment was Significantly Impaired by the Respondent’s Measures

(a) The Claimant’s Position

639. The Claimant argues that the Respondent violated the prohibition of arbitrary and discriminatory treatment (“**Non-Impairment Standard**”) contained in Article 10(1) of the ECT by acting in an unreasonable and inconsistent manner.⁹¹⁵
640. Article 10(1) of the ECT provides:
- [...] no Contracting Party shall in any way impair by unreasonable or discriminatory measures th[e] management, maintenance, use, enjoyment or disposal [of Investments of Investors of other Contracting Parties] [...]
641. In response to the Respondent’s argument that the Claimant’s investment was not significantly impaired, the Claimant, relying on the tribunal’s decision in *Saluka*,⁹¹⁶ suggests that any negative impact on investment is sufficient to constitute an impairment.⁹¹⁷
642. In the present case, the Claimant contends that the Respondent’s amendment measures had a material effect upon the SolarOne’s profitability. SolarOne’s value suffered a significant drop,

⁹¹⁵ Memorial, para. 446; Reply, para. 759.

⁹¹⁶ *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006, para. 458 (**Ex. CLA-43**).

⁹¹⁷ Reply, para. 764.

and the Claimant lost the opportunity to sell its shareholding in SolarOne.⁹¹⁸

(b) The Respondent's Position

643. The Respondent argues that the amendment measures were reasonable and appropriate and that therefore they do not amount to a violation of the Non-Impairment Standard.⁹¹⁹ The Respondent rejects the Claimant's argument that any negative effects on investments, however minor, satisfy the impairment requirement.⁹²⁰ In the Respondent's view, the impairment must be "significant" before it can amount to a violation of the treaty standard.⁹²¹ A mere imposition of tax measures or a simple repeal of a tax exemption is not sufficient to satisfy this requirement.⁹²²
644. The Respondent alleges that the Claimant fails to establish any such significant impact.⁹²³ The Claimant "was free to use the solar power plants to generate substantial revenue" even after the introduction of the amendment measures.⁹²⁴ The Respondent also points out that the Claimant's plants continue to enjoy the 15-year payback period and the 7% return rate despite the Taxation Measures.⁹²⁵ In addition, the Respondent submits that the Claimant received a share purchase offer in relation to SolarOne.⁹²⁶
645. Finally, the Respondent asserts that the impairment, according to the text of the treaty, must be related to the "management, maintenance, use, enjoyment, or disposal of the purported investment",⁹²⁷ and that the Claimant has not provided evidence for any such relationship. Rather, it has focussed solely on the alleged diminution of the plant's value.⁹²⁸

⁹¹⁸ Memorial, para. 472-474; Reply, paras. 762, 763.

⁹¹⁹ Counter-Memorial, paras. 502-503.

⁹²⁰ Rejoinder, paras. 564, 565.

⁹²¹ Rejoinder, para. 566.

⁹²² Rejoinder, para. 566, *referring to Occidental*, paras. 2-3, 161 (**Ex. CLA-32**); *Perenco*, paras. 596-599 (**Ex. RLA-173**); Counter-Memorial, para. 490, *referring to AES*, para. 10.3.3 (**Ex. RLA-41**); *Electrabel Decision on Jurisdiction*, para. 7.152 (**Ex. RLA-39**).

⁹²³ Rejoinder, para. 566.

⁹²⁴ Rejoinder, para. 567, *referring to Perenco*, paras. 597-599 (**Ex. RLA-173**).

⁹²⁵ Counter-Memorial, para. 513, 514.

⁹²⁶ Counter-Memorial, para. 513; Rejoinder, para. 567.

⁹²⁷ Rejoinder, para. 568.

⁹²⁸ Rejoinder, para. 569.

2. Whether the Respondent's Measures were Arbitrary or Discriminatory

(a) Whether the Respondent Pursued a Rational Policy

(1) The Claimant's Position

646. The Claimant submits that in order to establish a violation of the Non-Impairment Standard, the Tribunal should apply a “means-to-an-end” reasonableness test to analyse the reasonableness of the Respondent’s measures: a State’s measure is reasonable if (1) the State pursues a rational policy; and (2) the State acts in a reasonable manner when implementing the policy.⁹²⁹
647. Relying on *AES*,⁹³⁰ the Claimant explains that (1) a policy is rational “if it is taken ‘following a logical (good sense) explanation and with the aim of addressing a public interest matter’”; and (2) an implementation measure is reasonable “if there is ‘an appropriate correlation between the state’s policy objective and the measure adopted to achieve it’”.⁹³¹
648. In relation to the first prong of the reasonableness test, the Claimant rejects the argument that, since the purpose of the adopted measures was to eliminate excessive profits and to relieve consumers and the State budget of an additional burden, the Respondent pursued a rational policy. This is for a number of reasons.⁹³²
649. First, the Claimant alleges that the Incentive Regime did not give rise to windfall profits.⁹³³ The photovoltaic investors only received a 10-15% return, which is consistent with return rates in other EU markets.⁹³⁴ In this vein, the Claimant emphasizes that the explanatory report on Act No. 402/2010 Coll., which introduced the Solar Levy, did not speak in terms of windfall profits.⁹³⁵
650. Second, according to the Claimant, since “the Respondent facially destroyed the Claimant’s rights and interests”, the Respondent has to prove that “the maintenance of the Incentive Regime, and the allegedly resulting high electricity prices, would have entailed the catastrophic consequences for the Czech economy”, in order to demonstrate the rationality of its policy.⁹³⁶ However, the Claimant alleges that the Respondent has not shown that any specific harm existed

⁹²⁹ Memorial, paras. 449-451; Reply, para. 783.

⁹³⁰ *AES*, paras. 10.3.7, 10.3.8, 10.3.9 (**Ex. RLA-41**).

⁹³¹ Memorial, para. 451, 453.

⁹³² Memorial, paras. 454, 466.

⁹³³ Memorial, para. 459; Reply, paras. 785, 786, 788.

⁹³⁴ Reply para. 786.

⁹³⁵ Hearing Transcript (27 February 2017), 70:19-71:4, *referring to* Explanatory Report on Act No. 402/2010 Coll, 2010 (**Ex. R-14**).

⁹³⁶ Memorial, para. 456.

at the time of the adoption of the measures.⁹³⁷ On the contrary, the extra cost per unit for RES support, and the growth in electricity tariffs and electricity prices were low in the Czech Republic when the amendment measures were adopted.⁹³⁸ Industrial production in the Czech Republic was growing in 2010.⁹³⁹ The budget deficits of the Czech Republic were at the lowest level among the EU Member States.⁹⁴⁰ The Claimant also notes that host States may not intervene in, or interfere with, private investments “simply in the name of purported threats of its national economy”.⁹⁴¹

651. Third, according to the Claimant, the Respondent’s policy was not rational as there was no urgent need to change the Incentive Regime, on which the Claimant relied, before the EC had intervened.⁹⁴² In support of this argument, the Claimant relies on the award in *AES*,⁹⁴³ in which the tribunal found that Hungary was not obliged to limit potential State aid before the EC issued its decision.⁹⁴⁴ In the Claimant’s view, Professor Stern’s dissent in *AES* is not pertinent in the present case, as the EC did not put pressure on the Czech Government in the case at hand.⁹⁴⁵
652. Fourth, the Claimant contends that the Respondent’s policy retroactively to withdraw the promised profits led to the Czech Government losing its international reputation as a profitable destination for foreign investment.⁹⁴⁶ This is further proof of the irrationality of the Respondent’s policy, because without foreign investment the Respondent will likely fail to meet the EU’s 2020 target, by which it is still bound.⁹⁴⁷
653. Fifth, the Claimant adds that if there were any alleged windfall profits, they were caused by the Respondent’s policy choice to enact the Incentive Regime and the Respondent’s failure to calculate the relevant costs properly.⁹⁴⁸

⁹³⁷ Memorial, para. 457.

⁹³⁸ Reply, para. 787.

⁹³⁹ Hearing Transcript (2 March 2017), 15:6-13.

⁹⁴⁰ Hearing Transcript (27 February 2017), 47:10-11.

⁹⁴¹ Memorial, paras. 455-456.

⁹⁴² Memorial, paras. 457-459.

⁹⁴³ *AES*, para. 10.3.16 (**Ex. RLA-41**).

⁹⁴⁴ Memorial, para. 464.

⁹⁴⁵ Memorial, para. 465.

⁹⁴⁶ Memorial, para. 460.

⁹⁴⁷ Memorial, para. 460.

⁹⁴⁸ Memorial, para. 458.

(2) The Respondent's Position

654. According to the Respondent, a measure is reasonable, if it is reasonably connected to a rational policy.⁹⁴⁹ The Respondent notes that the general presumption is that a State's exercise of its regulatory power will be reasonable and that this test does not require or, in fact, entitle the Tribunal to second guess a State's policy or a measure that it seeks to introduce.⁹⁵⁰
655. The Respondent submits that a host State's policy is rational "if it has been adopted 'following a logical (good sense) explanation and with the aim of addressing a public interest matter.'"⁹⁵¹ In this regard, the Respondent objects to the Claimant's allegation that the Respondent must prove that "the Incentive Regime [...] would have entailed [...] catastrophic consequences for the Czech economy", alleging that no tribunal has requested a host State to prove that "near-calamitous consequences would have occurred, but for the State's intervention."⁹⁵² The Respondent also notes that tribunals have found a broad variety of policy objections to be "rational", including "the protection of consumers, accession to the European Union, and regulation of the windfall gains of a certain sector."⁹⁵³
656. With respect to the amendments to the Act on Income Tax, the Respondent argues that the repeal of the Income Tax Exemption and the change of the Shortened Depreciation Period were based on the desire to protect the State budget in the midst of a global economic crisis.⁹⁵⁴ With regard to the Solar Levy, the Respondent alleges that it introduced the Solar Levy, together with the State budget subsidy, in order to alleviate the excessive burden on consumers by transferring some of that burden to the excessively profitable photovoltaic producers.⁹⁵⁵ In this regard, the Claimant's argument that the solar boom did not impose an unsustainable burden on consumers is unreasonable, because (1) consumers in the Czech Republic were paying a higher proportion of their income on electricity than consumers in other EU States; (2) the Czech Republic's support per unit of RES generation was the highest among the EU Member States; and (3) the Czech Republic spent a significant share, *i.e.*, more than 0.5%, of State budget for photovoltaic

⁹⁴⁹ Counter-Memorial, para. 515; Rejoinder, paras. 562, 570-574.

⁹⁵⁰ Rejoinder, para. 575; Hearing Transcript (27 February 2017), 231:8-11.

⁹⁵¹ Rejoinder, para. 577; Counter-Memorial, para. 528 *referring to AES*, para 10.3.8 (**Ex. RLA-41**) and *Micula*, para. 525 (**Ex. CLA-3**).

⁹⁵² Counter-Memorial, para. 527.

⁹⁵³ Counter-Memorial, para. 516, *referring to AES*, para. 10.3.31 (**Ex. RLA-41**); *Micula*, para. 825 (**Ex. CLA-3**); Paushok, paras. 319-321 (**Ex. RLA-180**).

⁹⁵⁴ Rejoinder, para. 579.

⁹⁵⁵ Rejoinder, para. 580.

support.⁹⁵⁶

657. In response to the Claimant's argument that the rate of return in the Czech Republic was consistent with that in other EU Member States, the Respondent alleges that the Claimant's comparison of WACC figures in the EU Member States is misleading, because (1) the Claimant confuses post-tax and pre-tax rates; and (2) the Claimant does not distinguish between forms of support systems.⁹⁵⁷

(b) Whether the Respondent Acted in a Reasonable Manner When Implementing the Policy

(1) The Claimant's Position

658. The Claimant argues, further, that the Respondent acted in an unreasonable manner when implementing the policy, stating that a host State's measure can be reasonable only when (1) "its adverse effects on foreign investments are limited to what is strictly necessary to achieve the public interest"; and (2) "the public interest outweighs the negative impact on the rights of foreign investors in the specific case."⁹⁵⁸ In the present case, the Claimant argues that the contested measures do not satisfy either of these requirements.⁹⁵⁹

659. The Claimant argues that the Solar Levy did not correct the increase of electricity prices, because it served only modestly to reduce electricity bills by 3.6% for private households and 4.3% for medium size industries.⁹⁶⁰ With respect to the repeal of the Income Tax Exemption and the change to the Shortened Depreciation Period, the Claimant states that the Respondent does not sufficiently explain how these measures were meant to address the rise in electricity prices.⁹⁶¹ On the other hand, in the Claimant's view, the measures had significantly negative effects on photovoltaic investors.⁹⁶² For example, and most relevant to this case, the sale of the Claimant's plant became impossible after the measures were introduced.⁹⁶³

660. Finally, according to the Claimant, the Respondent was the first EU Member State that employed

⁹⁵⁶ Hearing Transcript (2 March 2017), 84:16-86:23; Mr. Jones' Presentation, slides 10-12.

⁹⁵⁷ Hearing Transcript (3 March 2017), 106:9-109:9

⁹⁵⁸ Memorial, paras. 452, *referring to Micula*, para. 525 (**Ex. CLA-3**); *Electrabel Award*, para. 179 (**Ex. CLA-131**).

⁹⁵⁹ Reply, para. 793, *referring to Occidental*, para. 163 (**Ex. CLA-32**).

⁹⁶⁰ Memorial, para. 468; Reply, para. 791.

⁹⁶¹ Memorial, para. 469; Reply, para. 792.

⁹⁶² Memorial, para. 470; Reply, para. 793.

⁹⁶³ Memorial, para. 470.

the retroactive measures to deal with the solar boom.⁹⁶⁴ The Claimant argues that the Respondent's retroactive changes to the Incentive Regime constituted bad regulatory practice which could have been avoided if the Respondent had followed the path taken by at least eight other EU Member States, *i.e.*, by addressing the solar boom with measures that apply only to future investments.⁹⁶⁵ In this vein, the Claimant submits that the Respondent's "retroactive" measures were criticized by the EC, citing the EC's letter to the Czech Ministry of Industry and Trade of 11 January 2011.⁹⁶⁶

(2) The Respondent's Position

661. According to the Respondent, a measure is reasonable if the measure is "appropriately tailored" to meet the policy.⁹⁶⁷ The Respondent argues that the Claimant's burden to prove a violation of the Non-Impairment Standard is particularly high, because of "a presumption of validity in favour of legislative measures adopted by a State."⁹⁶⁸ In addition, the Respondent submits that tribunals in other cases, in which fiscal legislation that was aimed at the elimination of windfall profits played a role, have found the measures to be reasonable.⁹⁶⁹
662. The Respondent submits that the reasonableness test should be distinguished from a balance test and that, to establish a reasonable relationship, the benefits derived by a host State from a measure do not need to outweigh the negative impact on investors.⁹⁷⁰ The Respondent also notes that the "appropriate tailoring" requirement is not a strict scrutiny test and that State measures do not need to be strictly necessary for the pursuance of the policy to qualify under the test.⁹⁷¹
663. In the instant case, the Respondent states that the amendment measures were meant to address negative impacts arising out of the unanticipated increase of solar investments in the middle of

⁹⁶⁴ Reply, para. 269.

⁹⁶⁵ Reply, para. 255-267, 798, *referencing* the regulatory practice in Germany, Portugal, France, UK, Austria, Denmark, The Netherlands, and Slovenia.

⁹⁶⁶ Hearing Transcript (27 February 2017), 48:4-8, *referring to* Letter from Ms. Hedegaard and Mr. Oettinger (Commissioners of the EC) to Mr. Kocourek (Czech Minister of Trade and Industry, 11 January 2011 (**Ex. C-120**)).

⁹⁶⁷ Counter-Memorial, para. 517, *referring to* *Micula*, para. 525 (**Ex. CLA-3**); Rejoinder, para. 582.

⁹⁶⁸ Counter-Memorial, para. 518, *referring to* *El Paso*, para. 290 (**Ex. RLA-31**).

⁹⁶⁹ Counter-Memorial, paras. 519- 520, *referring to* *Paushok*, para. 102-104, 105, 319, 321, (**Ex. RLA-180**); *AES*, paras. 4.18. 4.24, 10.3.21, 10.3.30, 10.3.31, 10.3.34 (**Ex. RLA-41**).

⁹⁷⁰ Counter-Memorial, para. 523 *referring to* *AES*, paras. 10.3.9-13 (**Ex. RLA-41**) and *Micula*, paras. 825-826 (**Ex. CLA-3**).

⁹⁷¹ Counter-Memorial, paras. 525, 526.

the financial crisis.⁹⁷² To address this problem, the Czech authorities (1) allowed investors to receive a reasonable rate of return; (2) imposed a tax on excessive returns; (3) levelled the playing field for all RES producers; (4) levelled the playing field for overly profitable PV producers; and (5) offered a tax deferral to photovoltaic producers faced with a serious financial risk.⁹⁷³ These measures were implemented to correct good faith mistakes in the design of the original scheme.⁹⁷⁴

664. The Respondent argues that the Solar Levy was meant to mitigate the negative impact on the State budget caused by the installation of solar power plants and to allow photovoltaic investors to continue to enjoy the expected benefits of the 15-year simple payback and the 7% return rate.⁹⁷⁵ The Tax Exemption was not economically justifiable, because, without it, the photovoltaic installations were still sufficiently profitable and the 2010 EU target was achievable.⁹⁷⁶ The Shortened Depreciation Period was not originally designed specifically to support solar power producers, since solar panels were originally categorized as an unclassified asset in the residual category.⁹⁷⁷ The changes to the depreciation period were intended to address an abuse of the measure by PV investors.⁹⁷⁸
665. To support its view, the Respondent submits that Czech domestic courts have confirmed that the amendment measures served the public interest.⁹⁷⁹ Furthermore, the Respondent alleges that the Taxation Measures only targeted photovoltaic energy producers, which received imbalanced excess profits in relation to the dropped installation costs.⁹⁸⁰ In the Respondent's view, these solar producers should have been aware of the possibility of modifications in the investment scheme.⁹⁸¹
666. The Respondent rejects the Claimant's argument that since the amendment measures were unprecedented, different from other States' measures, and constituted bad practice, they were

⁹⁷² Counter-Memorial, paras. 530, 531; Rejoinder, para. 579.

⁹⁷³ Counter-Memorial, para. 532.

⁹⁷⁴ Counter-Memorial, para. 532.

⁹⁷⁵ Rejoinder, paras. 583, 584.

⁹⁷⁶ Rejoinder, para. 585.

⁹⁷⁷ Rejoinder, para. 586.

⁹⁷⁸ Rejoinder, para. 586.

⁹⁷⁹ Counter-Memorial, para. 533, *referring to* May 2012 Constitutional Court Judgment, paras. 72, 83 (**Ex. CLA-12/R-110**).

⁹⁸⁰ Counter-Memorial, para. 533.

⁹⁸¹ Counter-Memorial, para. 534, *referring to* First Expert Report by Mr. Wynne Jones, dated 7 October 2015, paras. 6.36, 6.48.

unreasonable.⁹⁸² On the contrary, the Respondent submits that the measures were economically effective and that other EU Member States adopted comparable measures.⁹⁸³ In this regard, the Respondent emphasizes that EU Member States had little experience of support for the photovoltaic sector and therefore managing the photovoltaic sector was difficult.⁹⁸⁴ Moreover, the Respondent notes that the novelty of a measure is irrelevant to the reasonableness analysis.⁹⁸⁵ The Respondent also reiterates that the Tribunal is not in a position to second guess whether the measures could have been better designed.⁹⁸⁶ Referring to *Mesa Power*,⁹⁸⁷ the Respondent further submits that the mere fact that a measure taken by a State does not achieve its intended objectives does not make the measure unreasonable.⁹⁸⁸

667. Finally, the Respondent submits that legislation does not become unreasonable simply because States enact it quickly.⁹⁸⁹ In any event, the Respondent states that it carefully tailored the amendment measures with the benefit of the work of an inter-ministerial committee, through commissioning studies and by review in parliamentary sessions.⁹⁹⁰ In addition, the Respondent points out that the Claimant argues on the one hand that the Respondent should have reacted to the solar boom quickly, while, on the other hand, it states in the present context that the Respondent should have devoted more time to the consideration of the measures before enacting the legislation.⁹⁹¹

3. Whether the Respondent's Measures were Inherently Unreasonable

(a) The Claimant's Position

668. The Claimant alleges that the repeal of incentive assurances was inherently unreasonable,⁹⁹²

⁹⁸² Rejoinder, para. 593.

⁹⁸³ Counter-Memorial, para. 535; Rejoinder, para. 593.

⁹⁸⁴ Hearing Transcript (2 March 2017), 81:15-20, Mr. Jones' Presentation, slide 5.

⁹⁸⁵ Rejoinder, para. 594, referring to *Philip Morris*, para. 430 (**Ex. RLA-273**); *Invesmart*, para. 459 (**Ex. RLA-286**).

⁹⁸⁶ Rejoinder, para. 596, referring to *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 318 (**Ex. RLA-282**) and *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 292 (**Ex. RLA-289**).

⁹⁸⁷ *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-07, Award, 24 March 2016, para. 587 (**Ex. RLA-285**) ("*Mesa Power*").

⁹⁸⁸ Rejoinder, para. 597, referring to *Mesa Power*, para. 587 (**Ex. RLA-285**).

⁹⁸⁹ Rejoinder, para. 599, referring to *AES*, para. 9.3.66 (**Ex. RLA-41**).

⁹⁹⁰ Rejoinder, para. 598.

⁹⁹¹ Rejoinder, para. 598.

⁹⁹² Reply, para. 765.

especially when, as here, the Respondent first promised a long-term incentive regime to meet a certain policy goal, and then repealed the promised incentive in relation to existing investors.⁹⁹³

669. In addition, the Claimant argues that the Respondent's measures were irrational, because they changed the fundamental features of the Incentive Regime.⁹⁹⁴ In support of its argument, the Claimant relies on the general principle articulated in *Charanne*⁹⁹⁵ that "the existence of a guaranteed tariff throughout the lifetime of the facility is an essential characteristic of an incentive regime."⁹⁹⁶ The Claimant contends, however, that the actual conclusion of the tribunal in *Charanne* does not apply to the present case, since the claimants in *Charanne* invoked an unreasonably long 30-50 years guarantee period, and the tribunal in that case emphasized that the decision was based on case specific circumstances.⁹⁹⁷

(b) The Respondent's Position

670. The Respondent rejects the Claimant's argument that the Taxation Measures are unreasonable, because they had the effect of withdrawing the promised incentives.⁹⁹⁸ According to the Respondent, a breach of a promise, in the absence of other aggravating circumstances between a host State and the investor(s), is not *per se* unreasonable.⁹⁹⁹
671. The Respondent argues that the Solar Levy did not repeal the fundamental features of the Incentive Scheme, because the Scheme was not meant to stabilize the FiT level and therefore the FiT level itself did not constitute a fundamental feature of it. Furthermore, the Claimant has still been receiving the FiT.¹⁰⁰⁰ The Respondent relies on the decision of the Czech Constitutional Court, which concluded that the Solar Levy did not alter the RES scheme.¹⁰⁰¹
672. In addition, the Respondent argues that the Claimant has not provided any evidence to support its position that the amendment measures were part of a pre-planned mechanism by which the Respondent repealed the incentives, once it became likely it would achieve the 8% Indicative

⁹⁹³ Reply, paras. 766, 767.

⁹⁹⁴ Reply, para. 768.

⁹⁹⁵ *Charanne*, paras. 514, 539 (Ex. CLA-101).

⁹⁹⁶ Reply, paras. 769, 770, 775.

⁹⁹⁷ Reply, paras. 771-774.

⁹⁹⁸ Rejoinder, para. 589.

⁹⁹⁹ Rejoinder, para. 589.

¹⁰⁰⁰ Rejoinder, para. 588.

¹⁰⁰¹ Rejoinder, para. 588, referring to May 2012 Constitutional Court Judgment, para. 68 (Ex. CLA-12/R-110).

2010 Target.¹⁰⁰²

4. Whether the Respondent Acted in an Inconsistent Manner

(a) The Claimant's Position

673. The Claimant alleges that the Respondent acted in an inconsistent manner in relation to statements given to investors and in respect of its ultimate policy goal.¹⁰⁰³
674. In relation to investors, the Respondent first announced that the regime changes would only apply to new investments made on or after 1 January 2011, but eventually it applied it to all investments made between 1 January 2009 and 31 December 2010.¹⁰⁰⁴ With respect to the policy goal, the Respondent first attempted to achieve its EU target for both the years 2010 and 2020, 8% and 13% respectively.¹⁰⁰⁵ However, the Respondent's retroactive measures then made it impossible to achieve the 2020 goal, because the Respondent lost international credibility after the amendment measures.¹⁰⁰⁶

(b) The Respondent's Position

675. The Respondent dismisses the Claimant's argument that, since the Respondent's measures were "inconsistent", the measures were unreasonable.¹⁰⁰⁷ According to the Respondent, whether a State measure is objectively arbitrary should be assessed by the reasonableness test as indicated above, and according to which the Respondent's measures must be considered reasonable as appropriately tailored instruments to address the solar boom.¹⁰⁰⁸

5. Whether the Respondent Contributed to the Rise of the Solar Boom

(a) The Claimant's Position

676. The Claimant alleges that the Respondent cannot justify its amendment measures, since the allegedly excessive burden on consumers and the State budget, arising out of the rapid increase in solar investments, was caused by the Respondent's own conduct.¹⁰⁰⁹ The Claimant submits that Article 25(2)(b) of the ILC Draft Articles on the Responsibility of States for Internationally

¹⁰⁰² Rejoinder, para. 578.

¹⁰⁰³ Reply, para. 776.

¹⁰⁰⁴ Reply, paras. 777-779.

¹⁰⁰⁵ Reply paras. 780, 781.

¹⁰⁰⁶ Reply, para. 782.

¹⁰⁰⁷ Rejoinder, para. 573.

¹⁰⁰⁸ Rejoinder, para. 574.

¹⁰⁰⁹ Memorial, para. 471; Reply, para. 794.

Wrongful Acts 2001 provides that a State cannot invoke the necessity defence, if it “has contributed to the situation of necessity” and that this general rule should apply in the present case.¹⁰¹⁰

677. In the Claimant’s view, the Act on Promotion, especially the 5% rule, cannot be regarded as a good faith mistake; rather it was the Respondent’s active policy choice to attract investors.¹⁰¹¹ Since the Respondent was well aware in October 2009 that a significant number of photovoltaic power plants would be installed in 2010, it had enough time to react promptly and to issue a warning to discourage prospective investors, such that retroactive changes to the Incentive Scheme would not have become necessary.¹⁰¹² As support for this, the Claimant submits that Mr. Jones, the Respondent’s expert, accepted that it was “relatively easy to estimate” the costs on consumers and that the Czech Technical University predicted a drop of installation costs by more than 50%.¹⁰¹³ Rather, in the Claimant’s view, the Respondent used the rapid increase in the installation of solar plants in order to meet the 8% Indicative 2010 Target.¹⁰¹⁴

(b) The Respondent’s Position

678. The Respondent rejects the Claimant’s position that the solar boom was caused by the Respondent’s mismanagement.¹⁰¹⁵
679. The Respondent submits that the rapid increase of solar installations was unpredictable, given the novelty of the photovoltaic technology and the dramatic fall in the cost of the photovoltaic module.¹⁰¹⁶
680. The Respondent alleges that it reacted to the solar boom in a practical and timely manner, stating that the caretaker government, which was in place between May 2009 and July 2010, lacked authority to implement politically contentious legislative changes.¹⁰¹⁷ The moratorium for grid connection in February 2010 was also timely, because the Czech Government needed to obtain

¹⁰¹⁰ Reply, para. 756.

¹⁰¹¹ Reply, para. 796.

¹⁰¹² Reply, paras. 797-801.

¹⁰¹³ Hearing Transcript (3 March 2017), 9:18-11:14, *referring to* Hearing Transcript (2 March 2017), 148:8-19, 131:19-23.

¹⁰¹⁴ Hearing Transcript (27 May 2017), 44:14-20.

¹⁰¹⁵ Rejoinder, para. 592.

¹⁰¹⁶ Hearing Transcript (2 March 2017), 81:15-82:8.

¹⁰¹⁷ Hearing Transcript (27 February 2017), 157:12-22.

sufficient data before imposing it.¹⁰¹⁸ In the Respondent's view, photovoltaic energy investors rushed into the market to take advantage of the 5% rule when it became known that the Czech Government was considering its abolition.¹⁰¹⁹

681. In any event, the Respondent notes that the Claimant's reference to Article 25(2)(b) of the Draft Articles on State Responsibility is misplaced, because the Respondent has not invoked the necessity defence.¹⁰²⁰

6. The Tribunal's Analysis

682. The Parties are divided as to whether the Respondent's withdrawal of the Tax Incentives and the introduction of the Solar Levy amount to violations of the prohibition of arbitrary and discriminatory treatment.

683. As a preliminary matter, there is considerable disagreement between the Parties as to whether the impairment in question was "significant" enough for a violation of the treaty standard or whether any negative impact on foreign investment, whatever its magnitude, is sufficient to constitute an actionable treaty violation. In the Tribunal's view, an impairment needs to be substantial in order to constitute a treaty breach. This proposition, however, need not be developed here, since, in the Tribunal's view, the determinative question is not whether the impairment was substantial, but whether the challenged measures were promulgated in pursuit of a rational policy and were implemented in a reasonable manner.

684. The Parties seem to agree, and the Tribunal concurs, that the relevant test to assess the rationality of a policy is that cogently articulated by the tribunal in *AES* as follows: "A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter."¹⁰²¹ In addition, the challenged measure must also be reasonable. As stipulated by the tribunal in *AES* in words with which the Tribunal is in full agreement, "an appropriate correlation between the state's public policy objective and the measure adopted to achieve it" must exist.¹⁰²²

685. In essence, the Respondent has argued that the amendments relating to taxation were motivated by the State's desire to safeguard the State budget in the midst of a global economic crisis. The

¹⁰¹⁸ Hearing Transcript (3 March 2017), 128:7-19.

¹⁰¹⁹ Rejoinder, para. 592.

¹⁰²⁰ Rejoinder, paras. 590, 591.

¹⁰²¹ *AES*, para. 10.3.8 (**Ex. RLA-41**).

¹⁰²² *AES*, para. 10.3.9 (**Ex. RLA-41**).

Solar Levy was introduced, together with a State budget subsidy, to lower a perceived excessive burden caused by energy costs on consumers and to share it with what the Respondent considered (and considers) to be excessively profitable photovoltaic electricity producers.

686. The Tribunal finds that a “balancing” policy whereby electricity prices are lowered for the benefit of the general public and there is an equivalent diminution in excessive profits of PV investors, such that an excessive burden put on consumers might be alleviated, qualifies as a rational policy within the meaning of the above-referenced definition. Having carefully considered all the circumstances, the Tribunal finds the Respondent’s explanation plausible. It concludes that the challenged measures were clearly aimed at addressing a public interest matter.
687. In the Tribunal’s view, the Respondent also acted in a reasonable manner when implementing the challenged measures. First, the Tribunal notes that it was expected that the FiT would be reduced by 30% in 2011 once the 5% break out rule was abolished. In this context, a Solar Levy for existing plants of 26% is certainly reasonable. More importantly, even after the Solar Levy reduced excessive profits, a reasonable return remained available for PV investors. In 2009, without the legislative amendments, the reference plant would have received a full payback in 9.5 years. Following the amendments, a payback could still be achieved in 11 years, and therefore well below the promised 15 years.¹⁰²³ In 2010, without the legislative amendments, the reference plant would have received a full payback in 7.8 years. Following the amendments, a payback could still be achieved in 9.9 years, and therefore also well below the promised 15 years.¹⁰²⁴ The return for the reference plant without amendments would have been 8.4% in 2009 and 11.4% in 2010, while the return with the amendments amounted to 7% in 2009 and 8.4% in 2010, and therefore exactly in line with or well above the promised 7% return rate.¹⁰²⁵ In other words, despite the amendment measures, PV investments were as profitable – and in fact more profitable – than promised. Put shortly, the Solar Levy, contrary to the Claimant’s argument, did not undermine the fundamental features of the Incentive Scheme. The Incentive Scheme guaranteed that eligible solar PV plants could expect a FiT that allowed a 15-year payback and a 7% rate of return over a period of 15 years. The Respondent did not breach these promises.
688. In this context, it is also worth noting that while the return for the reference plant decreased by

¹⁰²³ First Peer Report, para. 4.8.1: the pay back for the Claimant would have been without amendments 6.6 years and was 8 years with amendments, *i.e.*, also well below the promised 15 years.

¹⁰²⁴ First Peer Report, para. 4.8.1: the pay back for the Claimant would have been without amendments 7.8 years and was 10.1 years with amendments, *i.e.*, also well below the promised 15 years.

¹⁰²⁵ First Peer Report, para. 4.8.3: The return for the Claimant would have been 14.4% without amendments and was 8% with amendments in 2009, and would have been 11.5% and was 8.2% in 2010, *i.e.*, also well above the promised 7% return rate. All measures together reduced the return for the 2009 reference plant from 8.4% to 7%, Hearing Transcript (2 March 2017), 230:8-18.

3%, electricity bills decreased by 3.6% for private households and 44.3% for medium industries. As a consequence, PV producers lost rather less, comparatively, than electricity consumers won.

689. For the above reasons, the Tribunal concludes that neither the introduction of the Solar Levy, nor the withdrawal of the Tax Incentives was unreasonable or arbitrary in the given circumstances. Whether, with the benefit of hindsight, there might have been a better way to address the problems caused by the rapid increase in the number of solar installations in the Czech Republic and the ensuing rise in electricity prices, is not a matter for the Tribunal to decide, but it is an issue that falls within a State's legislative discretion.
690. Having considered all materials and submissions before it, the Tribunal therefore concludes that the challenged measures did not impair the Claimant's investment in an arbitrary or discriminatory manner.

VII. COSTS

A. THE CLAIMANT'S POSITION

691. The Claimant submits that its total costs amount to EUR 502,986.09, which includes the arbitration deposit of EUR 100,000.00 to date.¹⁰²⁶
692. The Claimant posits three different scenarios for the outcome of the arbitration, which would have an impact on the allocation of costs. According to the Claimant:
- (i) in the event that the Claimant prevails on the merits (**Scenario 1**), it should be awarded the costs of this arbitration, including the “*costs of legal representation and assistance*” pursuant to Article 38(e) of the 1976 UNCITRAL Rules;
 - (ii) in the event that the Claimant prevails on jurisdiction, but not on the merits (**Scenario 2**), the Claimant should be awarded the costs of this arbitration, including the “*costs of legal representation and assistance*”, relating to the Respondent’s objections to the jurisdiction, but it should not bear any of the Respondent’s costs relating to the merits, because the claim is a *bona fide* claim, raising complex issues, while the Respondent delayed and hindered the adjudication of the dispute; and
 - (iii) in the event that the Respondent prevails on jurisdiction (**Scenario 3**), it is nonetheless reasonable that the Claimant should not bear any of the Respondent’s costs (including the Respondent’s costs for legal representation and assistance), because the claim is a *bona fide* claim, raising complex issues, while the Respondent delayed and hindered the adjudication of the dispute.¹⁰²⁷
693. The Claimant recalls that the principles with respect to the allocation of costs in the present arbitration are set out in Articles 38 and 40 of the UNCITRAL Rules.¹⁰²⁸ As for the costs of the arbitration, Article 40(1) contains the general rule that “costs follow the event”, pursuant to which a losing party bears the costs, but which also allows the arbitral tribunal to employ a different approach, taking into account “the circumstance of the case”.¹⁰²⁹ As for the costs of legal representation, Article 40(2) provides the tribunal a broader discretion to decide the allocation of the costs.¹⁰³⁰
694. In scenario 1, the Claimant submits that the Respondent should bear both the costs of arbitration and the costs of legal representation and assistance of the Claimant.¹⁰³¹ For the costs of

¹⁰²⁶ Claimant’s Updated Schedule of Costs, annexed to the Claimant’s Supplemental Submission on Costs

¹⁰²⁷ Claimant’s Submission on Costs, para. 2.

¹⁰²⁸ Claimant’s Submission on Costs, para. 4.

¹⁰²⁹ Claimant’s Submission on Costs, para. 5.

¹⁰³⁰ Claimant’s Submission on Costs, para. 6.

¹⁰³¹ Claimant’s Submission on Costs, para. 7.

arbitration, this follows from the “costs follow the event” rule.¹⁰³² As for the costs of legal representation, the Claimant alleges that an application of the “cost follow the event” rule would also be appropriate considering the circumstance of the case.¹⁰³³ While the Claimant says that it submitted *bona fide* claims and adopted cost-effective approaches, the Respondent unnecessarily increased the Claimant’s costs by refusing the adjudication of the claims in a single consolidated arbitration; provoking the EC’s investigation of the Incentive Regime in relation to plants connected before 2013; and by including jurisdictional arguments in its Rejoinder submission in breach of the procedural timetable.¹⁰³⁴ Moreover, since quantum constituted only a small portion of the entire arguments, whether the entirety, or only a portion, of the damages claimed were awarded would be irrelevant to the cost allocation.¹⁰³⁵ In addition, the Claimant bore the burden of proof regarding several novel and complex issues for which no precedent existed.¹⁰³⁶ The Respondent must also bear the costs of the *Achmea* phase, given that the jurisdictional objection was raised at a late stage in the proceedings.¹⁰³⁷ Finally, the Respondent must bear the costs associated with the unsuccessful challenge to Mr. Beechey.¹⁰³⁸

695. In scenario 2, the Claimant should be awarded its costs relating to the Respondent’s jurisdictional objections and should not bear the Respondent’s costs on the merits.¹⁰³⁹ The “costs follow the event” rule applies to both non-legal and legal costs as it does in scenario 1, as the Claimant would be the prevailing party on jurisdiction.¹⁰⁴⁰ With regard to the merits, the Claimant submits that the circumstances of the case warrant a departure from the “cost follows the event” principle. For example, while the Claimant’s claims were *bona fide*, the Respondent obstructed the proceeding by, *inter alia*, “raising overly complex – but totally unhelpful – EU State Aid law defenses.”¹⁰⁴¹
696. In scenario 3, the Claimant submits that it should not bear any of the Respondent’s costs.¹⁰⁴² The

¹⁰³² Claimant’s Submission on Costs, para. 8.

¹⁰³³ Claimant’s Submission on Costs, paras. 9-10.

¹⁰³⁴ Claimant’s Submission on Costs, paras. 11-14.

¹⁰³⁵ Claimant’s Submission on Costs, paras. 16-17.

¹⁰³⁶ Claimant’s Submission on Costs, paras. 18-19.

¹⁰³⁷ Claimant’s Supplemental Submission on Costs, paras. 3, 6-7.

¹⁰³⁸ Claimant’s Supplemental Submission on Costs, paras. 8-10.

¹⁰³⁹ Claimant’s Submission on Costs, para. 2.

¹⁰⁴⁰ Claimant’s Submission on Costs, para. 20.

¹⁰⁴¹ Claimant’s Submission on Costs, para. 21.

¹⁰⁴² Claimant’s Submission on Costs, para. 2.

Claimant alleges that the “costs follow the event” rule should not be applied by the Tribunal, given the procedural behaviour of the Parties more fully described above.¹⁰⁴³

697. The Claimant submits that its legal costs are reasonable pursuant to Article 38(e) of the UNCITRAL Rules.¹⁰⁴⁴ The Claimant alleges that it “ran the case with a small legal team, relied on expert evidence only where strictly necessary, and divided essentially all costs with the other nine claimants.”¹⁰⁴⁵ The Claimant adds that if the Respondent’s legal costs exceed those of the Claimant, any excess amount would be unreasonable.¹⁰⁴⁶

B. THE RESPONDENT’S POSITION

698. The Respondent requests that should it prevail in the arbitration, the Tribunal order the Claimant to pay all of the Czech Republic’s costs and expenses incurred in connection with this proceeding (including attorney fees and expenses), in the amount of USD 1,246,817, as well as the Czech Republic’s share of the costs incurred by the Tribunal and the PCA, in the amount of EUR 100,000 to date.¹⁰⁴⁷

699. The Respondent has divided its costs and expenses equally among PCA Cases 2014-19, 2014-20, 2014-21 and 2014-22, estimating “that the share of costs devoted to each of these matters has been roughly equal.”¹⁰⁴⁸

700. According to the Respondent, the costs of the arbitration should be allocated on the basis of the “loser pays” or “costs follow the event” principle pursuant to Article 40(1) of the UNCITRAL Rules. Accordingly, the Tribunal should issue “an award of reasonable costs in favour of the prevailing party”.¹⁰⁴⁹ With respect to the costs of legal representation, the Respondent acknowledges that Article 40(2) of the UNCITRAL Rules “confers on the Tribunal broad discretion to determine any reasonable apportionment of such costs in light of the circumstances of the case”.¹⁰⁵⁰

701. In the Respondent’s view, the “loser pays” principle does not only apply to arbitration costs, but

¹⁰⁴³ Claimant’s Submission on Costs, para. 23; Claimant’s Supplemental Submission on Costs, paras. 3, 7.

¹⁰⁴⁴ Claimant’s Submission on Costs, para. 24.

¹⁰⁴⁵ Claimant’s Submission on Costs, para. 24.

¹⁰⁴⁶ Claimant’s Submission on Costs, para. 25.

¹⁰⁴⁷ Respondent’s Submission on Costs, para. 1; Respondent’s Updated Submission on Costs, paras. 1-3.

¹⁰⁴⁸ Respondent’s Submission on Costs, para. 2. *See also* Respondent’s Updated Submission on Costs, para. 2.

¹⁰⁴⁹ Respondent’s Submission on Costs, paras. 3-4.

¹⁰⁵⁰ Respondent’s Submission on Costs, para. 5.

also to the costs of legal representation despite the difference in wording between Articles 40(1) and (2) of the UNCITRAL Rules. It refers the Tribunal to the decision in *ECE Projektmanagement GmbH et al. v. The Czech Republic*, which ruled that “the relevant criteria are in both cases essentially the same, and include in both cases the extent to which the successful party has succeeded on the principal question in issue in the dispute.”¹⁰⁵¹ The Respondent further alleges that the application of the “loser pays” principle “is not limited to the context of ‘abusive’ or ‘frivolous’ claims.”¹⁰⁵²

702. Under the “loser pays” rule, a party may be considered the “prevailing party” if it “has prevailed on all or only some of the issues in the case, *i.e.*, that party’s ‘relative success’”.¹⁰⁵³ The concept of “relative success” should only be employed, however, if “a tribunal has genuine difficulty in identifying the prevailing party.”¹⁰⁵⁴ Based on this understanding, the Respondent considers that it would be the “prevailing party”, if it “defeated all of the claims (whether on merits or jurisdiction)”.¹⁰⁵⁵ In such case, so argues the Respondent, it “should be awarded most or all of its reasonable costs”.¹⁰⁵⁶
703. The Respondent emphasises that the Tribunal may depart from the “loser pays” principle in situations where a prevailing party “caused an unnecessary aggravation of costs through its conduct in the proceedings (e.g. deficiencies in its presentation of the case or obstructive behavior)”.¹⁰⁵⁷
704. Against this background, the Respondent argues that the Claimant has caused such an “unnecessary aggravation of costs”.¹⁰⁵⁸ The Claimant, for example, (1) submitted “massively overbroad document production requests”,¹⁰⁵⁹ (2) disclosed funding sources of its investment in an untimely manner, creating a comparable situation to *Plama*, in which the Tribunal ordered the

¹⁰⁵¹ Respondent’s Submission on Costs, paras. 4-6, referring to *ECE Projektmanagement GmbH et al. v. The Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, para. 6.68.

¹⁰⁵² Respondent’s Submission on Costs, para. 7.

¹⁰⁵³ Respondent’s Submission on Costs, para. 8.

¹⁰⁵⁴ Respondent’s Submission on Costs, para. 8.

¹⁰⁵⁵ Respondent’s Submission on Costs, para. 9.

¹⁰⁵⁶ Respondent’s Submission on Costs, para. 9.

¹⁰⁵⁷ Respondent’s Submission on Costs, para. 17, quoting *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, 17 December 2015, para. 1038. (Ex. RLA-276).

¹⁰⁵⁸ Respondent’s Submission on Costs, para. 18.

¹⁰⁵⁹ Respondent’s Submission on Costs, para. 18(a).

claimant to bear arbitration costs and the respondent's legal costs,¹⁰⁶⁰ and (3) "pursued a convoluted and ever-changing approach to the quantification of alleged damages" and "even submitted a highly unusual supplemental expert report" which presented new arguments and required the Respondent to expend considerable resources in order to respond to it.¹⁰⁶¹

705. Further, the Respondent submits that its costs are reasonable in amount, noting that its costs "are as much as four times lower than the reported average costs of respondents in investment treaty disputes."¹⁰⁶²

706. The Respondent also states that the reasonableness of its costs is supported by the following four factors.¹⁰⁶³ First, the Respondent employed a number of methods to increase cost efficiencies by "coordinating its submissions", engaging "the same counsel team", "coordinating submission calendars and logistics with opposing counsel" among the six cases originally brought by a single Notice of Arbitration, and "agreeing to the same tribunal and joint hearing" in PCA Cases 2014-19, 2014-20, 2014-21 and 2014-22.¹⁰⁶⁴ Second, the case at hand has presented "a number of complex factual and legal issues".¹⁰⁶⁵ Third, the present case is "of significant importance" to the Czech Republic, given that "it could face a wave of additional claims if the decision in this case were favourable to Claimant."¹⁰⁶⁶ Fourth, the present proceedings have become lengthy because of a number of factors outside the Respondent's control, such as the EC's attempt to intervene and the Czech Republic's replacement of counsel due to the public procurement rules.¹⁰⁶⁷ Lastly, the Respondent claims that even "if [the Claimant] were to prevail on some or all of its claims", the Claimant should be required to bear its costs.¹⁰⁶⁸

707. In respect of costs incurred in the context of the briefing on the *Achmea* judgment, the Respondent argues that such briefing was "both necessary and entirely reasonable for the Czech Republic to request" given that it was a "landmark development" and that "the pursuit of EU law-based

¹⁰⁶⁰ Respondent's Submission on Costs, para. 18(b).

¹⁰⁶¹ Respondent's Submission on Costs, para. 18(c).

¹⁰⁶² Respondent's Submission on Costs, para. 10, *referring to* Matthew Hodgson, Allen & Overy LLP, *Costs in Investment Treaty Arbitration: The Case for Reform*, p. 1. *See also* Respondent's Updated Submission on Costs, para. 5.

¹⁰⁶³ Respondent's Submission on Costs, para. 11. *See also* Respondent's Updated Submission on Costs, paras. 9-10.

¹⁰⁶⁴ Respondent's Submission on Costs, para. 12.

¹⁰⁶⁵ Respondent's Submission on Costs, para. 13.

¹⁰⁶⁶ Respondent's Submission on Costs, para. 14.

¹⁰⁶⁷ Respondent's Submission on Costs, para. 15.

¹⁰⁶⁸ Respondent's Submission on Costs, paras. 17, 18, 19.

defenses [...] is even mandated by the overarching duty of loyalty binding the Czech Republic vis-à-vis the EU and its Member States”.¹⁰⁶⁹

708. As regards costs incurred in connection with the challenge to Mr. Beechey, the Respondent argues that it “was based on very real concerns”, “was not frivolous, vexatious, or dilatory” and “was pursued promptly and efficiently”.¹⁰⁷⁰

709. Finally, the Respondent objects to the Claimant claiming reimbursement for “IPVIC’s internal costs”, as there “is no reason for the Czech Republic to bear any share of the unspecified ‘internal’ costs incurred by a non-party to the proceedings.”¹⁰⁷¹

C. THE TRIBUNAL’S DECISION

710. The Tribunal will first detail the arbitration costs and the costs for legal representation and assistance of the Parties. It will then determine the apportionment of such costs.

1. Costs

711. Article 38 of the UNCITRAL Rules states that the Tribunal shall fix the costs of arbitration in its award, providing a list of items that may be claimed as such costs. These items include the fees and expenses of the Tribunal, the approved costs of witnesses and the reasonable costs for legal representation and assistance.

712. The Tribunal estimates that it has spent roughly equal amounts of time and effort on PCA Case Nos. 2014-19, 2014-20, 2014-21 and 2014-22. It therefore considers it reasonable to divide its costs and expenses, as well as the costs and expenses of the PCA, equally among the four arbitrations as follows.

713. The fees of Mr. Gary Born, co-arbitrator until his resignation on 24 June 2018, amount to EUR 31,912.50 and his expenses amount to EUR 749.72.

714. The fees of Mr. John Beechey CBE, co-arbitrator, amount to EUR 5,250. Mr. Beechey did not have any expenses.

715. The fees of Mr. Toby Landau QC, co-arbitrator, amount to EUR 39,135.42 and his expenses amount to EUR 653.49.

¹⁰⁶⁹ Respondent’s Updated Submission on Costs, paras. 6-7.

¹⁰⁷⁰ Respondent’s Updated Submission on Costs, para. 8.

¹⁰⁷¹ Respondent’s Updated Submission on Costs, para. 11.

716. The fees of Professor Hans van Houtte, presiding arbitrator, amount to EUR 64,442.50 and his expenses amount to EUR 121.50.
717. The costs of other tribunal expenses, including the costs of a court reporter, interpretation, technician, catering, printing and courier charges, and others total EUR 20,142.84.
718. PCA fees amount to EUR 36,500. The PCA incurred no expenses.
719. Each Party paid advances on costs in the amount of EUR 100,000, *i.e.*, a total advance of EUR 200,000.
720. As for the Parties' respective costs of legal representation and assistance, the Claimant's costs related to this arbitration amount to EUR 402,986.09. The Respondent's costs related to this arbitration amount to USD 1,246,817. Considering the complexity of this proceeding, the novel issues of fact and law that have arisen in its context, and the fact that the costs relate to four coordinated proceedings, both amounts appear reasonable.

2. Allocation of Costs

721. As correctly noted by both Parties, Article 40 of the UNCITRAL Rules provides as follows with regard to the allocation of costs:
1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

(a) The Costs of the Arbitration

722. As both Parties have recognised, Article 40 of the UNCITRAL Rules affords the Tribunal broad discretion in matters of costs. Pursuant to Article 40(1), the unsuccessful party shall "in principle" bear the costs of arbitration. Where no party clearly prevails, a common method to allocate costs is to take account of the relative success of the claims and defenses. Another criterion that tribunals frequently consider is the general conduct of a party throughout the proceedings.
723. As a first consideration, as far as the Parties' success on their respective cases is concerned, the Claimant has prevailed on jurisdiction, whereas the Respondent has prevailed on the merits.
724. As a second consideration, as far as the Parties' conduct is concerned, the Tribunal considers that

counsel on both sides conducted this arbitration fairly and with high professional standards. None of the facts that would clearly justify an adverse cost allocation, such as bad faith, abusive or unreasonable argument, obstructive or dilatory tactics etc., was present in this arbitration.

725. Accordingly, in line with the presumption contained in Article 40(1) of the UNCITRAL Rules and in the exercise of its discretion in matters of costs, the Tribunal concludes that the Respondent shall bear 25% and the Claimant shall bear 75% of the costs of arbitration.

726. The PCA shall therefore reimburse to the Respondent the unexpended balance of the deposit in the amount of EUR 1,092.03. The Claimant is requested to reimburse to the Respondent the amount of EUR 49,180.98 within six weeks of this Award.

(b) The Costs of Legal Representation and Assistance

727. Article 40(2) of the UNCITRAL Rules does not contain a presumption in favour of awarding the costs of legal representation and assistance of the successful party. Instead, it provides that in apportioning the costs, the Tribunal shall take account of “the circumstances of the case”.

728. The present arbitration was genuinely complex and raised difficult and novel issues of fact and law, the outcome of which was uncertain. In particular, the Tribunal considers that the Claimant’s claims, although ultimately unsuccessful, were reasonable.

729. In the exercise of its discretion, the Tribunal therefore finds that in the circumstances of the present case, it is fair for each Party to bear its own legal fees, costs, and expenses in this arbitration, including fees, costs, and expenses related to expert and fact witnesses.

VIII. THE TRIBUNAL'S DECISION

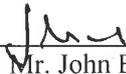
730. Based on the considerations set out above, the Tribunal rules as follows:

- (a) The Claimant's claims are dismissed.
- (b) The Claimant shall pay to the Respondent within six weeks of the delivery of this Award the sum of EUR 49,180.98.
- (c) Each Party shall bear its own costs of legal representation and assistance.
- (d) All other claims are dismissed.

[signature page follows]

Place of Arbitration: Geneva, Switzerland

Signed, this 15th day of May 2019



Mr. John Beechey CBE
Co-Arbitrator



Mr. Toby Landau QC
Co-Arbitrator



Professor Dr. Hans van Houtte
Presiding Arbitrator