

PCA CASE N° 2014-22

**IN THE MATTER OF AN ARBITRATION PURSUANT TO  
THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF  
GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE  
CZECH AND SLOVAK FEDERAL REPUBLIC FOR THE PROMOTION AND  
PROTECTION OF INVESTMENTS OF 10 JULY 1990  
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 -

**I.C.W. EUROPE INVESTMENTS LIMITED (UNITED KINGDOM)  
("Claimant")**

- and -

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

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**AWARD**

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**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**

<b>AA</b>	Appointing Authority
<b><i>Achmea</i> judgment</b>	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
<b>2010 Action Plan</b>	National Renewable Energy Action Plan 2010 of the Czech Ministry of Industry and Trade of July 2010
<b>Act on Income Tax</b>	Act No. 586/1992
<b>Act on Promotion</b>	Act No. 180/2005
<b>BIT</b>	Agreement between the Government of the United Kingdom of Great Britain and Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments of 26 October 1992
<b>Charter</b>	The Czech Republic's Charter of Fundamental Rights and Freedoms
<b>Claimant or ICW</b>	I.C.W. Europe Investments Limited
<b>Claimant's Submission on Costs</b>	Claimant's Submission on Costs dated 16 June 2017
<b>CJEU or ECJ</b>	Court of Justice of the European Union
<b>Claimant's Application</b>	Claimant's Application for Leave to Submit a Rejoinder on Jurisdiction and a Supplemental Report on Quantum, submitted by letter dated 11 November 2016
<b>Claimant's Comments on <i>Achmea</i></b>	Claimant's Comments on the impact of the <i>Achmea</i> judgment on the Tribunal's jurisdiction submitted on 9 June 2018
<b>Claimant's Reply on <i>Achmea</i></b>	Claimant's Reply on the impact of <i>Achmea</i> on the Tribunal's jurisdiction submitted on 17 December 2018
<b>Claimant's Supplemental Submission on Costs</b>	Claimant's supplemental submission on costs dated 11 January 2019
<b>Counter-Memorial</b>	Respondent's Counter-Memorial dated 9 October 2015
<b>CSR-Netherlands BIT</b>	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

<b>2001 Directive</b>	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
<b>2009 Directive</b>	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
<b>EC</b>	European Commission
<b>EC's Decision</b>	European Commission's decision in case "SA.40171 (2015/NN) — Czech Republic Promotion of electricity production from renewable energy sources" of 28 November 2016
<b>ECT</b>	Energy Charter Treaty of 16 April 1998
<b>Environmental Aid Guidelines</b>	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
<b>ERO</b>	Czech Energy Regulatory Office
<b>EUROSOLAR</b>	European Association for Renewable Energy
<b>Explanatory Report</b>	Explanatory Report on the Act on Promotion issued by the Czech Parliament on 12 November 2003
<b>FET</b>	Fair and Equitable Treatment
<b>First Notification</b>	Notification of the Czech Republic concerning the enactment of Act No. 165/2012, submitted to the European Commission on 8 January 2013
<b>FiT</b>	Fixed purchase prices or Feed-in-Tariffs
<b>Government or Respondent</b>	Government of the Czech Republic
<b>Green Bonuses</b>	Green Bonuses
<b>2001 Guidelines</b>	2001 Community Guidelines on State aid for environmental protection
<b>2008 Guidelines</b>	2008 Guidelines on State aid for environmental protection

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

<b>Reply</b>	Claimant's Reply Submission (including Rejoinder on Jurisdiction) dated 4 April 2016
<b>RES</b>	Renewable energy sources, including photovoltaic plants
<b>RES Regime</b>	The Czech Republic's regime for renewable energy sources
<b>Respondent's Comments on <i>Achmea</i></b>	Respondent's Comments on the impact of the <i>Achmea</i> judgment on the Tribunal's jurisdiction submitted on 17 May 2018
<b>Respondent's Reply on <i>Achmea</i></b>	Respondent's Reply on the impact of <i>Achmea</i> on the Tribunal's jurisdiction submitted on 3 December 2018
<b>Respondent's Submission on Costs</b>	Respondent's Submission on Costs dated 17 June 2017
<b>Respondent's Targeted Requests</b>	Respondent's Application for Leave to Make Further Targeted Requests for Production of Documents submitted on 17 July 2015
<b>Respondent's Updated Submission on Costs</b>	Respondent's Updated Submission on Costs dated 11 January 2019
<b>Response</b>	Respondent's Response to the Notice of Arbitration dated 23 May 2014
<b>5% rule or 5% limitation</b>	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
<b>Second Notification</b>	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
<b>Subsidies or Tariffs</b>	FiT and Green Bonuses
<b>TAL</b>	Tax Administration Law
<b>2020 Target</b>	The Czech Republic's Target for the contribution of electricity produced from RES by 2020
<b>Tax Holiday</b>	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**

<b>Ms. Kelyn Bacon QC</b>	Respondent's expert witness on EU State aid issues, barrister at Brick Court Chambers.
<b>Mr. David Borkovec</b>	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.
<b>Mr. Josef Fiřt</b>	Respondent's fact witness, Chairman of the Czech Republic's ERO from September 2004 to July 2011.
<b>Mr. Libor Frýzek</b>	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.
<b>Dr. Antón García</b>	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.
<b>Mr. Radek Haliček</b>	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.
<b>Mr. Wynne Jones</b>	Respondent's expert witness on the EU RES support framework and issues pertaining to industry economic regulation, Director of Frontier Economics.
<b>Dr. Petr Kotáb</b>	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.
<b>Mr. Pavel Koutný</b>	Claimant's fact witness, CFO and member of the Board of Directors of I.C.W. Europe Investments Limited
<b>Mr. Ladislav Minčíč</b>	Respondent's fact witness, First Deputy Minister of Finance of the Czech Republic from 2010 to 2014.
<b>Mr. Michael Peer</b>	Respondent's expert witness on the calculation of damages, accountant and partner at KPMG.
<b>Mr. Conor Quigley QC</b>	Claimant's expert witness on EU State aid issues, barrister at Serle Court.
<b>Mr. Geoffrey Senogles</b>	Claimant's expert witness on the calculation of damages, chartered accountant and Vice President at Charles River Associates.
<b>Dr. Pablo T. Spiller</b>	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 I.C.W. Europe Investments-Europa Nova Limited (“**ICW**” or the “**Claimant**”), a company incorporated under the laws of the United Kingdom, with its registered address at 788-790 Finchley Road, London, United Kingdom. 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 Skills 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 ICW 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 United Kingdom of Great Britain and Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments of 26 October 1992 (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.<sup>1</sup>
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

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<sup>1</sup> Memorial, Exhibits C-75 to C-122, Legal Authorities CLA-1 to CLA-57.

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 9 October instead of 7 October 2015.
65. On 9 October 2015, pursuant to the procedural calendar, the Respondent submitted its **Counter-Memorial** and accompanying documents.<sup>2</sup>
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 Redfern Schedule, attached as Annex I to Procedural Order No. 4.

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<sup>2</sup> Counter-Memorial, Exhibits **R-44 to R-182, R-184 to R-197, R-199 to R-208, R-210 to R-226**, Legal Authorities **RLA-1 to RLA-243**.

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 29 March 2016 and on an equivalent extension of the deadline for the Respondent's Rejoinder until 19 September 2016.
79. On 4 April 2016, the Claimant submitted its **Reply Submission (including Rejoinder on Jurisdiction)** (the "**Reply**"), and accompanying documents.<sup>3</sup>
80. On 19 September 2016, the Parties jointly agreed on a postponement of the deadline for the

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<sup>3</sup> Reply, Exhibits C-201 to C-249, Legal Authorities CLA-101 to C-157.

submission of the Respondent's Rejoinder Submissions until 29 September 2016.

81. On 29 September 2016, the Respondent submitted the **Respondent's Rejoinder** (the "**Rejoinder**") and accompanying documents.<sup>4</sup>
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,<sup>5</sup> 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**").<sup>6</sup> 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.<sup>7</sup> 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 the Claimant to submit seven further exhibits into the factual record as exhibits R-417 to R-422,

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<sup>4</sup> Rejoinder, Exhibits **R-61a**, **R-115a**, **R-63** to **R-383**, Legal Authorities **RLA-72a**, **RLA-244** to **RLA-322**, **RLA-324** to **RLA-325**, **RLA-330**

<sup>5</sup> Claimant's Rejoinder, Exhibits **C-256** to **C-283**, Legal Authorities **CLA-159**, **CLA-162** to **CLA-193**.

<sup>6</sup> Exhibits **R-411** to **R-416**; **C-284** to **C-288**.

<sup>7</sup> Exhibit **C-289**.

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. Pavel Koutný

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 Minčič

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,<sup>8</sup> 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 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

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

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.<sup>9</sup>
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

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<sup>9</sup> Letter of the Tribunal, 18 April 2018, p. 2.

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.<sup>10</sup>

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*, 3<sup>rd</sup> 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.

112. By letter of 28 August 2018, the Respondent expressed concerns pertaining to Mr. Beechey's

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

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 39.2 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.<sup>11</sup>

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 59.1 million (inclusive of pre-award interest);

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<sup>11</sup> Memorial, para. 534.

- (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.<sup>12</sup>

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 62.1 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.<sup>13</sup>

#### **B. THE RESPONDENT'S REQUESTS**

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

- (a) Declare ICW's claims barred for lack of jurisdiction;
- (b) In the event it exercises jurisdiction over any of ICW'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 ICW's claims and finds the Czech Republic liable, declare that ICW is not entitled to any damages;
- (d) Order ICW to pay all costs of the arbitration, including the totality of the Czech

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<sup>12</sup> Reply, para. 935.

<sup>13</sup> Rejoinder on Jurisdiction, para. 203.

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.<sup>14</sup>

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

- (a) Declare all of ICW's claims barred for lack of jurisdiction;
- (b) In the event it exercises jurisdiction over any of ICW'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 ICW's claims and finds the Czech Republic liable, declare that ICW is not entitled to any damages;
- (d) Order ICW 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.<sup>15</sup>

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<sup>14</sup> Counter-Memorial, para. 550.

<sup>15</sup> Rejoinder, para. 630.

#### 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**”).<sup>16</sup> The second incentive introduced an accelerated depreciation period for tax purposes for certain components of, *inter alia*, photovoltaic installations.<sup>17</sup>
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.<sup>18</sup> 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.”<sup>19</sup>
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.”<sup>20</sup> 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

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<sup>16</sup> 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.

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

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

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

<sup>20</sup> 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”<sup>21</sup> 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.”<sup>22</sup> 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.<sup>23</sup> 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.”<sup>24</sup>

133. In late 2003, the Czech Republic prepared draft legislation that was aimed at increasing the support provided to RES producers.<sup>25</sup> An explanatory report on the draft legislation was dated 12 November 2003 (“**Explanatory Report**”).<sup>26</sup> 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.<sup>27</sup>
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”.<sup>28</sup> 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”.<sup>29</sup>
135. Upon its accession to the EU, on 1 May 2004, the Czech Republic assumed all obligations

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<sup>21</sup> Article 3(1), 2001 Directive (**Ex. C-20**).

<sup>22</sup> Article 3(2), 2001 Directive (**Ex. C-20**).

<sup>23</sup> Article 3(3), 2001 Directive (**Ex. C-20**).

<sup>24</sup> Annex, 2001 Directive (**Ex. C-20**).

<sup>25</sup> Memorial, para. 37; Counter-Memorial, para. 13.

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

<sup>27</sup> 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**).

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

<sup>29</sup> 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**”).<sup>30</sup>

136. On 31 March 2005, the Czech Republic adopted the Act on Promotion, which entered into force on 1 August 2005.<sup>31</sup> 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**”).<sup>32</sup>

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.<sup>33</sup>

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**”). The

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

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

<sup>32</sup> 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**).

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

Green Bonus system, which was the one selected by the Claimant, entitled RES producers to sell electricity to third parties at a market price and granted them a financial bonus paid by the grid operator for each kilowatt-hour produced and sold.<sup>34</sup>

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

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<sup>34</sup> Memorial, para. 64; Counter-Memorial, para. 21.

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.<sup>35</sup> 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**”).<sup>36</sup> With regard to Green Bonuses, Article 4(3) stipulated that RES producers were allowed to switch freely from Green Bonuses to FiT and *vice versa*.<sup>37</sup>

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.<sup>38</sup> 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.”<sup>39</sup>
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

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

<sup>36</sup> Memorial, paras. 68-72; Counter-Memorial, para. 28.

<sup>37</sup> Memorial, para. 69, *referring to* Act No. 180/2005 Coll. on the promotion of electricity produced from renewable energy sources and amending certain acts, 31 March 2005 (**Ex. C-26**).

<sup>38</sup> Memorial, paras. 94-105, *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**).

<sup>39</sup> Hearing Transcript (27 February 2017), 21:7-11, *Claimant’s counsel referring to* Bursik M., *Obnovitelne zdroje: Novy zakon je príležitosť pro moderni obec*, 1 June 2005 (**Ex. C-32**).

6(1)(b)(1) of the Act on Promotion.<sup>40</sup> 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
- 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.<sup>41</sup>

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%.<sup>42</sup> It moreover applied the maximum 5% annual Tariffs reduction required by Section 6(4) of the Act on Promotion.<sup>43</sup> Furthermore, it amended the Technical Regulation in 2007, confirmed in 2009, to fix the estimated lifetime of new photovoltaic plants at 20 years.<sup>44</sup> The period during which the FiT would apply was correspondingly extended from 15 to 20 years.<sup>45</sup>

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.<sup>46</sup>

<sup>40</sup> 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.

<sup>41</sup> Technical Regulation (**Ex. R-6**).

<sup>42</sup> Memorial, para. 73; Counter-Memorial, para. 34, *referring to* Methodology for Determination of Purchasing Prices and Green Bonuses (**Ex. C-218/R-62**).

<sup>43</sup> Counter-Memorial, para. 66, *referring to* FiT Statement, para. 11.

<sup>44</sup> Memorial, para. 86 *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**).

<sup>45</sup> Counter-Memorial, para. 37.

<sup>46</sup> ERO Regulation No. 149/2009 Coll., Article 2(9) (**Ex. C-31**).

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.”<sup>47</sup>
148. 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**”).<sup>48</sup> 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.
149. 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.<sup>49</sup>
150. According to the Claimant, the ERO was still promoting the Incentive Regime in 2009. One of the Claimant’s employees attended a presentation delivered by Mr. Rostislav Krejcar on 18 September 2009 in Znojmo. The conclusions of that conference were made available to Mr. Pavel Koutný.<sup>50</sup> According to Mr. Koutný, slide 44 of the relevant presentation “clearly stresses that FiT and Green Bonuses apply over the expected lifetime of solar plants, set by the ERO itself in 20 years”.<sup>51</sup>

## **B. THE CLAIMANT’S INVESTMENT IN THE CZECH REPUBLIC**

151. On 19 July 2010, the Claimant acquired from Enkory a.s. 51% of the shares of Hutira FVE-

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<sup>47</sup> Memorial, paras. 87-88, *referring to* ERO Regulation No. 140/2009 Coll., Article 2(9) (**Ex. C-31**).

<sup>48</sup> Reply, paras. 6-10.

<sup>49</sup> 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-113**), in which Mr. Fiřt stated: “photovoltaic plants have seen a sharp decline in specific investment costs by approx. 30%.”

<sup>50</sup> Hearing Transcript (28 February 2017), 34:10-35:6.

<sup>51</sup> First Witness Statement of Mr. Pavel Koutný, dated 24 June 2015 (“**First Koutný Statement**”), para. 26, *referring to* ERO presentation by Mr. Rostislav Krejcar, 18 September 2009 (**Annex V to First Koutný Statement**).

Omice a.s. (“**Hutira**” or “**SPV**”) for CZK 1,020,000<sup>52</sup>, which by that time had already entered into a grid connection agreement.<sup>53</sup> According to the Claimant the investment is “sunk” when the SPV is acquired and when the Engineering, Procurement and Construction (“**EPC**”) contract is concluded “so that the Claimant puts the money in the project”.<sup>54</sup> Hutira entered into the EPC contract on 2 August 2010.<sup>55</sup>

152. On 13 September 2010, the Claimant increased its shareholding in the SPV to 76%, acquiring a further 25% share in it from Hutira Omice s.r.o. for CZK 5,000,000.<sup>56</sup> The investment was made with a view to constructing a solar plant in Omice, South Moravia, with a capacity of MW 1.052.
153. The construction of the solar plant was financed by shareholder loans provided by the Claimant, on the basis of six agreements for a total of CZK 25,500,000,<sup>57</sup> and a CZK 54,131,000 senior bank loan provided by Komerční banka a.s. of 29 October 2010.<sup>58</sup> On 25 October 2010, the Claimant and the SPV entered into a further loan agreement, which provided for a further financing of CZK 10,000,000, increasing the total loan to the SPV to CZK 35,500,000.<sup>59</sup> On 20 December 2012, the Claimant subscribed subordinated bonds with maturity on 20 December 2027 issued by the SPV for an amount of CZK 34,162,000, which was set-off against the amount owed by the SPV to the Claimant.<sup>60</sup> On 18 November 2013, the Claimant acquired from Hutira

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<sup>52</sup> Memorial, para. 115, *referring to* Agreement on transfer of securities between Enkory, a.s., as seller, and the Claimant, as buyer, 19 July 2010 (**Ex. C-89**).

<sup>53</sup> Grid Connection Agreement, 26 May 2010 (**Ex. C-106**).

<sup>54</sup> Hearing Transcript (27 February 2017), 41:8-11 (Claimant’s opening statement).

<sup>55</sup> EPC contract, 2 August 2010 (**Ex. C-105**).

<sup>56</sup> Memorial, para. 115, *referring to* Agreement on transfer of securities between Hutira Omice s.r.o., as seller, and the Claimant, as buyer, 13 September 2010 (**Ex. C-90**).

<sup>57</sup> Memorial, para. 118, *referring to* Loan agreements between the Claimant, as lender, and the SPV, as borrower, 28 May 2010 (**Ex. C-92**); 22 June 2010 (**Ex. C-93**); 19 July 2010 (**Ex. C-94**); 11 August 2010 (**Ex. C-95**); 13 September 2010 (**Ex. C-96**); and 21 September 2010 (**Ex. C-97**).

<sup>58</sup> Memorial, para. 117, *referring to* Loan agreement between Komerční banka a.s. and Hutira Fve-Omice a.s. (**Annex II to First Koutný Statement**).

<sup>59</sup> Memorial, para. 119, *referring to* Loan agreement between the Claimant, as lender, and the SPV, as borrower, 25 October 2010 (**Ex. C-98**); Amendment to the loan agreement of 25 October 2010 between the Claimant as lender and the SPV, as borrower, 21 March 2011 (**Ex. C-99**).

<sup>60</sup> Memorial, para. 120, *referring to* Agreement on subscription of subordinated bonds between the Claimant, as subscriber, and the SPV, as issuer, 20 December 2012 (**Ex. C-100**); Protocol of handover of the subordinated bonds issued by the SPV, 20 December 2012 (**Ex. C-101**); Set-off agreement between the Claimant and the SPV, 20 December 2012 (**Ex. C-102**).

Omice s.r.o. the remaining 24% of the SPV's shares for CZK 3,800,000, thereby becoming the sole shareholder.<sup>61</sup>

154. 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.<sup>62</sup>

155. The Claimant's solar plant was finished and the licensing process completed in October 2010.<sup>63</sup> Subsequently, the SPV obtained the energy license and concluded the Agreement on the Payment of Green Bonuses with E.ON Distribuce a.s.<sup>64</sup>

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

156. 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.<sup>65</sup> In May 2009, a temporary government led by the new Prime Minister Jan Fischer was sworn in.<sup>66</sup> 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".<sup>67</sup> 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.<sup>68</sup>

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<sup>61</sup> Memorial, para. 121, *referring to* Agreement on transfer of securities between Hutira Omice s.r.o., as seller, and the Claimant, as buyer, 18 November 2013 (**Ex. C-103**).

<sup>62</sup> Memorial, paras. 122-128.

<sup>63</sup> Memorial, para. 116, *referring to* Excerpt from the SPV's commercial register, 29 April 2015 (**Ex. C-91**).

<sup>64</sup> Memorial, para. 129.

<sup>65</sup> Hearing Transcript (27 February 2017), 156:19-21.

<sup>66</sup> Hearing Transcript (27 February 2017), 156:19-21.

<sup>67</sup> Fischer Government Policy Statement (2009) (**Ex. R-130**).

<sup>68</sup> Hearing Transcript (27 February 2017), 156:21-157:3.

157. 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, which makes electricity more expensive for consumers.”<sup>69</sup> Therefore, as further reported by the Czech media, the ERO was “seeking ways to reduce the solar energy feed-in tariff dramatically.”<sup>70</sup> 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.”<sup>71</sup>
158. 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**”).<sup>72</sup> The 2009 Directive fixed the Czech Republic’s new target for the contribution of electricity produced from RES at 13% by 2020 (“**2020 target**”).<sup>73</sup> 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”.<sup>74</sup>
159. 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.<sup>75</sup> 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.<sup>76</sup> By letter dated 1 July 2009, Mr. Fiřt informed the Minister of

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<sup>69</sup> “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.

<sup>70</sup> “State wants to stop solar power plants boom” (e15.cz), 19 June 2009 (**Ex. R-310**).

<sup>71</sup> “State wants to stop solar power plants boom” (e15.cz), 19 June 2009 (**Ex. R-310**).

<sup>72</sup> 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**).

<sup>73</sup> Memorial, para. 33.

<sup>74</sup> Memorial, para. 32, *referring to* 2009 Directive, Preamble, para. 25 (**Ex. C-23**).

<sup>75</sup> Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009 (**Ex. C-113**); Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Hüner (Deputy Minister of Industry and Trade), 4 July 2008 (**Ex. C-112**); Letter from B. Němeček to R. Portužak, 10 August 2009 (**Ex. R-136**).

<sup>76</sup> Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Hüner (Deputy Minister of Industry and Trade), 4 July 2008 (**Ex. C-112**).

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.<sup>77</sup> Mr. Fiřt also stressed that the on-going growth in the photovoltaic 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.<sup>78</sup> In view of these considerations, Mr. Fiřt proposed to repeal the 5% rule so that the ERO would be allowed to adjust the FiT.<sup>79</sup> 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.<sup>80</sup>

160. 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.”<sup>81</sup>
161. 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.<sup>82</sup> 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

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<sup>77</sup> Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009 (**Ex. C-113**).

<sup>78</sup> Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009 (**Ex. C-113**).

<sup>79</sup> Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009 (**Ex. C-113**).

<sup>80</sup> Letter from B. Němeček to R. Portužák, 10 August 2009 (**Ex. R-136**).

<sup>81</sup> “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**).

<sup>82</sup> Letter from Mr. Portužák (MIT) to Mr. Němeček (ERO), 28 August 2009 (**Ex. R-145**).

- suits filed by investors against the Czech Republic on grounds of lost investment.”<sup>83</sup> 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 time” and would “exceed the time limit for ERO’s obligation to set purchasing prices for RES to be commissioned in 2010”.<sup>84</sup>
162. 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.<sup>85</sup> 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”.<sup>86</sup> 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.”<sup>87</sup>
163. 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.<sup>88</sup>
164. On the same day, during the Government’s press conference, Mr. Vladimír Tošovský (Minister of Industry and Trade) clarified that the Incentive Regime would remain unchanged for 2010. Mr. Tošovský 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.”<sup>89</sup>
165. In February 2010, the Czech national transmission system operator put a national moratorium on

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<sup>83</sup> Letter from Mr. Portužák (MIT) to Mr. Němeček (ERO), 28 August 2009 (**Ex. R-145**).

<sup>84</sup> Letter from Mr. Portužák (MIT) to Mr. Němeček (ERO), 28 August 2009 (**Ex. R-145**).

<sup>85</sup> 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-114**).

<sup>86</sup> 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-114**).

<sup>87</sup> 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-114**).

<sup>88</sup> Explanatory Report to Draft Act No. 137/2010 Coll. 16 November 2009 (**Ex. R-147**).

<sup>89</sup> Czech Government’s press conference, 16 November 2009 (**Ex. C-109**).

further reservation of capacity of the grid for future connections.<sup>90</sup>

166. 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 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.”<sup>91</sup>
167. 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.”<sup>92</sup> According to the Claimant, this amendment concerned only those plants that were connected to the grid after 2011.<sup>93</sup> Since the level of Green Bonuses was in principle fixed as the difference between FiT and the electricity market price, the abolition of the 5% break rule also affected the level of Green Bonuses.<sup>94</sup>
168. 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**”).<sup>95</sup> The 2010 Action Plan, *inter alia*, mentioned tax exemptions as part of the incentive scheme.<sup>96</sup> It also confirmed the FiT level for plants connected in 2010 and its 20-year duration of the guaranteed FiT.<sup>97</sup> 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

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<sup>90</sup> Counter-Memorial, paras. 78-80, *referring to* Letter from Mr. Fiřt to Mr. Tošovský, 1 July 2009 (**Ex. C-113**); and Fiřt Statement, para. 21.

<sup>91</sup> Letter from electricity companies (ČEZ, E.ON and PRE) to the Chamber of Deputies, 12 March 2010 (**Ex. R-152**).

<sup>92</sup> Act No. 137/2010 Coll. (**Ex. C-36**).

<sup>93</sup> Memorial, para. 135.

<sup>94</sup> Memorial, para. 136.

<sup>95</sup> 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.

<sup>96</sup> 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.

<sup>97</sup> National Renewable Energy Action Plan, published by the Ministry of Industry and Trade, July 2010, pp. 58-59 (**Ex. C-69**).

to the FiT.<sup>98</sup>

169. 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 regime.<sup>99</sup>
170. 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.<sup>100</sup> 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”.<sup>101</sup> 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”.<sup>102</sup>
171. 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.<sup>103</sup> 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”.<sup>104</sup>
172. On 20 October 2010, the Government stated on its website that the discussion regarding measures

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<sup>98</sup> 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.”

<sup>99</sup> “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**).

<sup>100</sup> Explanatory Report to Draft Act No. 330/2010 Coll., 15 September 2010 (**Ex. R-193**).

<sup>101</sup> Explanatory Report to Draft Act No. 330/2010 Coll., 15 September 2010 (**Ex. R-193**).

<sup>102</sup> Resolution of the Government of the Czech Republic from 22 September 2010 No. 681, with Submission Report (**Ex. R-212**).

<sup>103</sup> 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**).

<sup>104</sup> Article II, Government Document No. 145/10, Government proposal of an act amending the Act on Promotion (**Ex. R-317**).

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”.<sup>105</sup>

173. 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 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”.<sup>106</sup>

174. 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.<sup>107</sup> 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;<sup>108</sup>
- 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**”).<sup>109</sup> 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.<sup>110</sup> The rate of the Solar Levy was set at 26% and 28%

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<sup>105</sup> Government of the Czech Republic, “Electricity prices will increase by 5.5% at maximum” (vlada.cz), 20 October 2010 (**Ex. R-219**).

<sup>106</sup> Chamber of Deputies of the Parliament of the Czech Republic, Chamber Material No. 145/1 of 2010 (**Ex. R-352**).

<sup>107</sup> Explanatory Report to Draft Act No. 330/2010 Coll., 15 September 2010, p. 8 (**Ex. R-193**).

<sup>108</sup> Act 346/2010, 12 November 2010 (**Ex. R-28**).

<sup>109</sup> 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**).

<sup>110</sup> 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**).

for payments to solar energy producers respectively under the FiT system and under the Green Bonuses system respectively.<sup>111</sup>

175. In 2012-2013 the RES regime was further amended by Act No. 165/2012 Coll. and Act No. 310/2013 Coll.
176. 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**”).<sup>112</sup> 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.<sup>113</sup> However, as Hutira SPV has selected the Green Bonus system, the referenced provision does not apply to ICW’s investment.<sup>114</sup> 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.<sup>115</sup> Third, Act No. 165/2012 introduced certain recycling fees for the disposal of photovoltaic panels.<sup>116</sup> At the same time, the New Act on Promotion did not affect the tariffs guaranteed to the existing installations under the Act on Promotion.<sup>117</sup>
177. 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.<sup>118</sup>
178. On 5 November 2013, the Czech Deputy Minister of Industry and Trade, Mr. Pavel Šolc,

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<sup>111</sup> 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**).

<sup>112</sup> Act No. 165/2012 Coll. (**Ex. C-39**).

<sup>113</sup> Memorial, para. 156.

<sup>114</sup> Counter-Memorial, para. 237.

<sup>115</sup> Memorial, para. 156; Counter-Memorial, para. 156.

<sup>116</sup> Memorial, para. 157; Counter-Memorial, paras. 238-239.

<sup>117</sup> Memorial, para. 153; Counter-Memorial, para. 235.

<sup>118</sup> Article 1(9), Act No. 310/2013 Coll. (**Ex. C-111**).

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, which would have an adverse effect on the market.<sup>119</sup>

179. 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.”<sup>120</sup>
180. 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.<sup>121</sup> 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.<sup>122</sup>
181. 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.<sup>123</sup> 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.<sup>124</sup>

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

182. Following the introduction of the Solar Levy and the abolition of the Income Tax Provisions, a

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<sup>119</sup> Memorial, para. 166, *referring to* announcement of 5 November 2013 by the then Czech Deputy Minister of Industry and Trade Mr. Pavel Šolc (**Ex. C-72**).

<sup>120</sup> Memorial, para. 167, *referring to* Policy Statement, 14 February 2014 (**Ex. C-73**).

<sup>121</sup> Reply, para. 245, *referring to* various ERO Price Decisions.

<sup>122</sup> Reply, para. 246, *referring to* ERO Price Decision No. 5/2015 of 19 November 2015 (**Ex. C-230**).

<sup>123</sup> Reply, para. 253, *referring to* Government Regulation No. 402/2015 Coll., 21 December 2015 (**Ex. C-239**).

<sup>124</sup> Reply, para. 253, *referring to* ERO Price Decision No. 9/2015, 29 December 2015 (**Ex. C-241**).

group of Czech senators (“**Petitioners**”) brought a challenge to the Czech Constitutional Court, seeking the annulment of these measures.<sup>125</sup>

183. The Petitioners asserted that these measures violated a number of Czech and international legal 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.<sup>126</sup> 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.<sup>127</sup>

184. 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.<sup>128</sup>

185. 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.<sup>129</sup>

186. 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.<sup>130</sup>

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

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<sup>125</sup> Czech Constitutional Court, Case No. Pl. ÚS 17/11, 15 May 2012, paras. 88-89 (**Ex. CLA-15/R-110**) (“**May 2012 Constitutional Court Judgment**”).

<sup>126</sup> May 2012 Constitutional Court Judgment, para. 2 (**Ex. CLA-15/R-110**).

<sup>127</sup> May 2012 Constitutional Court Judgment, para. 6 (**Ex. CLA-15/R-110**).

<sup>128</sup> May 2012 Constitutional Court Judgment, para. 8 (**Ex. CLA-15/R-110**).

<sup>129</sup> May 2012 Constitutional Court Judgment, paras. 14-22 (**Ex. CLA-15/R-110**).

<sup>130</sup> May 2012 Constitutional Court Judgment, paras. 88-89 (**Ex. CLA-15/R-110**).

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.<sup>131</sup>

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

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.<sup>132</sup>

189. 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.<sup>133</sup> 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 Procedural Code.<sup>134</sup>

190. 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.<sup>135</sup>

191. 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.<sup>136</sup>

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<sup>131</sup> May 2012 Constitutional Court Judgment, para. 86 (**Ex. CLA-15/R-110**).

<sup>132</sup> May 2012 Constitutional Court Judgment, para. 85 (**Ex. CLA-15/R-110**).

<sup>133</sup> Counter-Memorial, para. 218.

<sup>134</sup> 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**).

<sup>135</sup> Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 17, 20 (**Ex. CLA-2**).

<sup>136</sup> “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**).

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

192. On 8 January 2013, the Czech Republic notified the EC that it had passed the New Act on Promotion (“**First Notification**”).<sup>137</sup>
193. 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 that, by virtue of an exemption, the incentives were still compatible with the internal market.<sup>138</sup>
194. 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**”).<sup>139</sup> 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.<sup>140</sup>
195. 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.<sup>141</sup>

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<sup>137</sup> Reply, para. 400.

<sup>138</sup> EC's Communication on EU State Aid Modernisation, 8 May 2012 (**Ex. R-83**).

<sup>139</sup> Reply, para. 404.

<sup>140</sup> Memorial, para. 52.

<sup>141</sup> EC Decision on State Aid, 28 November 2016 (**Ex. R-411**).

**V. THE JURISDICTION OF THE TRIBUNAL**

196. The Respondent argues that the Tribunal lacks jurisdiction over all claims brought by the Claimant.<sup>142</sup>
197. The Claimant contends that the Tribunal has jurisdiction over the claims it has brought.<sup>143</sup>
198. The Parties' respective arguments are set out in detail in the sections which follow.

**A. WHETHER THE CLAIMANT MADE A "FOREIGN" INVESTMENT WITHIN THE MEANING OF THE BIT AND THE ECT**

**1. The Respondent's Position**

199. The Respondent submits that Articles 1(a) of the BIT and 1(6) of the ECT require the existence of a "foreign investment", which in turn requires economic characteristics in the form of a contribution made from outside the host state.<sup>144</sup> The Respondent, relying upon the decisions in *Nova Scotia Power Incorporated (Canada) v. Venezuela*<sup>145</sup> and *Standard Chartered Bank v. Tanzania*,<sup>146</sup> argues that for the investment to be protected and for the Tribunal to exercise jurisdiction, the above requirements must be satisfied, lest an abuse of process occurs, as held in *Phoenix Action Ltd. v. Czech Republic*.<sup>147</sup>
200. The Respondent argues that the Claimant's interest in Hutira SPV constitutes a purely domestic investment, not protected by either the ECT or the BIT, given that it was made by a domestic investor through a "foreign shell company".<sup>148</sup>
201. The Respondent alleges that the Claimant has no substantive ties with the United Kingdom, its place of registration, and that the identity of its shareholders has been withheld.<sup>149</sup> In this vein, the Respondent argues that the Claimant revealed only in the Reply that Mr. Pavel Koutný, a

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<sup>142</sup> Rejoinder, paras. 343, 347.

<sup>143</sup> Reply, paras. 490-492.

<sup>144</sup> Rejoinder, para. 465-472.

<sup>145</sup> *Nova Scotia Power Incorporated (Canada) v. Venezuela*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award, 30 April 2014, para. 82 ("*Nova Scotia*") (Ex. RLA-304).

<sup>146</sup> *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 232 ("*Standard Chartered Bank*") (Ex. RLA-308).

<sup>147</sup> Rejoinder, paras. 473-474, referring to *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 135-141, 144 ("*Phoenix*") (Ex. RLA-1).

<sup>148</sup> Rejoinder, para. 461. Hearing Transcript (3 March 2017), 150:5-9.

<sup>149</sup> Rejoinder, para. 459.

Czech national, was the holder of all Hutira SPV bearer shares and the sole beneficial owner of ICW since 2005,<sup>150</sup> and that he purchased the shares using funds denominated in Czech currency, from a Czech bank account.<sup>151</sup>

202. In particular, the Respondent alleges that the Tribunal lacks jurisdiction, because ICW's investment is merely "disguised" as international.<sup>152</sup> As held by the Tribunal in *KT Asia Investment Group BV v. Kazakhstan*, a shell company's holding does not amount to a commitment sufficient to constitute an investment.<sup>153</sup> The Respondent observes that ICW, which serves merely as a "shell", was incorporated in 1998 and remained dormant until Mr. Koutný acquired its shares in 2005.<sup>154</sup> The Respondent further notes that ICW has its seat at 788-790 Finchley Road, London, United Kingdom, which serves not only as head office of the Claimant and domicile of Mr. Koutný, but also the registered seat of more than 30,000 companies.<sup>155</sup> The Respondent alleges that there is no evidence of any activity of ICW in the UK after 2005, or indeed ever since its incorporation.<sup>156</sup> Its only connections to the UK are its Finchley Road address in London and its use of nominee directors. The latter, however, appear to lack decision-making power, which rests with Mr. Koutný, as CFO and sole beneficial owner of the company.<sup>157</sup> The Respondent also points out that Mr. Koutný's residential and service addresses are in Prague.<sup>158</sup>

## 2. The Claimant's Position

203. The Claimant submits that its character as investor is to be determined solely by reference to the specific requirements set out in the ECT and the BIT. For this reason, the Claimant disavows the proposition that the object and purpose of investment treaties is to prevent tribunals from adjudicating disputes involving claimants controlled by nationals of the host state. Hence, the Czech nationality of the Claimant's beneficial owner is of no consequence in the present case,

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<sup>150</sup> Rejoinder, paras. 460, 475. Hearing Transcript (3 March 2017), 150:10-12.

<sup>151</sup> Rejoinder, para. 459-460.

<sup>152</sup> Rejoinder, para. 484. Hearing Transcript (3 March 2017), 150:5-9.

<sup>153</sup> Rejoinder, para. 485, referring to *KT Asia Investment Group BV v. Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paras. 1, 166, 178, 180, 206 ("*KT Asia*") (Ex. RLA-307).

<sup>154</sup> Rejoinder, paras. 476-477, 481.

<sup>155</sup> Rejoinder, paras. 477-478.

<sup>156</sup> Rejoinder, para. 482.

<sup>157</sup> Rejoinder, para. 483, referring to Second Witness Statement of Mr. Pavel Koutný Statement, dated 31 March 2016 ("**Second Koutný Statement**"), para. 14.

<sup>158</sup> Rejoinder, para. 483.

nor is the Claimant's character as investor affected by the substance of its economic connection with the United Kingdom.<sup>159</sup> This conclusion is further evidenced by the Respondent's own stance, since, in Czech investment treaty practice, specific language is required in order to exclude an entity lacking a substantial connection with its place of incorporation from treaty protection. In addition, the Claimant notes that ICW serves as the investment vehicle for various investments, which demonstrates, for the sake of completeness, that it is in fact an active company.<sup>160</sup>

204. Further, the Claimant argues that its investment falls within the broad definition of investment set out in the ECT, understood in its ordinary meaning, and that the test applicable thereunder differs from the standard applicable under the ICSID Convention. An "inherent meaning" requirement, in the Claimant's contention, lacks any basis in the text of the ECT and the UK BIT. In this vein, the Claimant maintains that the origin of the capital, a requirement for which no treaty foundation is provided, is irrelevant. Also, where relied upon, the inherent meaning test has been used to decline jurisdiction in cases involving investments in the form of one-off sales of goods, unlike the present case. In any case, even if the Tribunal were to accept the inherent meaning theory, the Claimant has satisfied the requirements, as it made a financial contribution.<sup>161</sup>

### **3. The Tribunal's Decision**

205. The Tribunal notes the Parties' disagreement as to whether the Claimant has made an investment within the meaning of Article 1(a) of the BIT and 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.
206. It is recalled that the Respondent relies primarily upon the decisions in *Nova Scotia*<sup>162</sup> and *Standard Chartered Bank*,<sup>163</sup> to argue that a contribution of foreign origin is required by the inherent meaning of the term "investment". The Claimant contests the existence and the relevance of an inherent meaning of investment. In the alternative, it submits that it made an

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<sup>159</sup> Rejoinder on Jurisdiction, paras. 156-166, *referring to Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 36 ("*Tokios Tokelès*") (Ex. CLA-159).

<sup>160</sup> Rejoinder on Jurisdiction, paras. 156-166, *referring to* Second Koutný Statement, paras. 13-14, 20-24, 26-45.

<sup>161</sup> Rejoinder on Jurisdiction, paras. 167-190. Hearing Transcript (27 February 2017), 98:13-19.

<sup>162</sup> *Nova Scotia*, para. 82 (Ex. RLA-304).

<sup>163</sup> *Standard Chartered Bank*, para. 232 (Ex. RLA-308).

investment which satisfies such an inherent conception by making an appropriate financial contribution.

207. 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 BIT or the ECT. The Tribunal reaches this conclusion on the basis of the text of the provisions of the BIT and the ECT.
208. It is accepted by all Parties that the interpretation of a treaty provision is governed by the customary international law rules as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Hence the first step of the interpretive exercise, , as provided in Article 31 of the VCLT, is to consider the ordinary meaning of the terms of the treaty, in their context and in the light of the treaty’s object and purpose.
209. Article 1(a) of the BIT and Article 1(6) of the ECT provide as follows:

**Article 1(a) of the BIT**

For the purposes of this Agreement:

(a) the term “investment” means every kind of asset belonging to an investor of one Contracting Party in the territory of the other Contracting Party under the law in force of the latter Contracting Party in any sector of economic activity and in particular, though not exclusively, includes:

(i) movable and immovable property and any other related property rights including mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, know-how and technical processes;

(v) business concessions conferred by law or, where appropriate under the law of the Contracting Party concerned, under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments within the meaning of this Agreement. The term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement;

**Article 1(6) of the ECT**

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.

210. As to Article 1(a) of the BIT, the Tribunal is not persuaded that this provision imposes a requirement that the funds of an investment be foreign in their origin. In particular, the Tribunal notes that paragraph (a) refers to "every kind of asset", regardless of the origin of the funds utilised for its acquisition. The only restriction imposed in paragraph (a) is that the asset in question is one "belonging to an investor". In this vein, the Tribunal considers that whether an investment belongs to an investor is independent of the question of the origin of the funds employed by an investor to acquire such investment. Furthermore, the nationality requirement set out in the part of the clause following "belonging" is confined to that of the investor, and thus, it does not support the proposition that funds must originate in either Contracting Party. These considerations are at least in part confirmed by the final sentence in Article 1(a) of the BIT, which emphasises that "all investments" which fall within the provision's scope of application are covered, regardless of the time of making of the respective investment.
211. Nor is the Tribunal 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) also 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”. Once again, the Tribunal considers that the question whether an investment is owned by an investor is a matter independent of the question of origin of the funds employed by an investor to acquire such investment. Furthermore, where the investor needs to be a national of another Contracting Party, the ECT does not require that the funds also come from another Contracting Party.

212. To sustain its arguments as to the meaning of the term “investment, the Respondent has relied upon a number of decisions, most prominently those adopted by the *Nova Scotia*, *Standard Chartered Bank*, *Phoenix* and *KT Asia* tribunals.
213. As for the decision in *Nova Scotia*, the Tribunal concurs with the Claimant’s observation that this decision went essentially to the question whether the dispute concerned a sale of goods, which could not be considered as an “investment”.<sup>164</sup> Its reasoning therefore is not applicable to the present circumstances.
214. As for *Standard Chartered Bank*, the tribunal in that arbitration found that the use of the verb “made” in Article I(a) of the Tanzania-UK BIT entailed an investor’s “active” role, “rather than simple passive ownership.”<sup>165</sup> 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 to be held applicable, such requirement does not have any bearing upon the origin of the funds employed by the investor.
215. The Tribunal notes that 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”.<sup>166</sup> 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, the Claimant’s incorporation took place before any dispute was foreseeable. The situation was 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.<sup>167</sup> Furthermore, unlike Article 1(a) of the BIT, Article 1 of the Czech Republic-Israel BIT includes among the definition of “investment” “assets invested in connection with economic activities by

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<sup>164</sup> *Nova Scotia*, para. 113 (Ex. RLA-304).

<sup>165</sup> *Standard Chartered Bank*, para. 232 (Ex. RLA-308).

<sup>166</sup> *Phoenix*, paras. 136 (Ex. RLA-1).

<sup>167</sup> *Phoenix*, paras. 138 (Ex. RLA-1).

an investor”. Thus, it follows that, in light of the timing of the Claimant’s incorporation, no abuse of process through the commencement of the present arbitration is involved.

216. In relation to *KT Asia*, the Tribunal notes that the tribunal undertook an inquiry into the meaning of “investment” under the ICSID Convention, which is not applicable to the present case. In addition, the parties in that matter had not contested that the “objective definition” of investment was applicable to both the BIT and the ICISD Convention.<sup>168</sup> In spite of the above aspects rendering the decision in *KT Asia* largely inapposite for present purposes, 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 the finding that no contribution had been made,<sup>169</sup> did not interpret the BIT so as to set out a requirement concerning the origin of funds. In this regard, the Claimant has argued that it made a financial contribution, and 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.
217. The Claimant, on its part mainly relying upon Czech treaty practice and the decision in *Tokios Tokelès*, argues that the Czech nationality of its beneficiary owner and the extent of its economic connection with the UK have no bearing upon the existence and scope of treaty protection under the BIT and the ECT. The Tribunal agrees and finds that, contrary to the Respondent’s contentions, the Claimant’s investment enjoys the protection of the BIT and the ECT.
218. Lastly, the Tribunal considered the Parties’ submissions regarding the alleged character of the Claimant as a shell company, in connection with the question whether the holding of such an entity is insufficient to constitute an investment over which the Tribunal can exercise jurisdiction. This question arises out of the Respondent’s allegation that the Claimant’s corporate structure entails no more than a holding, which cannot constitute an investment under the BIT.
219. The Tribunal’s observations regarding the general relevance of the decision in *KT Asia* above hold true in relation to this argument as well. The Tribunal adds to the aforementioned considerations that Article 1(a) of the BIT and Article 1(6) of the ECT neither require that an investment belongs to, or be owned by, an entity having a substantial connection with its place of incorporation, nor do they 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

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<sup>168</sup> *KT Asia*, para. 166 (Ex. CLA-163).

<sup>169</sup> *KT Asia*, para. 206 (Ex. CLA-163).

BIT and the ECT do not require that a substantial connection be established for a legal entity to be deemed an investor and for its investment to be protected.

220. For the foregoing reasons, the Tribunal finds that it has jurisdiction *ratione materiae* over the Claimant's investments.
221. Consequently, the Tribunal does not deem it necessary to address the Parties' submissions in the alternative, as well as those regarding the existence of an inherent meaning of investment and its applicability to the present case, if any. Indeed, according to the *chapeaux* of the provisions, the Tribunal is called upon to apply definitions created "[f]or the purposes of" the BIT and "[a]s used in" the ECT.

## **B. WHETHER THE RESPONDENT CONSENTED TO ARBITRATE CERTAIN BIT CLAIMS**

### **1. The Claimant's Position**

222. The Claimant contends that the Tribunal has jurisdiction over claims of breach of the BIT's fair and equitable treatment, full protection and security, and non-impairment provisions.<sup>170</sup>
223. These claims are brought under Article 2(2) of the BIT. Article 8(1) of the BIT (the investor-state arbitration provision) makes express reference to a number of articles of the treaty – but does not list amongst these Article 2(2).
224. The Claimant argues that, despite this omission, Article 8(1) does indeed cover Article 2(2) by virtue of the express reference to the broad umbrella clause contained in Article 2(3), under which the Respondent is under an obligation to respect the BIT in its entirety, including Article 2(2). This, so the Claimant contends, is confirmed by Articles 8(2) and 8(3).<sup>171</sup>
225. The Claimant submits that it would be inconsistent with the principle of *effet utile* to exclude the substantive standards set out in Article 2(2) from the scope of Article 8(1), as that would imply that the reference in Article 8(1) to Article 2(3) would in substance be only to a portion thereof and not to the full provision.<sup>172</sup> The Claimant also contends that, the Respondent is incorrect in invoking the *lex specialis* principle to argue that the specific language of the arbitration clause prevails over the general formulation of Article 2(3). According to the Claimant, there is no need

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<sup>170</sup> Reply, paras. 594-595.

<sup>171</sup> Reply, paras. 596-598. Hearing Transcript (27 February 2017), 105:4-23.

<sup>172</sup> Reply, para. 599. Hearing Transcript (27 February 2017), 105:24 to 106:12.

to resort to the *lex specialis* principle when it is possible to reconcile the language of the arbitration clause with the broad umbrella clause.<sup>173</sup>

226. Furthermore, the Claimant argues that no reliance should be placed on the preparatory works of the BIT, given the primarily textual character of treaty interpretation, and the fact that the memoranda relied upon by the Respondent do not address the precise scope of Article 8(1).<sup>174</sup> The Claimant also considers that the decision in *Nagel v. Czech Republic* is irrelevant since, despite having held inadmissible fair and equitable treatment and non-impairment claims under the BIT, it did not address the scope of Article 2(3) *in fine* of the BIT.<sup>175</sup>
227. The Claimant submits, in any event, that the Tribunal has jurisdiction by virtue of Article 2 of the BIT, whereby UK nationals such as the Claimant are entitled to most favourable treatment, including pursuant to the Netherlands-Czech Republic BIT, which in turn provides for arbitration of fair and equitable treatment and non-impairment claims.<sup>176</sup> The Claimant argues that the Respondent's contention that the MFN clause in the BIT only creates obligations under domestic law, lacks support in any authority and would deprive the MFN clause of any practical effect. To avoid this result, the expression "under its law" should be understood as encompassing international law incorporated into Czech law.<sup>177</sup> In this vein, to the extent that the MFN provision dealt with in *Daimler Financial Services AG v. Argentina* guaranteed MFN treatment in "its territory", that case is, according to the Claimant, inapposite.<sup>178</sup>
228. The Claimant further submits that, in light of several decisions confirming their applicability to procedural matters, and the difficulty of distinguishing between procedure and substance, there is no basis to exclude the applicability of MFN clauses to procedural matters.<sup>179</sup>

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<sup>173</sup> Reply, para. 600.

<sup>174</sup> Reply, para. 601.

<sup>175</sup> Reply, para. 602, referring *William Nagel v. Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, para. 271 (**Ex. RLA-192**) ("*Nagel*").

<sup>176</sup> Reply, paras. 603-604.

<sup>177</sup> Reply, para. 605. Hearing Transcript (27 February 2017), 107:16-23.

<sup>178</sup> Reply, para. 606, referring to *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 228 (**Ex. RLA-144**) ("*Daimler*"). Hearing Transcript (27 February 2017), 106:13-24.

<sup>179</sup> Reply, para. 608.

## 2. The Respondent's Position

229. The Respondent argues that all claims under the BIT fall outside the scope of its consent to arbitration.<sup>180</sup>
230. With regard to the Claimant's contention that the contested measures are in breach of obligations under Article 2(2) of the BIT, the Respondent argues that claims concerning such obligations cannot be brought under the UK BIT. In accordance with the principle *expressio unius est exclusio alterius* and as held by the tribunal in *Nagel*, obligations under Article 2(2) are not included in the "closed list of obligations" capable of submission to investor-State arbitration set out in Article 8(1) of the BIT.<sup>181</sup>
231. On the Respondent's analysis, contrary to the Claimant's arguments, neither Article 8(1) nor the MFN clause expressly or in any other way authorizes arbitration of claims regarding Article 2(2) of the UK BIT.<sup>182</sup>
232. As for the Claimant's submission that Article 2(2) claims are indirectly authorized by Article 8(1), the Respondent argues that this is based on the proposition that the second sentence of Article 2(3) operates as a broad umbrella clause encompassing violations of all substantive obligations under Article 2 and of every other provision of the BIT. But on the Respondent's analysis, this proposition is "illogical".<sup>183</sup> Article 2(3) provides only that where a contract between an investor and a host State is concluded, the host State is bound by both the BIT and the contract.<sup>184</sup> The Respondent argues that an "umbrella" clause is a treaty provision that incorporates *external* obligations within the treaty's sphere of protection. But the obligations that the treaty creates are already under the treaty's protection; a separate clause is not necessary to make those obligations binding. If the Contracting State Parties had intended to refer in Article 8(1) to all of the substantive obligations contained in Article 2, the shortest—and simplest—way to do this, according to the Respondent, would have been to use the words "Article 2." There is no basis to explain the use of a longer term (*i.e.*, Article 2(3)) as shorthand for a shorter term (*i.e.*, Article 2).<sup>185</sup> Nor does the reference in Article 8(1) to Article 2(3) serve as a basis for claims regarding any BIT obligation, contrary to Claimant's interpretation, since if this were so, the

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<sup>180</sup> Rejoinder, paras. 343, 486(2). Hearing Transcript (3 March 2017), 148:17-20.

<sup>181</sup> Rejoinder, paras. 440-441, *referring to Nagel*, para. 271 (**Ex. RLA-192**).

<sup>182</sup> Rejoinder, para. 442. Hearing Transcript (3 March 2017), 149:20-23.

<sup>183</sup> Rejoinder, paras. 445-446.

<sup>184</sup> Rejoinder, para. 448.

<sup>185</sup> Rejoinder, para. 446.

express reference to three other provisions in Article 8(1) (in addition to Article 2(3)) would be redundant or without effect.<sup>186</sup> This interpretation, according to the Respondent, defies logic and is at odds with the intention of the Parties.<sup>187</sup> In contrast, the Respondent's logical interpretation gives full effect to the provision, in accordance with the principle of *effet utile*, and is consistent with the BIT's drafting history.<sup>188</sup>

233. As for the Claimant's argument that Article 2(2) claims are authorized by Article 3, the BIT's MFN clause, the Respondent argues that the Claimant's position contradicts established jurisprudence, which confines a tribunal's jurisdiction in respect of a list of treaty provisions to those provisions only and does not permit the expansion of jurisdiction to other treaty provisions through an MFN clause.<sup>189</sup>

234. Furthermore, in light of the text of Article 3 and the decision, in analogous circumstances, in *Daimler v. Argentina*, the right to pursue international law claims through arbitration, invariably taking place outside the host State's territory, falls outside the scope of the MFN clause.<sup>190</sup> Also, the proposition that the term "law" in Article 3 cannot be limited to domestic law, as foreign nationals are frequently granted rights only by treaty and rarely by ordinary legislation,<sup>191</sup> is not supported by any authority and is inconsistent with the Claimant's legitimate expectations argument.<sup>192</sup>

235. Thirdly, given that in UK treaty practice, the application of MFN treatment to international dispute resolution is expressly provided for in the treaty's text, the absence of such express reference in Article 3 entails that it falls outside the scope of the MFN clause.<sup>193</sup>

### **3. The Tribunal's Decision**

236. As already set out earlier, the Tribunal once again recalls that the interpretation of a treaty provision is governed by the customary international law rules as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. This is not disputed by the Parties.

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<sup>186</sup> Rejoinder, para. 447.

<sup>187</sup> Rejoinder, para. 446.

<sup>188</sup> Rejoinder, paras. 446-448.

<sup>189</sup> Rejoinder, para. 450, *referring inter alia to Nagel*, para. 271 (**Ex. RLA-192**).

<sup>190</sup> Rejoinder, paras. 453-454, *referring to Daimler*, paras. 225, 226 (**Ex. RLA-144**).

<sup>191</sup> Rejoinder, para. 456.

<sup>192</sup> Rejoinder, para. 456.

<sup>193</sup> Rejoinder, paras. 456-458, *referring to various other BITs to which the UK is a Contracting Party*.

237. Article 8 of the BIT, entitled “Settlement of Disputes between an Investor and a Host State”, provides as follows:

“(1) Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four months from written notification of a claim, be submitted to arbitration under paragraph (2) below if either party to the dispute so wishes.

(2) Where the dispute is referred to arbitration, the investor concerned in the dispute shall have the right to refer the dispute either to:

(a) an arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement or established and conducted under the Arbitration Rules of the United Nations Commission on International Trade Law; the parties to the dispute may agree in writing to modify these Rules, or

(b) the Institute of Arbitration of the Chamber of Commerce of Stockholm, or

(c) the Court of Arbitration of the Federal Chamber of Commerce and Industry in Vienna.

(3) The arbitrator or arbitral tribunal to which the dispute is referred under paragraph (2) shall, in particular, base its decision on the provisions of this Agreement.”

238. Pursuant to Article 8(1), the categories of disputes which “shall [...] be submitted to arbitration” are expressly limited to those which: (i) [arise] “between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement in relation to an investment of the former”; and (ii) “have not been amicably settled” once “a period of four months from written notification of a claim” has elapsed.

239. Therefore, under Article 8(1) of the BIT, the first condition which a claim has to meet to be capable of submission to arbitration is that it concerns a breach of an obligation under “Articles 2(3), 4, 5 and 6” of the BIT. In this regard, the Tribunal agrees with the conclusions reached by the tribunal in *Nagel*, which held that “Article 8(1) only states that disputes under Articles 2(3), 4, 5 and 6 may be submitted to arbitration and there is nothing in the text to indicate that the arbitration may also include other questions arising under the Treaty.”<sup>194</sup> Likewise, the Tribunal agrees with the stance adopted by the tribunal in *WNC Factoring*, which held that “[t]he meaning of Article 8(1) is clear” and that “[t]he only obligations that may be subject of arbitration are those contained in the specified articles, including Article 2(3).”<sup>195</sup> An interpretation to the

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<sup>194</sup> *Nagel*, para. 271 (Ex. RLA-192).

<sup>195</sup> *WNC Factoring*, para. 353 (Ex. RLA-348).

effect that Article 8(1) encompasses claims concerning obligations beyond those under “Articles 2(3), 4, 5 and 6” would obviously render the detailed specification of articles in Article 8(1) “superfluous”, as the *WNC Factoring* tribunal found.<sup>196</sup> The Tribunal therefore agrees with the Respondent’s reliance on the principle of *effet utile* in connection with the interpretation of Article 8(1) of the BIT.<sup>197</sup>

240. The issue then is whether Article 2(3) can be interpreted as encompassing obligations under Article 2(2), among others, so as to bring the latter within the scope of the consent to arbitration in Article 8(1).

241. Article 2(3), entitled “Promotion and Protection of Investment”, reads:

(3) Investors of one Contracting Party may conclude with the other Contracting Party specific agreements, the provisions and effect of which, unless more beneficial to the investor, shall not be at variance with this Agreement. Each Contracting Party shall, with regard to investments of investors of the other Contracting Party, observe the provisions of these specific agreements, as well as the provisions of this Agreement.”

242. In the Tribunal’s view, Article 2(3) sets out a special regime within the BIT which governs the obligations of the Contracting Parties when a Contracting Party has concluded a “specific agreement” with an investor. The two sentences contained in paragraph (3) of Article 2, and the special rules they contain, have no application beyond the conclusion of such specific agreements.

243. In other words, none of the provisions contained in the two sentences in Article 2(3) is separable, as a matter of their interpretation and application. Rather, both are contingent upon the conclusion of a specific agreement, and govern the position with respect to investments of an investor in such circumstances.

244. In this vein, the Tribunal agrees with the propositions of the tribunal in *WNC Factoring*, to the effect that Article 2(3) “must be read [...] in its entirety” and that its second sentence, “does not sit apart as a separate requirement”.<sup>198</sup> This holds true for Article 2(3), first sentence. Also, without prejudice to the existence of two separate provisions, in each sentence of Article 2(3), the conclusion of a “specific agreement” is their common condition for application, in the absence of which none of the two provisions is applicable.

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<sup>196</sup> *WNC Factoring*, para. 353 (Ex. RLA-348).

<sup>197</sup> *WNC Factoring*, para. 353 (Ex. RLA-348).

<sup>198</sup> *WNC Factoring*, para. 354 (Ex. RLA-348).

245. More specifically, the first sentence of Article 2(3) sets out a prohibition and an implied permission, whereby, respectively, provisions in the specific agreements may not be “at variance” with the BIT and, if any provision in the specific agreement is “at variance”, such variance is permissible only if and to the extent that it is “more beneficial to the investor”. As articulated by the Respondent, a “specific agreement” according to this provision is a contract the content of which must not be less beneficial than the BIT.
246. The second sentence of Article 2(3) provides that the Contracting Parties are obliged to observe “the provision of these specific agreements, as well as the provisions of” the BIT. Importantly, the obligation under Article 2(3), second sentence, is applicable only in relation to the set of obligations of a Contracting Party to the BIT under provisions of a “specific agreement” in conjunction with the BIT. In this regard, the Tribunal also agrees with the Respondent that the purpose of the second sentence of Article 2(3) is to make clear that the host state is bound by both the BIT and the “specific agreement”.
247. The Tribunal also notes that, to the extent that the “specific agreement” contains obligations “equivalent or superior” to those under the BIT, obligations under the BIT may be binding upon the Contracting Party to the BIT not only *qua* the BIT but also *qua* the “specific agreement”, as suggested by the tribunal in *WNC Factoring*. It observed that “the Contracting Party has an obligation both to adhere to the specific agreement and to observe the BIT protections in so far as those protections are contained in the specific agreement”, in which case, for instance “if a specific agreement contained a protection tantamount to the FET standard, a tribunal would have jurisdiction to consider a breach of that standard”.<sup>199</sup> Nevertheless, since the Parties’ difference is not concerned with obligations binding upon the Respondent *qua* a specific agreement, no question arises as to obligations other than those under and *qua* the BIT and which are capable of submission to arbitration under Article 8(1).
248. It is worth noting that the award in *WNC Factoring* (which also concerned the UK-Czech Republic BIT) made clear that an “obligation in a specific agreement where that obligation is mirrored in the BIT but not captured by Article 8(1)” would bar a respondent from alleging lack of jurisdiction.<sup>200</sup> The Tribunal observes that this principle has no relevance in the present case, since no specific agreement has been relied upon by the Claimant.<sup>201</sup>

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<sup>199</sup> *WNC Factoring*, para. 356 (Ex. RLA-348).

<sup>200</sup> *WNC Factoring*, para. 356 (Ex. RLA-348).

<sup>201</sup> *WNC Factoring*, para. 362 (Ex. RLA-348).

249. The Tribunal has also taken into account certain grammatical features of the second sentence of Article 2(3). In particular, the Tribunal notes the use of the word “these”, in relation to “specific agreements”, and of the phrase “as well as”, which serves as a coordinating conjunction before “the Agreement”, *i.e.*, the BIT. The Tribunal considers that these features imply that obligations under “specific agreements” and the BIT are equally binding and, more importantly for present purposes, that the obligations of a Contracting Party for the purposes of Article 2(3), second sentence, are those which arise in connection with the specific agreement, namely under the provisions of the “specific agreement” in conjunction with, or “in addition to”, those under the provisions of the BIT. Therefore, in this particular context, the obligation to observe the provisions of the BIT is applicable only in conjunction with, and only to the extent that they are additional to, those under a specific agreement.
250. The Tribunal agrees with the conclusions reached by the tribunal in *WNC Factoring* that, in accordance with the ordinary meaning of the text of the provision, the use of “these” in the second sentence of Article 2(3) is intended as a reference to the provisions in the first sentence of Article 2(3) and imply a “*renvoi* to the scope given to ‘specific agreements’ in the first sentence”.<sup>202</sup> This analysis coincides with the Tribunal’s conclusion that the reference to “the provisions of this Agreement” in Article 2(3), second sentence, only applies to the extent that a specific agreement within the meaning of Article 2(3), first sentence, has been concluded. Such a *renvoi* is a feature of this specific regime within the BIT.
251. In conclusion, therefore, as put by the *WNC Factoring* tribunal, Article 2(3) “read in conjunction with Article 8(1) [...] cannot be intended to extend an arbitral tribunal’s jurisdiction to all other substantive obligations in the BIT”.<sup>203</sup>
252. It follows that on the Tribunal’s analysis, Article 2(3), second sentence, does not extend the Tribunal’s jurisdiction to all other BIT obligations, including obligations found in Articles 2(1) and 2(2). Therefore, the Tribunal rejects the Claimant’s contention that it has jurisdiction under Article 8(1), in conjunction with Article 2(3), of the BIT, over claims concerning obligations under Article 2(2) of the BIT.<sup>204</sup>

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<sup>202</sup> *WNC Factoring*, para. 317 (Ex. RLA-348).

<sup>203</sup> *WNC Factoring*, para. 353 (Ex. RLA-348).

<sup>204</sup> *WNC Factoring*, para. 362 (Ex. RLA-348), reaching a similar conclusion on the basis of the absence of a specific agreement in relation to alleged jurisdiction over an FET claim arising under Article 2(2) of the BIT.

253. The Tribunal turns now to the subsidiary submission of the Claimant and the related question of whether, pursuant to Article 3(1), it is entitled to MFN treatment, so as to be able to rely upon provisions of the Netherlands-Czech Republic BIT.

254. Article 3, which sets out the “National Treatment and Most-favoured-nation Provisions”, reads:

“(1) Each Contracting Party shall ensure that under its law investments or returns of investors of the other Contracting Party are granted treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.

(2) Each Contracting Party shall ensure that under its law investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, are granted treatment not less favourable than that which it accords to its own investors or to investors of any third State.”

255. The Tribunal observes, as noted by the *WNC Factoring* tribunal, that the differences of the Parties regarding MFN treatment concern “a dispute as to the application and interpretation of Article 3, which is not provided for in Article 8(1).”<sup>205</sup> Article 3, however, is not listed in Article 8(1). It follows, therefore, that the Tribunal lacks jurisdiction to consider any claim based upon Article 3 (which would include, inter alia, the question of whether the scope of its jurisdiction may be expanded by virtue of MFN treatment pursuant to this provision).

256. The Tribunal, in conclusion, finds that it lacks jurisdiction under Article 8(1) over claims under Article 2(2) of the BIT.

## **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**

257. 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.<sup>206</sup> The Respondent observes that the Claimant itself considered the Tax Incentives to be taxation measures<sup>207</sup> 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

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<sup>205</sup> *WNC Factoring*, para. 350 (Ex. RLA-348).

<sup>206</sup> Rejoinder, para. 343.

<sup>207</sup> Rejoinder, para. 344.

Measures”.<sup>208</sup>

258. 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”.<sup>209</sup>
259. 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;<sup>210</sup> (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;<sup>211</sup> (3) the Claimant has not explained why the use of domestic law would undermine the ECT’s purpose;<sup>212</sup> 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.<sup>213</sup>
260. 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 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,

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<sup>208</sup> Rejoinder, para. 348; Hearing Transcript (27 February 2017), 241:11-15.

<sup>209</sup> Rejoinder, paras. 349-353; Hearing Transcript (27 February 2017), 244:4-15.

<sup>210</sup> Rejoinder, para. 355; Hearing Transcript (27 February 2017), 245:2-12.

<sup>211</sup> Rejoinder, para. 356; Hearing Transcript (27 February 2017), 246:16-20.

<sup>212</sup> Rejoinder, para. 357.

<sup>213</sup> Rejoinder, paras. 358-360.

should be “levied only on the basis of the law.”<sup>214</sup> 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.<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup>

261. 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.<sup>218</sup> However, even if the Tribunal 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

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<sup>214</sup> Rejoinder, paras. 361-367 *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.

<sup>215</sup> Rejoinder, paras. 368-372, *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.

<sup>216</sup> Rejoinder, 373-374.

<sup>217</sup> Rejoinder, para. 374.

<sup>218</sup> Rejoinder, paras. 375-381; First Frýzek Report, para. 26; Second Frýzek Report, para. 30, Borkovec Report, paras. 27, 29-32; Kotáb Report, paras. 41, 47, 96, 100.

measure.<sup>219</sup> 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.

262. 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."<sup>220</sup> 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."<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup> In short, payment of the Solar Levy involves no "*quid pro quo*" in consideration for receiving the FiT.<sup>224</sup>
263. 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.<sup>225</sup> In this vein, the Respondent argues that the amount of the budget subsidy is not calculated by reference to the 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

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<sup>219</sup> Rejoinder, paras. 382-383; Borkovec Report, para. 23. *See also* Hearing Transcript (27 February 2017), 182:24-25.

<sup>220</sup> Rejoinder, para. 386; 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.

<sup>221</sup> Rejoinder, para. 387 *quoting from* R. Boháč, "Tax Revenues of Public Budgets in the Czech Republic" (excerpt), p. 225 (**Ex. R-318**).

<sup>222</sup> Rejoinder, para. 387, *referring to* Act on Promotion, Article 4(4) (**Ex. R-5**).

<sup>223</sup> Rejoinder, para. 387; Hearing Transcript (27 February 2017), 186:10-13.

<sup>224</sup> Rejoinder, para. 387.

<sup>225</sup> Rejoinder, para. 389, *referring to* Article 1(8)-(9), 1(12), Act 310/2013 Coll. (**Ex. C-111**); 2014 Report on the Activities and Finances of ERO, 15 March 2016, p. 23 (**Ex. R-270**).

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.<sup>226</sup>

264. 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".<sup>227</sup> 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.<sup>228</sup>
265. 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.<sup>229</sup> 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.<sup>230</sup>
266. 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.<sup>231</sup> In particular relation to the decisions of the Supreme 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

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<sup>226</sup> Rejoinder, para. 388.

<sup>227</sup> Rejoinder, paras. 390-392.

<sup>228</sup> Rejoinder, para. 392.

<sup>229</sup> Rejoinder, paras. 393-396, *referring to* Kotáb Report, paras. 56-60; First Frýzek Report, paras. 25, 26(f).

<sup>230</sup> 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-10**) ("*Yukos*"); May 2012 Constitutional Court Judgment, para. 67 (**Ex. CLA-15/R-110**). *See also* Hearing Transcript (27 February 2017), 246:24 to 247:4.

<sup>231</sup> Rejoinder, paras. 402-404, *referring to* Haliček Report, paras. 47-48; 2 May 2012 Constitutional Court Judgment, paras. 46, 59, 60, 64 (**Ex. CLA-15/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**).

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.<sup>232</sup>

267. 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*.<sup>233</sup>

268. 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.<sup>234</sup> 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.<sup>235</sup> 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.<sup>236</sup> 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 find the Solar Levy to be a confiscatory tax.<sup>237</sup> 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

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<sup>232</sup> Rejoinder, paras. 405-415, *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.

<sup>233</sup> Rejoinder, paras. 416-419.

<sup>234</sup> Rejoinder, paras. 420-421, *referring to* Kotáb Report, para. 39; First Witness Statement of Ladislav Minčič Statement, dated 19 September 2016 (“**First Minčič Statement**”), para. 6.

<sup>235</sup> Rejoinder, paras. 422-423, *referring to* Minčič Statement, para. 14.

<sup>236</sup> Rejoinder, para. 424, *referring to* Kotáb Report, paras. 65.

<sup>237</sup> Rejoinder, para. 425, *referring to* Kotáb Report, para. 63.

that there is no requirement that a measure be indefinite in order to qualify as a tax.<sup>238</sup> 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.<sup>239</sup>

269. 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.<sup>240</sup> 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;<sup>241</sup> that, in any case, the Energy Charter Secretariat 2015 publication does not suggest that taxes must be imposed in good faith,<sup>242</sup> and that, even if it were accepted that bad faith was involved, such conduct would only be relevant to the merits,<sup>243</sup> 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.<sup>244</sup> To conclude, the Respondent requests that the Tribunal decline jurisdiction in relation to the Claimant's ECT claims.

## 2. The Claimant's Position

270. 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 domestic law.<sup>245</sup>
271. 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

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<sup>238</sup> Rejoinder, paras. 426-427, *referring to* Kotáb Report, para. 68.

<sup>239</sup> Rejoinder, para. 428.

<sup>240</sup> Rejoinder, para. 431, *referring to* Minčič Statement, para. 15.

<sup>241</sup> Rejoinder, para. 432, *quoting Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, para. 125 (Ex. RLA-30).

<sup>242</sup> Rejoinder, para. 430.

<sup>243</sup> Rejoinder, para. 429, *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).

<sup>244</sup> Rejoinder, paras. 433-438, *referring to Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), 26 June 2009, paras. 430, 484, 501 (Ex. RLA-286) ("*Invesmart*").

<sup>245</sup> Reply, paras. 500-504; Rejoinder on Jurisdiction, paras. 15-16, 21-22, 131-132.

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.<sup>246</sup>

272. 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.<sup>247</sup> 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.<sup>248</sup> 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.<sup>249</sup>
273. 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*,<sup>250</sup> *RosInvestCo UK Ltd. v. The Russian Federation*,<sup>251</sup> and *Quasar de Valores v. The Russian Federation*,<sup>252</sup> 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.<sup>253</sup> 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 tribunal’s jurisdiction over, a dispute arising out of such a measure.<sup>254</sup>
274. The Claimant submits that the Solar Levy is not a *bona fide* taxation measure,<sup>255</sup> since it was not

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<sup>246</sup> Reply, paras. 505-511.

<sup>247</sup> Rejoinder on Jurisdiction, paras. 22-23, 28-29.

<sup>248</sup> Rejoinder on Jurisdiction, paras. 25-27.

<sup>249</sup> Rejoinder on Jurisdiction, paras. 28-33.

<sup>250</sup> *Yukos (Ex. CLA-10)*.

<sup>251</sup> *Rosinvest (Ex. CLA-13)*.

<sup>252</sup> *Quasar (Ex. CLA-14)*.

<sup>253</sup> Reply, paras. 512-522, *referring, inter alia, to Yukos*, paras. 1430, 1431 (**Ex. CLA-10**).

<sup>254</sup> Rejoinder on Jurisdiction, paras. 13, 17-19, 42, 48-50.

<sup>255</sup> Reply, paras. 558-559; Rejoinder on Jurisdiction, paras. 9, 68-70, 88.

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.<sup>256</sup> 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.<sup>257</sup> 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.<sup>258</sup>

275. 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.<sup>259</sup>

276. 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 October<sup>260</sup> and 2 November 2010,<sup>261</sup> 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 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

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<sup>256</sup> Reply, paras. 523-524, 531; Rejoinder on Jurisdiction, paras. 9, 51.

<sup>257</sup> Rejoinder on Jurisdiction, paras. 34-38.

<sup>258</sup> Rejoinder on Jurisdiction, paras. 39-40.

<sup>259</sup> Rejoinder on Jurisdiction, paras. 52-56, *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.

<sup>260</sup> Rejoinder on Jurisdiction, paras. 61-62, *referring to* Minutes of the third meeting of the Coordination Committee of 15 October 2010, p. 4 (**Ex. C-110**).

<sup>261</sup> Rejoinder on Jurisdiction, paras. 61, 63, *referring to* Minutes of Session of the Economic Committee of the Chamber of Deputies of 2 November 2010, p. 5 (**Ex. C-121**).

enactment of the Solar Levy.<sup>262</sup>

277. 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.<sup>263</sup> 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.<sup>264</sup>
278. 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.<sup>265</sup>
279. 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 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,

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<sup>262</sup> Rejoinder on Jurisdiction, paras. 64-66, *referring to* Minčič Statement, para. 15.

<sup>263</sup> Rejoinder on Jurisdiction, para. 67, *referring to* Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 19-20 (**Ex. CLA-2**).

<sup>264</sup> Rejoinder on Jurisdiction, paras. 72-74, *referring to* Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 19-20 (**Ex. CLA-2**).

<sup>265</sup> Rejoinder on Jurisdiction, para. 110-121, *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-15/R-110**); Decision of the Czech Constitutional Court, Case No. 3211/13, 6 February 2014, para. 5 (**Annex 16 to First Frýzek Report**).

the question of a direct reduction of the FiT was not in issue.<sup>266</sup> 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.<sup>267</sup> In addition, the enactment of a direct reduction of the FiT would not have been more cumbersome than the introduction of the Solar Levy.<sup>268</sup>

280. 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,<sup>269</sup> 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.<sup>270</sup> 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.<sup>271</sup> 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.<sup>272</sup>

281. In addition, the Claimant further contends that the Solar Levy is not a tax under Czech law.<sup>273</sup> 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".<sup>274</sup>

282. 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,

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<sup>266</sup> Rejoinder on Jurisdiction, paras. 57-58, *referring to* Minutes of meeting of the Economic Committee of the Chamber of Deputies, 2 November 2010, pp. 3-4, 12 (**Ex. C-121**).

<sup>267</sup> Rejoinder on Jurisdiction, para. 59, *referring to* Minčič Statement, paras. 13, 16.

<sup>268</sup> Rejoinder on Jurisdiction, para. 60, *referring to* Minčič Statement, para. 16.

<sup>269</sup> Reply, paras. 525-529, *referring to* Minutes of meeting of the Economic Committee of the Chamber of Deputies, 2 November 2010, p. 5 (**Ex. C-121**).

<sup>270</sup> Reply, para. 530, *referring to* Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 19-20 (**Ex. CLA-2**).

<sup>271</sup> Reply, paras. 531, 595-596; Rejoinder on Jurisdiction, para. 75.

<sup>272</sup> Rejoinder on Jurisdiction, para. 12.

<sup>273</sup> Reply, paras. 532-533, 581; Rejoinder on Jurisdiction, paras. 133-134.

<sup>274</sup> Reply, paras. 534-538.

(5) intended to serve as income, and (6) paid for no specific purpose.<sup>275</sup> In light of these features, the Claimant puts forward a number of specific arguments, as broadly summarized below.

283. 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.<sup>276</sup> 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.<sup>277</sup>
284. 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”.<sup>278</sup> 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.<sup>279</sup>
285. 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.<sup>280</sup> 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.<sup>281</sup> This conclusion finds support in the decision of the Czech Supreme Administrative Court of 10 July 2014, which held that the Solar Levy was not a tax, but a *de facto* reduction of the FiT and Green Bonuses.<sup>282</sup> The decision, in the

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<sup>275</sup> Reply, paras. 539-543, 581.

<sup>276</sup> Reply, paras. 544-555, *referring to* Minutes of meeting of the Economic Committee of the Chamber of Deputies, 2 November 2010, p. 1 (**Ex. C-121**). *See also* Rejoinder on Jurisdiction, paras. 10-11.

<sup>277</sup> Rejoinder on Jurisdiction, paras. 97-101.

<sup>278</sup> Rejoinder on Jurisdiction, para. 94.

<sup>279</sup> Rejoinder on Jurisdiction, paras. 91-96.

<sup>280</sup> Rejoinder on Jurisdiction, para. 102.

<sup>281</sup> Reply, paras. 556-559.

<sup>282</sup> Reply, paras. 559-563, 595, *referring to* Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 5, 19-20 (**Ex. CLA-2**).

Claimant's submission, is thorough and highly authoritative, therefore dealing a fatal blow to the Respondent's argument.<sup>283</sup> 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.<sup>284</sup>

286. With respect to certain decisions of the Czech Supreme Administrative Court and the Constitutional Court relied upon by the Respondent,<sup>285</sup> 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.<sup>286</sup>

287. 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.<sup>287</sup> 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"<sup>288</sup> 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

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<sup>283</sup> Rejoinder on Jurisdiction, para. 107.

<sup>284</sup> Rejoinder on Jurisdiction, paras. 108-109, *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).

<sup>285</sup> Reply, paras. 564-573, *referring to* Decision of the Czech Constitutional Court, Case No. 2216/14, 13 January 2015, paras. 25, 33 (**Ex. CLA-16**); 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**).

<sup>286</sup> Reply, paras. 566, 572-573.

<sup>287</sup> Rejoinder on Jurisdiction, para. 105.

<sup>288</sup> Rejoinder on Jurisdiction, para. 104.

aspects.”<sup>289</sup>

288. Third, five further indicators of the non-tax nature of the Solar Levy exist:<sup>290</sup> (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;<sup>291</sup> (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;<sup>292</sup> (3) the Solar Levy was temporary, which further demonstrates the non-tax nature of the Solar Levy,<sup>293</sup> (4) the term “levy” was employed, instead of “tax”, without explanation,<sup>294</sup> and (5) the Solar Levy was not proportional, as it may have “strangling” or “liquidating” effects according to the Czech Constitutional Court.<sup>295</sup> 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.<sup>296</sup>
289. 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.<sup>297</sup> Even assuming that the definition set out in these cases is applicable, the Claimant argues that

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<sup>289</sup> Rejoinder on Jurisdiction, para. 104, *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**).

<sup>290</sup> Rejoinder on Jurisdiction, paras. 122-130.

<sup>291</sup> Reply, paras. 575, 580, *referring to* First Frýzek Report, paras. 46-47.

<sup>292</sup> Reply, paras. 576, 580, 588.

<sup>293</sup> Reply, paras. 577, 580.

<sup>294</sup> Reply, paras. 578, 580.

<sup>295</sup> Reply, para. 579, *referring to* Decision of the Czech Constitutional Court, 13 January 2015, Case No. ÚS 2216/14, para. 35 (**Ex. CLA-16**); May 2012 Constitutional Court Judgment, para. 88 (**Ex. CLA-15/R-110**).

<sup>296</sup> Rejoinder on Jurisdiction, para 124.

<sup>297</sup> Reply, paras. 582-583, *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-52**) (“*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.<sup>298</sup>

### **3. The Tribunal’s Decision**

290. 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,”<sup>299</sup> a proposition that the Respondent repeated at the Hearing<sup>300</sup> and that the Claimant did not challenge at any time.
291. 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.
292. 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.
293. 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 general terms of the ECT. The Respondent indeed does not dispute that it bears the burden of

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<sup>298</sup> Reply, paras. 584-589.

<sup>299</sup> Rejoinder, para. 348.

<sup>300</sup> 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.”).

proof that the Solar Levy constitutes a “tax” or “Taxation Measure” within the meaning of Article 21.

294. 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.
295. First, the Respondent’s primary contention is that the Tribunal “must look to the domestic law of the Czech Republic”<sup>301</sup> 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.
296. 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.<sup>302</sup> 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.”<sup>303</sup>
297. 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.”<sup>304</sup> 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, *prima facie*, only to those measures which constitute taxation measures within the legal order of

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<sup>301</sup> Rejoinder, paras. 354; Counter-Memorial, paras. 408-413.

<sup>302</sup> Reply, para. 522; Rejoinder, para. 350.

<sup>303</sup> Counter-Memorial, para. 396.

<sup>304</sup> 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).

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.)

298. 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.
299. 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.
300. 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).<sup>305</sup> 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,”<sup>306</sup> 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.<sup>307</sup>
301. There is no dispute that the Czech Supreme Administrative Court was the Czech Republic's

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<sup>305</sup> Decision of the Czech Supreme Administrative Court, 10 July 2014, para. 20 (Ex. CLA-2).

<sup>306</sup> Decision of the Czech Supreme Administrative Court, 10 July 2014, para. 19 (Ex. CLA-2).

<sup>307</sup> Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 19-20 (Ex. CLA-2).

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.<sup>308</sup> 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.<sup>309</sup>

302. 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.<sup>310</sup> 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."<sup>311</sup>
303. 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.
304. The Tribunal draws further comfort in reaching this conclusion from the fact that the Respondent itself contended, through its Ministry of Finance, that the Solar Levy was not a tax in proceedings

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<sup>308</sup> 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).

<sup>309</sup> 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-15/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**).

<sup>310</sup> Kotáb Report, para 81.

<sup>311</sup> Hearing Transcript (1 March 2017), 140:18-141:1.

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”<sup>312</sup> and that “from the material perspective, the introduced measures [including the Solar Levy] are considered a reduction of subsidy”<sup>313</sup> 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.

305. 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.<sup>314</sup> 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.<sup>315</sup> It is also undisputed that Article 11(5) of the Charter is applicable not only to taxes, but also to fees.<sup>316</sup> 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 in the present case.

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<sup>312</sup> 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**).

<sup>313</sup> Decision of the Czech Supreme Administrative Court, 10 July 2014, paras. 19-20 (**Ex. CLA-2**).

<sup>314</sup> Halíček Report, paras. 47-48, May 2012 Constitutional Court Judgment, paras. 46, 59, 60, 64 (**Ex. CLA-15/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**).

<sup>315</sup> First Frýzek Report, para. 38; Rejoinder, para. 370; 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.”).

<sup>316</sup> 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.

306. 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."<sup>317</sup> 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.<sup>318</sup> 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.
307. 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.
308. 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.
309. 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.
310. 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).<sup>319</sup> 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 taxation measures from certain provisions of the ECT does not strip the Contracting Parties from

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<sup>317</sup> Rejoinder, para. 377.

<sup>318</sup> 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.

<sup>319</sup> 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**).

one of their “most quintessential sovereign powers.”<sup>320</sup> 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.

311. 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.
312. 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.
313. 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,<sup>321</sup> and which were formulated and structured as taxation measures for a particular ulterior reason (such as, here, reducing the risk of legal challenges).
314. 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.<sup>322</sup> 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 fairly with each other, to represent their motives and purposes truthfully, and to refrain from

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<sup>320</sup> Hearing Transcript (27 February 2017), 245:7-12.

<sup>321</sup> *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-10**). 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-14**).

<sup>322</sup> 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.”).

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.”<sup>323</sup>

315. 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”<sup>324</sup> 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.

316. 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*.”<sup>325</sup>

(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.”<sup>326</sup>

(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 electricity consumers in the Czech Republic. This method – through the withholding

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<sup>323</sup> *Phoenix*, para. 107 (Ex. RLA-1).

<sup>324</sup> Article 2 of the ECT.

<sup>325</sup> 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).

<sup>326</sup> Minutes of the third meeting of the Coordination Committee, 15 October 2010, p. 4 (Ex. C-110).

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.*<sup>327</sup>

- (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.”<sup>328</sup>
- (e) Ministry of Finance opinion to Czech Constitutional Court: “The state uses the [Solar Levy] measures [...] to regulate prices”<sup>329</sup> and “Introduction of the levy [...] is aimed to decrease the economic feed-in tariffs.”<sup>330</sup>
- (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.”<sup>331</sup>

317. 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).<sup>332</sup> 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.

318. Despite this, the Solar Levy was structured, in a number of respects, to resemble a tax; as the

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<sup>327</sup> Minutes of Session of the Economic Committee of the Chamber of Deputies, 2 November 2010, p. 5 (emphasis added) (**Ex. C-110**).

<sup>328</sup> Transcript of the Senate session, 29 November 2009 (**Ex. C-225**).

<sup>329</sup> 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**).

<sup>330</sup> 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**).

<sup>331</sup> Statement by Mr Firt (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**).

<sup>332</sup> Frýzek Hearing presentation, slide 7; Rejoinder, para 397.

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.

319. 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.
320. 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.
321. 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. WHETHER THE TRIBUNAL HAS JURISDICTION IN A DISPUTE BETWEEN EU INVESTORS AND EU MEMBER STATES**

322. 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*.<sup>333</sup> In the operative part of the judgment, the ECJ ruled that:

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<sup>333</sup> *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.<sup>334</sup>

323. 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.

324. 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.

325. 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.”<sup>335</sup> The Claimant contends that “the *Achmea* judgment does not affect [the Tribunal’s] jurisdiction.”<sup>336</sup>

326. 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;

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<sup>334</sup> *Achmea* judgment, para. 62 (Ex. RLA-349).

<sup>335</sup> Respondent’s Comments on *Achmea*, para. 167.

<sup>336</sup> 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.

**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**

327. 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.<sup>337</sup> 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).’”<sup>338</sup>
328. In addition, the Respondent notes that the wording of *Achmea* applies to “(i) ‘any provision in an 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.’”<sup>339</sup> As Article 26 of the ECT fulfils these criteria, the *Achmea* judgment is also applicable to this case.

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<sup>337</sup> 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.

<sup>338</sup> Respondent's Comments on *Achmea*, para. 59, referring to *Achmea* judgment, para. 23 (**Ex. RLA-349**).

<sup>339</sup> Respondent's Reply on *Achmea*, para. 24, referring to *Achmea* judgment, paras. 61-62 (**Ex. RLA-349**).

329. 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*.<sup>340</sup> 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.<sup>341</sup> 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.”<sup>342</sup>
330. 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.<sup>343</sup> 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.<sup>344</sup> The Respondent highlights that the treaty is not a “self-contained legal framework, isolated from international and domestic law”<sup>345</sup> and that the Tribunal has to decide the dispute on the basis of all relevant rules of international law, including the TFEU.<sup>346</sup>
331. 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.<sup>347</sup> The Tribunal’s award will

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<sup>340</sup> Respondent’s Reply on *Achmea*, para. 25.

<sup>341</sup> Respondent’s Comments on *Achmea*, paras. 63-64, referring to *Achmea* judgment, paras. 32-37, 43, 57 (**Ex. RLA-349**).

<sup>342</sup> Respondent’s Comments on *Achmea*, para. 65, referring to *Achmea* judgment, paras. 39, 43, 50 (**Ex. RLA-349**).

<sup>343</sup> Respondent’s Comments on *Achmea*, paras. 67-71, 76.

<sup>344</sup> Respondent’s Reply on *Achmea*, paras. 10-12.

<sup>345</sup> Respondent’s Reply on *Achmea*, para. 13, referring to *BG Group Plc. v. Argentina*, UNCITRAL, Award, 24 December 2007, para. 100 (**Ex. CLA-129**).

<sup>346</sup> 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**).

<sup>347</sup> Respondent’s Comments on *Achmea*, para. 72.

be final and sufficient judicial remedies against a potential breach of EU law will not be available.<sup>348</sup> This is especially true in this proceeding, which is seated in Switzerland and, therefore, outside the EU.<sup>349</sup>

332. 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.<sup>350</sup>

333. 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"<sup>351</sup> parts of the Opinion of the Advocate General Wathelet.<sup>352</sup>

334. The Respondent concludes that the *Achmea* judgment "is not dependent on the specific wording of the CSFR-Netherlands BIT [and] applies with equal force"<sup>353</sup> and that "there can be no doubt that the BIT's dispute resolution clause [is] in conflict with the TFEU."<sup>354</sup>

**(b) The Claimant's Position**

335. 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 invoked by the Claimants do not contain any such clause.<sup>355</sup>

336. 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

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<sup>348</sup> Respondent's Comments on *Achmea*, paras. 73-74, referring to *Achmea* judgment, paras. 51, 55 (Ex. RLA-349).

<sup>349</sup> Respondent's Comments on *Achmea*, para. 80, referring to *Achmea* judgment, paras. 55-56 (Ex. RLA-349).

<sup>350</sup> 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).

<sup>351</sup> Respondent's Reply on *Achmea*, para. 30, referring to Claimant's Comments on *Achmea*, paras. 35, 56-57, 68.

<sup>352</sup> Respondent's Reply on *Achmea*, para. 31.

<sup>353</sup> Respondent's Comments on *Achmea*, para. 82.

<sup>354</sup> Respondent's Reply on *Achmea*, para 37.

<sup>355</sup> Claimant's Comments on *Achmea*, para. 213; Claimant's Reply on *Achmea*, para. 17.

effect of compromising the effectiveness of EU law”, especially considered that the Tribunal is seated outside of the EU.<sup>356</sup>

337. 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.<sup>357</sup> 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.<sup>358</sup> 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.<sup>359</sup>
338. 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”.<sup>360</sup> Therefore, according to the Claimant, no authority can be accorded to the ECJ’s conclusion that intra-EU BITs conflict with EU law.<sup>361</sup> 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,<sup>362</sup> Additionally, the ECJ wrongly affirmed that the *Achmea* tribunal would have been unable to request a preliminary ruling from the ECJ.<sup>363</sup> 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.”<sup>364</sup> In any event, no interpretation of EU law arises out of this dispute that could be referred to the ECJ, as the issue of the jurisdiction of the Tribunal is a matter of international law.<sup>365</sup> 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

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<sup>356</sup> Claimant’s Reply on *Achmea*, paras. 17-19.

<sup>357</sup> Claimant’s Reply on *Achmea*, paras. 9-10, referring to Claimant’s Comments on *Achmea*, para. 22.

<sup>358</sup> Claimant’s Reply on *Achmea*, paras. 9-11.

<sup>359</sup> Claimant’s Reply on *Achmea*, para. 11.

<sup>360</sup> Claimant’s Comments on *Achmea*, para. 48.

<sup>361</sup> Claimant’s Comments on *Achmea*, para. 213.

<sup>362</sup> Claimant’s Comments on *Achmea*, paras. 54-55.

<sup>363</sup> Claimant’s Comments on *Achmea*, paras. 56-57.

<sup>364</sup> Claimant’s Reply on *Achmea*, paras. 23-24.

<sup>365</sup> Claimant’s Reply on *Achmea*, para. 24.

commercial arbitration.<sup>366</sup>

339. 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”.<sup>367</sup> According to the Claimant, it follows that Articles 344 and 267 TFEU, on their ordinary meaning, do not prohibit investor-State arbitration.
340. 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.”<sup>368</sup> The Claimant argues that the alleged conflict between EU law and investment treaties is one of jurisdiction, connected to states’ consent to arbitration.<sup>369</sup> 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”,<sup>370</sup> the Tribunal should decide whether a conflict between the ECT and EU law exists only on the basis of international law.<sup>371</sup>

**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**

341. The Respondent submits that the seat of arbitration and the procedural law under which the arbitration is conducted are irrelevant to the application of the *Achmea* judgment.<sup>372</sup> 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.<sup>373</sup> According to the Respondent, to interpret the *Achmea* judgment otherwise would be contrary to its clear language and its purpose to ensure

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<sup>366</sup> Claimant’s Comments on *Achmea*, para. 58.

<sup>367</sup> Claimant’s Reply on *Achmea*, para. 25.

<sup>368</sup> Claimant’s Reply on *Achmea*, para. 12.

<sup>369</sup> Claimant’s Reply on *Achmea*, para. 12.

<sup>370</sup> Claimant’s Comments on *Achmea*, para. 69; Claimant’s Reply on *Achmea*, para. 12.

<sup>371</sup> Claimant’s Comments on *Achmea*, para. 62; Claimant’s Reply on *Achmea*, paras. 9-12.

<sup>372</sup> Respondent’s Comments on *Achmea*, para. 83, referring to *Achmea* judgment, paras. 61-62 (**Ex. RLA-349**).

<sup>373</sup> Respondent’s Comments on *Achmea*, para. 84, referring to *Achmea* judgment, para. 56 (**Ex. RLA-349**).

the effectiveness of EU law.<sup>374</sup>

342. 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).<sup>375</sup>

**(b) The Claimant’s Position**

343. 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.<sup>376</sup> 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.<sup>377</sup>

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

**(a) The Respondent’s Position**

344. 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.<sup>378</sup>
345. According to the Respondent, the term “international agreements concluded between [EU] 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.”<sup>379</sup> 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”.<sup>380</sup> 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

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<sup>374</sup> Respondent’s Comments on *Achmea*, para. 89.

<sup>375</sup> Respondent’s Comments, para. 88, referring to *Achmea* judgment, paras. 50-56 (Ex. RLA-349).

<sup>376</sup> Claimant’s Comments, para. 214. See also Claimant’s Reply on *Achmea*, para. 19.

<sup>377</sup> Claimant’s Reply on *Achmea*, para. 19, referring to *Achmea* judgment, para. 34 (Ex. RLA-349).

<sup>378</sup> Respondent’s Reply on *Achmea*, para. 38.

<sup>379</sup> Respondent’s Comments on *Achmea*, para. 91, referring to *Achmea* judgment, para. 62 (Ex. RLA-349).

<sup>380</sup> Respondent’s Reply on *Achmea*, para. 40.

concerning a “bilateral investment protection agreement between Member States,”<sup>381</sup> to one concerning “international agreement[s] concluded between Member States” in general.<sup>382</sup>

346. 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.<sup>383</sup> 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.<sup>384</sup> 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.”<sup>385</sup>
347. 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*.<sup>386</sup>
348. 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

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<sup>381</sup> Respondent’s Comments on *Achmea*, para. 92, referring to *Achmea* judgment, para. 23 (Ex. RLA-349).

<sup>382</sup> Respondent’s Comments on *Achmea*, para. 92, referring to *Achmea* judgment, para. 31 (Ex. RLA-349).

<sup>383</sup> 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*”).

<sup>384</sup> 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).

<sup>385</sup> Respondent’s Comments on *Achmea*, para. 99.

<sup>386</sup> Respondent’s Comments on *Achmea*, paras. 95-96, referring to Claimant’s letter to the Tribunal, 13 April 2018, pp. 3-4.

provisions, provided that the autonomy of the EU and its legal order is respected [...].<sup>387</sup>

is concerned only with “the possibility for the EU to subject itself to non-EU jurisdictions”.<sup>388</sup>

Hence, it does not apply to this arbitration, which concerns a dispute settlement mechanism included in an agreement concluded between EU Member States.<sup>389</sup>

349. 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.<sup>390</sup> This is in line with the international law principle of *pacta sunt servanda*.<sup>391</sup> 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”.<sup>392</sup>
350. 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.<sup>393</sup> Nor can Article 16 of the ECT 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.<sup>394</sup>

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<sup>387</sup> Respondent’s Comments on *Achmea*, para. 105, referring *Achmea* judgment, paras. 57-58 (**Ex. RLA-349**).

<sup>388</sup> Respondent’s Comments on *Achmea*, paras. 106-107.

<sup>389</sup> Respondent’s Comments on *Achmea*, paras. 108-109.

<sup>390</sup> 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**).

<sup>391</sup> Respondent’s Reply on *Achmea*, para. 41, referring to *Mox Plant* (**Ex. RLA-209**).

<sup>392</sup> 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*”).

<sup>393</sup> Respondent’s Reply on *Achmea*, para. 48.

<sup>394</sup> Respondent’s Reply on *Achmea*, para. 51.

**(b) The Claimant's Position**

351. The Claimant argues that the Tribunal must base its decision on international law rather than on EU law.<sup>395</sup> 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.<sup>396</sup> 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.<sup>397</sup>
352. 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”.<sup>398</sup>
353. 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.<sup>399</sup> 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*.<sup>400</sup>
354. 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.”<sup>401</sup>

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<sup>395</sup> Claimant's Reply on *Achmea*, paras. 13-15, 43.

<sup>396</sup> 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**”).

<sup>397</sup> Claimant's Reply on *Achmea*, para. 65-71.

<sup>398</sup> 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**).

<sup>399</sup> Claimant's Reply on *Achmea*, paras. 72-77.

<sup>400</sup> Claimant's Reply on *Achmea*, para. 74, referring to *AES Summit Generation Limited and AES-Tisza Erömi 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**).

<sup>401</sup> Claimant's Comments on *Achmea*, para. 215.

355. 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.”<sup>402</sup>
356. 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.”<sup>403</sup> Further, the Claimant notes that the ECJ never mentions the ECT in *Achmea*.<sup>404</sup> For the Claimant, the ECJ’s “silence speaks volumes”.<sup>405</sup>
357. 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.<sup>406</sup>
358. 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.<sup>407</sup> 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.<sup>408</sup>

**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**

359. 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

<sup>402</sup> 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*”).

<sup>403</sup> Claimant’s Comments on *Achmea*, para. 215, referring to *Masdar* (**Ex. CLA-199**). See also Claimant’s Reply on *Achmea*, para. 56.

<sup>404</sup> Claimant’s Comments on *Achmea*, paras. 102-104. Respondent’s Reply on *Achmea*, paras. 48-49.

<sup>405</sup> Claimant’s Reply on *Achmea*, para. 51.

<sup>406</sup> 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**).

<sup>407</sup> Claimant’s Reply on *Achmea*, paras. 57-64.

<sup>408</sup> Claimant’s Reply on *Achmea*, paras. 60-62.

has become bound by” the instruments at issue.<sup>409</sup> 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.<sup>410</sup> 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.”<sup>411</sup>

**(b) The Claimant’s Position**

360. 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.”<sup>412</sup>

**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**

361. 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.<sup>413</sup>

362. 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 whole.<sup>414</sup> 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.”<sup>415</sup> Instead, it should be deemed satisfied when “(i) a certain course of conduct attracts

<sup>409</sup> Respondent’s Comments on *Achmea*, paras. 73-75.

<sup>410</sup> 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).

<sup>411</sup> Respondent’s Comments on *Achmea*, para. 120.

<sup>412</sup> Claimant’s Comments on *Achmea*, para. 216.

<sup>413</sup> Respondent’s Comments on *Achmea*, paras. 121-122.

<sup>414</sup> Respondent’s Comments on *Achmea*, para. 123.

<sup>415</sup> 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

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”,<sup>416</sup> According to the Respondent, this is presently the case:<sup>417</sup> 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.<sup>418</sup> The applicability of Article 30 of the VCLT thus ensures the prevalence of the later treaty, the TFEU, over the earlier investment treaty.

363. 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*.<sup>419</sup> 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.”<sup>420</sup> 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”.<sup>421</sup> 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.<sup>422</sup>
364. The Respondent rejects the Claimant’s argument that the ECT should be given precedence over EU law as *lex specialis*.<sup>423</sup> 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.”
365. The Respondent concludes that both Article 351 of the TFEU and Article 30 of the VCLT render

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30, in O. Dörr, K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties A Commentary, Springer, 2018, p. 544 (RLA-429) (“Dörr/Schmalenbach”).

<sup>416</sup> Respondent’s Comments on *Achmea*, para. 129, referring to ILC Fragmentation Report, paras. 23-25 (Ex. RLA-390).

<sup>417</sup> Respondent’s Comments on *Achmea*, paras. 130-135.

<sup>418</sup> Respondent’s Comments on *Achmea*, para. 135.

<sup>419</sup> Respondent’s Comments on *Achmea*, paras. 124-126.

<sup>420</sup> Respondent’s Reply on *Achmea*, para. 59.

<sup>421</sup> Respondent’s Reply on *Achmea*, para. 61.

<sup>422</sup> Respondent’s Reply on *Achmea*, para. 18.

<sup>423</sup> Respondent’s Reply on *Achmea*, para. 54.

the investor-State arbitration provisions in this proceeding inapplicable.<sup>424</sup>

**(b) The Claimant's Position**

366. 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’.”<sup>425</sup> 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.<sup>426</sup>

367. 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.”<sup>427</sup>

368. The Claimant argues that the “same subject matter” consideration under Articles 59 and 30 of the VCLT “must be construed strictly, as requiring the ‘same level of generality’ between treaties”.<sup>428</sup> The Claimant rejects the Respondent’s position that investment treaties should be considered as part of the EU legal regime.<sup>429</sup> 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””.<sup>430</sup> Therefore, “[a]ny hypothetical conflict

<sup>424</sup> Respondent’s Comments on *Achmea*, para. 138.

<sup>425</sup> 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.

<sup>426</sup> 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**”); *Eureka*, 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**”).

<sup>427</sup> Claimant’s Reply on *Achmea*, para. 37, *referring to* *Marfin*, para. 589 (**Ex. CLA-295**).

<sup>428</sup> 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**).

<sup>429</sup> Claimant’s Reply on *Achmea*, paras. 5-6.

<sup>430</sup> Claimant’s Reply on *Achmea*, para. 6.

between the [ECT] and EU law must be resolved in favour of the [ECT]”.<sup>431</sup> 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.

369. For the Claimant, the Respondent also wrongly invokes Article 351 of the TFEU.<sup>432</sup> 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.<sup>433</sup> 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.<sup>434</sup>

## **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**

370. 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.<sup>435</sup>

371. 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 transform the law created by EU treaties into national law.<sup>436</sup> The Respondent highlights that the Claimant itself confirmed in its submission on *Achmea* the international nature of EU law.<sup>437</sup>

### **(b) The Claimant’s Position**

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

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<sup>431</sup> Claimant’s Comments on *Achmea*, para. 217. *See also* Claimant’s Reply on *Achmea*, para. 29.

<sup>432</sup> Claimant’s Reply on *Achmea*, para. 30.

<sup>433</sup> Claimant’s Reply on *Achmea*, paras. 31-32.

<sup>434</sup> 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**).

<sup>435</sup> Respondent’s Comments, para. 142.

<sup>436</sup> Respondent’s Reply on *Achmea*, para. 7, *referring to* *Vattenfall* Decision on the *Achmea* Issue, para. 145 (**Ex. RLA-425**).

<sup>437</sup> Respondent’s Reply on *Achmea*, para. 6.

[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.<sup>438</sup>

373. 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.”<sup>439</sup> Therefore, “for the purposes of Articles 27 and 46 VCLT, internal law includes [supranational] EC law.”<sup>440</sup>

374. 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”,<sup>441</sup> in particular “its primacy over, and direct effect on, the Member States’ internal laws.”<sup>442</sup>

## **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**

375. 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*).”<sup>443</sup> Nevertheless, given its close relationship with the EU, “EU law also plays an extremely significant role in the Swiss legal system.”<sup>444</sup> For instance, more than one hundred international treaties that Switzerland concluded with the EU became part of Swiss domestic law once ratified.<sup>445</sup> Additionally, on several occasions, Switzerland has unilaterally enacted domestic legislation

<sup>438</sup> Claimant’s Comments, para. 218.

<sup>439</sup> Claimant’s Comments, para. 93.

<sup>440</sup> Claimant’s Comments on *Achmea*, para. 95.

<sup>441</sup> Claimant’s Reply on *Achmea*, para. 7, referring to Respondent’s Reply on *Achmea*, para. 7.

<sup>442</sup> 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, 3<sup>rd</sup> 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).

<sup>443</sup> Respondent’s Comments on *Achmea*, para. 144.

<sup>444</sup> Respondent’s Comments on *Achmea*, para. 145.

<sup>445</sup> 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).

based on EU law, a practice known as “autonomous adaptation”.<sup>446</sup> The uniform interpretation of Swiss domestic law and EU law is thus necessary to ensure a level playing field,<sup>447</sup> and is actively pursued by Switzerland’s judicial and government institutions.<sup>448</sup> 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.”<sup>449</sup>

376. 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.”<sup>450</sup> 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”.<sup>451</sup>
377. According to the Respondent, the Swiss Federal Tribunal decided that fundamental provisions of EU competition law constitute relevant public policy considerations.<sup>452</sup> 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.<sup>453</sup> 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

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<sup>446</sup> 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**”).

<sup>447</sup> Respondent’s Comments on *Achmea*, para. 147, referring to Switzerland’s Implementation of EU Legislation, p. 4 (**Ex. RLA-399**).

<sup>448</sup> 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**).

<sup>449</sup> Respondent’s Comments on *Achmea*, para. 149.

<sup>450</sup> 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**).

<sup>451</sup> 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*”).

<sup>452</sup> 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**).

<sup>453</sup> 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**).

(“PILA”).<sup>454</sup> In determining the content of the relevant EU law, the Respondent asserts that the Swiss Federal Tribunal follows the decision of the ECJ.<sup>455</sup>

**(b) The Claimant’s Position**

378. 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.

379. 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.<sup>456</sup> 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.”<sup>457</sup> That said, the Claimant acknowledges that “interpretation [of Swiss law] in harmony with EU law has been understandably considered preferable where possible”<sup>458</sup> as long as it would serve Switzerland’s own economic interests in terms of its nationals’ competitiveness within the EU market.<sup>459</sup> Accordingly, the Claimant submits that, in general, “Switzerland takes no stance towards the general harmonization of EU law [as it is] not a policy concern for Switzerland.”<sup>460</sup>

380. 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.<sup>461</sup> First, pursuant to Article 19 of the PILA, “there is no basis for the assertion that an arbitral tribunal seated in

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<sup>454</sup> 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**).

<sup>455</sup> 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**).

<sup>456</sup> Claimant’s Comments on *Achmea*, paras. 127-129.

<sup>457</sup> Claimant’s Comments on *Achmea*, para. 130.

<sup>458</sup> Claimant’s Comments on *Achmea*, para. 130.

<sup>459</sup> Claimant’s Comments on *Achmea*, para. 131.

<sup>460</sup> Claimant’s Comments on *Achmea*, para. 131.

<sup>461</sup> Claimant’s Comments on *Achmea*, para. 134.

Switzerland is obliged to apply foreign mandatory rules.”<sup>462</sup> 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)”.<sup>463</sup>

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

381. 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**

382. 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”.<sup>464</sup> 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.<sup>465</sup> Against this background, the provision thus does not apply “where the relevant legal change is outside a Party’s control.”<sup>466</sup> As the *Achmea* judgment is not attributable to the Respondent, Article 177(2) of the PILA is not applicable.<sup>467</sup>

383. 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.<sup>468</sup>

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<sup>462</sup> Claimant’s Comments on *Achmea*, para. 150.

<sup>463</sup> 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**).

<sup>464</sup> 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**).

<sup>465</sup> 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.), 3<sup>rd</sup> ed., 2013, para. 22 (**Ex. RLA-407**).

<sup>466</sup> Respondent’s Comments on *Achmea*, para. 156.

<sup>467</sup> Respondent’s Comments on *Achmea*, paras. 157-158.

<sup>468</sup> 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.”

**(b) The Claimant's Position**

384. The Claimant submits that Article 177(2) is applicable in this case.<sup>469</sup>

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”.<sup>470</sup>

385. 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.<sup>471</sup> 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]”.<sup>472</sup>

**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**

386. 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**

387. The Respondent contends that Article 186(2) of the PILA “only applies to objectively arbitrable

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<sup>469</sup> Claimant's Comments on *Achmea*, para. 143.

<sup>470</sup> Claimant's Comments on *Achmea*, para. 220.

<sup>471</sup> Claimant's Comments on *Achmea*, para. 145.

<sup>472</sup> 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, 5<sup>th</sup> ed., Helbing Lichtenhahn, 2016, p. 800 (Ex. CLA-260).

matters.”<sup>473</sup> 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.”<sup>474</sup> 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.<sup>475</sup>

388. In any case, the Respondent cannot be considered to have waived the intra-EU Investment Treaty jurisdictional objection because, to be effective, such waiver must be “clear and unequivocal”.<sup>476</sup> 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.<sup>477</sup> The Respondent adds that it raises this jurisdictional objection in a timely manner following the issuance of the *Achmea* judgment.<sup>478</sup>

**(b) The Claimant’s Position**

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

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.<sup>479</sup>

390. The Claimant observes that “waiver is a well-established principle of international law which has

<sup>473</sup> 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).

<sup>474</sup> 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*, 1<sup>st</sup> ed., Oxford University Press, 2015, p. 99, para. 3.39 (Ex. RLA-412).

<sup>475</sup> Respondent’s Comments on *Achmea*, para. 163.

<sup>476</sup> Respondent’s Comments on *Achmea*, para. 164, referring to A. Bucher, *Commentaire Romand*, 1<sup>st</sup> ed., Helbing Lichtenhahn Verlag, 2011, para. 12 (Ex. RLA-414); B. Berger, F. Kellerhals, *International and Domestic Arbitration in Switzerland*, 3<sup>rd</sup> ed., Hart, 2015, paras. 1853 et seq. (Ex. RLA-415) (“Berger/Kellerhals”).

<sup>477</sup> Respondent’s Comments on *Achmea*, para. 165, referring to Counter-Memorial, paras. 368-369.

<sup>478</sup> Respondent’s Comments on *Achmea*, para. 166.

<sup>479</sup> Claimant’s Comments on *Achmea*, para. 221.

been consistently been applied by the ICJ”.<sup>480</sup> 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.<sup>481</sup>

391. In this regard, the Claimant argues that the Respondent’s statement that it “does not raise (or intend to raise) the intra-European Union [Investment Treaty] objection” meets these six requirements and thus constitutes an enforceable waiver.<sup>482</sup>
392. In any event and separately, the Claimant contends that, pursuant to the well-established principle of estoppel,<sup>483</sup> the Respondent would be precluded from raising the intra-EU objection.<sup>484</sup> 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.”<sup>485</sup> Some tribunals have considered a third element, namely “a showing of detriment for the party relying on the representation or declaration”.<sup>486</sup> 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.<sup>487</sup>

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<sup>480</sup> 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**).

<sup>481</sup> 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**).

<sup>482</sup> Claimant’s Comments on *Achmea*, paras. 162-182.

<sup>483</sup> 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*”).

<sup>484</sup> 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**).

<sup>485</sup> 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**).

<sup>486</sup> 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**).

<sup>487</sup> Claimant’s Comments on *Achmea*, paras. 191-197.

393. 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.<sup>488</sup> In any case, "estoppel operates irrespective of whether the representation of [the Respondent] is legal or correct."<sup>489</sup>
394. 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".<sup>490</sup> 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)".<sup>491</sup>
395. 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.<sup>492</sup> 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.<sup>493</sup> With reference to academic commentary, the Claimant also rejects the Respondent's argument that the Tribunal should consider arbitrability *ex officio*.<sup>494</sup>

## 10. The Tribunal's Decision

396. 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

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<sup>488</sup> Claimant's Comments on *Achmea*, para. 198.

<sup>489</sup> 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).

<sup>490</sup> Claimant's Comments on *Achmea*, paras. 203, 211.

<sup>491</sup> Claimant's Comments on *Achmea*, para. 203.

<sup>492</sup> 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).

<sup>493</sup> Claimant's Comments on *Achmea*, para. 207.

<sup>494</sup> 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).

proceedings.

397. The seat of this arbitration is Geneva, Switzerland.<sup>495</sup> Importantly, the Tribunal is seated outside the EU.
398. 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.<sup>496</sup> 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.
399. 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.
400. 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 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.<sup>497</sup>
401. 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."
402. In this case, there is nothing to which the Respondent can point to satisfy the requirement in both

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<sup>495</sup> Procedural Order No. 2 dated 27 February 2015.

<sup>496</sup> Respondent's Comments on *Achmea*, para. 83.

<sup>497</sup> 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**).

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.

403. 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".<sup>498</sup>

404. In its Counter-Memorial, the Respondent stated that "the Czech Republic does not plead a fundamental incompatibility between investment treaties and EU law".<sup>499</sup>

405. At the Hearing, the Respondent submitted that the "Czech Republic, as you know, does not advance an intra-EU jurisdictional objection in this case".<sup>500</sup>

406. 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.<sup>501</sup> 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 ECJ".<sup>502</sup>

407. 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 Investment Treaty 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.

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<sup>498</sup> Response, para. 228.

<sup>499</sup> Counter-Memorial, paras. 296, 363.

<sup>500</sup> Hearing Transcript (27 February 2017), 188:9-10 and the Respondent's Opening Presentation, slide No. 67.

<sup>501</sup> Respondent's Comments on *Achmea*, para. 164.

<sup>502</sup> Respondent's Comments on *Achmea*, para. 165, Counter-Memorial, paras. 368-369.

408. 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.
409. 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.
410. 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*”).<sup>503</sup> 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 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.<sup>504</sup> 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.
411. The applicable Article 177(1) of the PILA provides that “[a]ny dispute of financial interest may

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<sup>503</sup> See Respondent’s Comments on *Achmea*, para. 144; Claimant’s Comments on *Achmea*, para. 129.

<sup>504</sup> 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**).

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.<sup>505</sup> 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.<sup>506</sup>

412. 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.<sup>507</sup> 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.
413. In so far as the Respondent relies on the decision in *Eco Swiss*,<sup>508</sup> 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.
414. 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.

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<sup>505</sup> Berger/Kellerhals, para. 217 (**Ex. CLA-253**).

<sup>506</sup> SFT, Case No 118 II 353, Judgment, 23 June 1992 (**Ex. CLA 254**).

<sup>507</sup> Berger/Kellerhals, para. 272-274 (**Ex. CLA-253**); J.F. Poudret, S. Besson, *Comparative law of international arbitration*, 2<sup>nd</sup> ed., Sweet & Maxwell, 2007, para. 333 (**Ex. CLA-255**).

<sup>508</sup> 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**).

415. 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.
416. 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.<sup>509</sup>
417. 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.
418. 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.

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<sup>509</sup> 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

419. 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.<sup>510</sup> In the present case, the Claimant submits that the obligation to provide FET is contained in Article 10(1) of the ECT.<sup>511</sup>

420. 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 [...].<sup>512</sup>

421. 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.<sup>513</sup> 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.<sup>514</sup>

422. 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.<sup>515</sup>

423. 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.<sup>516</sup> The

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<sup>510</sup> Memorial, paras. 352, 353, 356.

<sup>511</sup> Memorial, paras. 356-358.

<sup>512</sup> Memorial, para. 357.

<sup>513</sup> Memorial, para. 367.

<sup>514</sup> Memorial, paras. 368, *referring to* Dolzer/Schreuer, p. 133 (Ex. CLA-29). *See also* Reply, paras. 617-620.

<sup>515</sup> Memorial, para. 404; Reply, paras. 668-670.

<sup>516</sup> Reply, para. 619.

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."<sup>517</sup> 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.<sup>518</sup>

424. 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.<sup>519</sup>

425. 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 or alternatively Green Bonuses, the 5% rule,<sup>520</sup> the Income Tax Exemption and the Shortened Depreciation Period.<sup>521</sup> 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.<sup>522</sup> 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.<sup>523</sup>

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<sup>517</sup> Reply, paras. 621-623, *see also* Memorial, para. 310-327, *Duke Energy v. Ecuador*, para. 340 (**Ex. CLA-52**); *Electrabel* Decision on Jurisdiction, para. 7.75 (**Ex. RLA-39**); *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-53**) ("**Enron**").

<sup>518</sup> Hearing Transcript (27 February 2017), 51:11-21.

<sup>519</sup> Reply, paras. 632, 662.

<sup>520</sup> Hearing Transcripts (27 February 2017), 21:24 to 22:8.

<sup>521</sup> Reply, paras. 6-10.

<sup>522</sup> Reply, paras. 632, 662.

<sup>523</sup> Reply, paras. 637, 648, *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

426. 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.<sup>524</sup>
427. 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.”<sup>525</sup> 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.<sup>526</sup>
428. The Claimant rejects the Respondent’s argument that a stabilization clause would be necessary to stabilize the Incentive Regime.<sup>527</sup>
429. 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.<sup>528</sup>
430. 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.<sup>529</sup> 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.<sup>530</sup> In this regard, the Claimant notes that its position is in line with relevant regulatory practice in the RES market,

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7 December 2005, *The support of electricity from renewable energy sources (Ex. C-207)*; 2009 Directive, (Ex. C-23).

<sup>524</sup> Memorial, para. 402.; Reply, para. 667.

<sup>525</sup> Memorial, para. 399, *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. 665.

<sup>526</sup> Memorial, 400-401.

<sup>527</sup> Reply, paras. 627, 633, 634.

<sup>528</sup> Reply, paras. 636-638.

<sup>529</sup> Reply, paras. 639-645, 652, *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).

<sup>530</sup> Reply, para. 647.

according to which agencies usually do not review an incentive mechanism once it is set.<sup>531</sup>

431. 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.<sup>532</sup> 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.<sup>533</sup> 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.<sup>534</sup>
432. 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. v. The United Mexican States*,<sup>535</sup> *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*,<sup>536</sup> *Occidental Exploration and Production Company v. The Republic of Ecuador*,<sup>537</sup> and *CMS Gas Transmission Company v. The Argentine Republic*<sup>538</sup> required host States to act in a stable and consistent manner.<sup>539</sup> In addition, the Claimant submits that the tribunals in *LG&E Energy Corp., LG&E Capital Corp, LG&E International Inc. v. Argentine Republic*,<sup>540</sup> *Enron*,<sup>541</sup> and *Eureko v.*

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<sup>531</sup> Reply, para. 646, 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.

<sup>532</sup> Reply, para. 649, 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-116**).

<sup>533</sup> Reply, para. 652, referring to P. Cameron, *International Energy Investment Law*, 1<sup>st</sup> ed., Oxford University Press, 2010, pp. 3-5 (**Ex. RLA-174**).

<sup>534</sup> Reply, paras. 650-651.

<sup>535</sup> *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**”).

<sup>536</sup> *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-48**) (“**MTD**”).

<sup>537</sup> *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, para. 191 (**Ex. CLA-38**) (“**Occidental**”).

<sup>538</sup> *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**”).

<sup>539</sup> Reply, paras. 654-658, referring to *Tecmed*, para. 154 (**Ex. RLA-20**); *MTD*, para. 114 (**Ex. CLA-48**); *Occidental*, paras. 183, 191 (**Ex. CLA-38**); *CMS*, paras. 134, 137, 275, 276 (**Ex. RLA-44**).

<sup>540</sup> *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-50**) (“**LG&E Decision on Liability**”).

<sup>541</sup> *Enron*, paras. 259, 260 (**Ex. CLA-53**).

*Republic of Poland*,<sup>542</sup> decided that the requirement of stability is fundamental to the FET standard.<sup>543</sup> Finally, the Claimant contends that the tribunal in *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*<sup>544</sup> found that a mere change of a host State's investment policy can constitute a breach of the FET standard.<sup>545</sup>

433. 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".<sup>546</sup> 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.<sup>547</sup>

**(b) The Respondent's Position**

434. 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.<sup>548</sup>
435. 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.<sup>549</sup>
436. 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.<sup>550</sup>
437. Third, the Respondent alleges that a mere change of the legal framework applicable to the

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<sup>542</sup> *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, paras. 231-235 (**Ex. RLA-148**) ("*Eureko Partial Award*").

<sup>543</sup> Reply, para. 659, referring to LG&E Decision on Liability, para. 124 (**Ex. CLA-50**); *Enron*, para. 259-260 (**Ex. CLA-53**); *Eureko Partial Award*, paras. 231-235 (**Ex. RLA-148**).

<sup>544</sup> *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-27**) ("*Bayindir*").

<sup>545</sup> Reply, paras. 660-661, referring to *Bayindir*, para. 240 (**Ex. CLA-27**).

<sup>546</sup> Hearing Transcript (3 March 2017), 48:15-19.

<sup>547</sup> 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**).

<sup>548</sup> Counter-Memorial, para. 455.

<sup>549</sup> Hearing Transcript (27 February 2017), 203:4-206:3.

<sup>550</sup> Rejoinder, para. 506; 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.<sup>551</sup> 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.<sup>552</sup> 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*,<sup>553</sup> 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.<sup>554</sup> 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.<sup>555</sup> 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.<sup>556</sup> 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

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<sup>551</sup> Counter-Memorial, para. 455; Rejoinder, paras. 491, 505.

<sup>552</sup> Rejoinder, para. 497, 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*").

<sup>553</sup> *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**).

<sup>554</sup> Counter-Memorial, paras. 458, 461, 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*").

<sup>555</sup> Counter-Memorial, para. 461, referring to *Duke Energy v. Peru*, para. 190 (**Ex. RLA-236**); *Noble Energy*, para. 161 (**Ex. RLA-170**).

<sup>556</sup> Counter-Memorial, para. 461, referring to *Duke Energy v. Peru*, para. 190 (**Ex. RLA-236**); *Noble Energy*, para. 161 (**Ex. RLA-170**).

adverse changes”.<sup>557</sup> The Respondent further submits that the tribunals in *Duke Energy v. Peru*,<sup>558</sup> *Noble Energy*,<sup>559</sup> *Oxus v. The Republic of Uzbekistan*,<sup>560</sup> *Occidental*<sup>561</sup> and *Nations Energy Inc. and others v. The Republic of Panama*,<sup>562</sup> required evidence of specific and express arrangements to protect investors from legislative changes in order to establish a treaty violation.<sup>563</sup>

438. 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.<sup>564</sup> 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.<sup>565</sup>
439. In the present case, the Respondent alleges that it did not provide a guarantee of stabilization to photovoltaic investors.<sup>566</sup> 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

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<sup>557</sup> Rejoinder, para. 500, 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-38**); *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*”).

<sup>558</sup> *Duke Energy v. Peru*, para. 190 (**Ex. RLA-236**).

<sup>559</sup> *Noble Energy*, para. 161 (**Ex. RLA-170**).

<sup>560</sup> *Oxus Gold*, para. 823 (**Ex. RLA-276**).

<sup>561</sup> *Occidental*, para. 103 (**Ex. CLA-38**).

<sup>562</sup> *Nations Energy*, para. 102 (**Ex. RLA-277**).

<sup>563</sup> Rejoinder, paras. 499-500, 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-38**); *Nations Energy*, para. 102 (**Ex. RLA-277**).

<sup>564</sup> Counter-Memorial, para. 459, 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*”).

<sup>565</sup> Counter-Memorial, paras. 459-460; 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**).

<sup>566</sup> Counter-Memorial, para. 462; Rejoinder, paras. 492-493, 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.<sup>567</sup> 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.<sup>568</sup> 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.<sup>569</sup> 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.<sup>570</sup>

440. 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.<sup>571</sup>
441. 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.<sup>572</sup>

## **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**

442. The Claimant further alleges that the Respondent violated the Claimant’s legitimate expectations as to the stability of the Incentive Regime.<sup>573</sup>
443. As a preliminary matter, the Claimant notes that a general right of host States to regulate markets

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<sup>567</sup> Rejoinder, paras. 501-502.

<sup>568</sup> Rejoinder, para. 516, *referring to* Explanatory Report, p. 4 (Ex. C-27).

<sup>569</sup> Hearing Transcript (27 February 2017), 215:10-216:2.

<sup>570</sup> Hearing Transcript (27 February 2017), 217:13-18.

<sup>571</sup> Rejoinder, para. 498.

<sup>572</sup> Rejoinder, paras. 503-505.

<sup>573</sup> Reply, paras. 671, 676.

and to enact legislation for the public benefit exists, and that the FET standard does not interfere with this general right.<sup>574</sup> 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.<sup>575</sup> Relying on the decisions in *Micula*,<sup>576</sup> *Duke Energy v. Ecuador*,<sup>577</sup> *LG&E v. Argentina*,<sup>578</sup> *CMS v. Argentina*,<sup>579</sup> *Enron*,<sup>580</sup> and *Occidental*,<sup>581</sup> 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.<sup>582</sup>

444. According to the Claimant, the decision in *Tecmed*<sup>583</sup> most clearly articulates that one element of the FET standard is the protection of an investor's legitimate expectations.<sup>584</sup> The Claimant notes, referring to several subsequent decisions by investment tribunals, that this aspect of the *Tecmed* decision has repeatedly been confirmed.<sup>585</sup>
445. 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.<sup>586</sup>

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<sup>574</sup> Memorial, paras. 386-389, 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*").

<sup>575</sup> Memorial, paras. 390-391, 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-51**).

<sup>576</sup> *Micula*, para. 529 (**Ex. CLA-3**).

<sup>577</sup> *Duke Energy v. Ecuador*, para. 340 (**Ex. CLA-52**).

<sup>578</sup> *LG&E Decision on Liability*, para. 124 (**Ex. CLA-50**).

<sup>579</sup> *CMS*, para. 274 (**Ex. RLA-44**).

<sup>580</sup> *Enron*, paras. 259-260, 268 (**Ex. CLA-53**).

<sup>581</sup> *Occidental*, para. 191 (**Ex. CLA-38**).

<sup>582</sup> Memorial, paras. 392, 397, referring to *Micula*, paras. 529, 666 (**Ex. CLA-3**); *Duke Energy v. Ecuador*, para. 340 (**Ex. CLA-52**); *LG&E Decision on Liability*, paras. 124-125 (**Ex. CLA-50**); *CMS*, para. 274 (**Ex. RLA-44**); *Enron*, para. 259-260, 268 (**Ex. CLA-53**); *Occidental*, para. 191 (**Ex. CLA-38**).

<sup>583</sup> *Tecmed*, para. 154 (**Ex. RLA-20**).

<sup>584</sup> Memorial, para. 405 referring to *Tecmed*, para. 154 (**Ex. RLA-20**).

<sup>585</sup> Memorial, paras. 406-411, referring to *Occidental*, paras. 184-192 (**Ex. CLA-38**); *LG&E Decision on Liability*, para. 127 (**Ex. CLA-50**); *Int'l Thunderbird Gaming Corp. v. United Mexican States*, Award, 26 January 2006, para. 147 (**Ex. CLA-54**); *Enron*, paras. 259-262 (**Ex. CLA-53**); *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-39**) ("**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**).

<sup>586</sup> 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.<sup>587</sup> 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.”<sup>588</sup>

446. 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”.<sup>589</sup> Conversely, the host State's actual intent is said to be irrelevant.<sup>590</sup> 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.<sup>591</sup> 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.<sup>592</sup>
447. 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.<sup>593</sup>
448. 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 Tariff 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.<sup>594</sup>

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<sup>587</sup> Hearing Transcript (27 February 2017), 51:22-52:7.

<sup>588</sup> Memorial, para. 412, *referring to Micula*, para. 178 (**Ex. CLA-3**).

<sup>589</sup> Reply, para. 679, *referring to Micula*, para. 669 (**Ex. CLA-3**).

<sup>590</sup> Reply, para. 679, *referring to Micula*, para. 669 (**Ex. CLA-3**).

<sup>591</sup> Reply, paras. 672, 673, 677,

<sup>592</sup> Reply, paras. 672-673, *referring to First Koutný Statement*, para. 33, 38 and 39; *Second CWS-Koutný*, para. 61.

<sup>593</sup> Reply, paras. 674-675, *referring to Dolzer/Schreuer*, p. 133-134 (**Ex. CLA-32**); *Electrabel Decision on Jurisdiction*, para. 7.79 (**Ex. RLA-39**).

<sup>594</sup> Memorial, para. 422.

449. The Claimant argues that the promised legislative stability as detailed above stems from (1) the 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.<sup>595</sup>
450. 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.<sup>596</sup> 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 Tariffs would be payable for 20 years.<sup>597</sup> According to the Claimant, the promised stability was not limited to a 15-year simple payback and a 7% return rate.<sup>598</sup> 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 and Green Bonuses level.<sup>599</sup> The irrelevance of the return rate in setting FiT is supported by the fact that the ERO did not review the return rates annually.<sup>600</sup> 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.<sup>601</sup> Similarly, the WACC, as set by the ERO at 7%, was not sufficient to achieve the 8% EU target for 2010.<sup>602</sup> In addition, the Claimant submits that a WACC was no more than an indicative technical parameter to calculate FiT under the Technical Regulation.<sup>603</sup> Moreover, the Respondent's argument ignores the importance of stability from a business perspectives.<sup>604</sup>
451. The Claimant further submits that the Act on Income Tax provided the promise of legislative

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<sup>595</sup> Memorial, para. 415.; Reply, para. 682.

<sup>596</sup> Memorial, para. 420; Reply, para. 684, nn. 779-780 *referring to* First Koutný Statement, paras. 18, 23 and 25, and Second Koutný Statement, paras. 27, 33.

<sup>597</sup> Memorial, para. 422.

<sup>598</sup> Reply, paras. 685-687.

<sup>599</sup> Memorial, para. 423.

<sup>600</sup> Hearing Transcript (3 March 2017), 68:20-69:5.

<sup>601</sup> Hearing Transcript (3 March 2017), 25:13-25, *referring to* Hearing Transcript (2 March 2017), 112:1-5.

<sup>602</sup> Hearing Transcript (2 March 2017), 18:17-19:7.

<sup>603</sup> Hearing Transcript (27 May 2017), 23:20-22; *referring to* ERO Regulation No. 364/2007 Coll. (**Ex. C-29**).

<sup>604</sup> Memorial, para. 423, *referring to* Response, para.155.

stability jointly with the Act on Promotion.<sup>605</sup> As evidence for this, the Claimant points to the 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”.<sup>606</sup> 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.<sup>607</sup> 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.<sup>608</sup>

452. 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*,<sup>609</sup> 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.<sup>610</sup>

453. 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.<sup>611</sup> The Incentive Regime did so by offering stable incentives to prospective investors.<sup>612</sup> With regard to the Tariffs, 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”.<sup>613</sup>

454. With regard to the Income Tax Exemption and the Shortened Tax Period (collectively “**Tax**

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<sup>605</sup> Memorial, paras. 424-425, *referring to* Explanatory Report, p. 4 (**Ex. C-78**), p. 1 (**Ex. C-27**).

<sup>606</sup> Memorial, para. 424, *referring to* Explanatory Report, p. 4 (**Ex. C-78**), p. 1 (**Ex. C-27**).

<sup>607</sup> Reply, para. 697, *referring to Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2012, p. 69 (**Ex. CLA-128**).

<sup>608</sup> Reply, para. 699.

<sup>609</sup> *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*”).

<sup>610</sup> Reply, paras. 688-689, *referring to Charanne* (**Ex. CLA-101**) and Dissenting opinion of Professor G. S. Tawil in *Charanne*, para. 5 (**Ex. CLA-130**).

<sup>611</sup> Memorial, paras. 416-418.

<sup>612</sup> Memorial, paras. 417-418.

<sup>613</sup> Reply, para. 701, *referring to* Explanatory Report, pp. 2-3 (**Ex. C-78**).

**Incentives**”) the Claimant states that its purpose was closely related to the Act of Promotion to jointly provide a long-term incentive scheme.<sup>614</sup> 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.<sup>615</sup> 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]”.<sup>616</sup> 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.”<sup>617</sup>

455. In the Claimant’s view, the decision of the Tribunal in *PSEG*,<sup>618</sup> 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.<sup>619</sup>
456. Contrary to what the Respondent alleges, the Claimant argues that the Explanatory Report constitutes a sufficient basis for legitimate expectations.<sup>620</sup> Although the report is not a source of law, it is evidence of the Czech Republic’s intention to attract photovoltaic investors.<sup>621</sup> 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.<sup>622</sup> That the Explanatory Report does not address the Claimant individually is also irrelevant, because individual knowledge is not necessary for legitimate expectations to arise.<sup>623</sup> Moreover, the Claimant alleges that it had actual knowledge of the 2010

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<sup>614</sup> Reply, para. 703, *referring to* Explanatory Report, p. 4 (**Ex. C-78**).

<sup>615</sup> Reply, para. 703, *referring to* Explanatory Report, p. 4 (**Ex. C-78**).

<sup>616</sup> Hearing Transcript (3 March 2017), 7:1-19.

<sup>617</sup> 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-116**).

<sup>618</sup> *PSEG*, para. 243 (**Ex. CLA-39**).

<sup>619</sup> Reply, para. 702.

<sup>620</sup> Reply, para. 704.

<sup>621</sup> Reply, para. 704.

<sup>622</sup> Reply, para. 704.

<sup>623</sup> Reply, para. 705.

- Action Plan, which mentioned that financial support was available to RES investments.<sup>624</sup>
457. Third, the Claimant argues that the Czech Government and the ERO officials launched an intense marketing campaign to promote the FiT and the Green Bonuses offered under the Act on Promotion, submitting several examples of this campaign.<sup>625</sup>
458. As emphasized by the Claimant, Mr. Pavel Koutný (the Claimant's CFO), explains that the ERO's presentations, such as the one dated on 18 September 2009, strengthened the Claimant's understanding that the Incentive Regime would be stable for 20 years.<sup>626</sup>
459. As further evidence for this, the Claimant submits that the 2010 Action Plan did not provide for a cap on the total volume of electricity for the Tariff, and that the plan forecasted a significant rise of photovoltaic installations for the year 2010.<sup>627</sup>
460. 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.<sup>628</sup>
461. 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.<sup>629</sup> 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.<sup>630</sup> Finally, in response to the Respondent's argument that the 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.<sup>631</sup>
462. 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

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<sup>624</sup> Reply, para. 705.

<sup>625</sup> Memorial, para. 428; Reply, para. 706.

<sup>626</sup> Memorial, para. 429, *referring to* First Koutný Statement, para. 26.

<sup>627</sup> Memorial, para. 430; Reply, para. 707, *referring to* 2010 Action Plan, pp. 58-59 (**Ex C-69**).

<sup>628</sup> Reply, para. 708.

<sup>629</sup> Memorial, paras. 426-427.

<sup>630</sup> Reply, paras. 710-711.

<sup>631</sup> Reply, para. 711.

Regime, is irrelevant to the present case.<sup>632</sup> 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.<sup>633</sup> 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.<sup>634</sup> The Claimant also notes that the Constitutional Court's loyalty to the State might have affected its decision.<sup>635</sup>

## (2) The Respondent's Position

463. 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.<sup>636</sup> In relation to the last element, the Respondent states that minor expectations do not trigger a treaty violation.<sup>637</sup> Additionally, according to the Respondent, the Tribunal should analyse the relevant circumstances objectively, and it should ensure that any expectations were formed at the time of investment.<sup>638</sup> In respect of the threshold question whether legitimate expectations objectively existed, the Respondent refers to a four-step

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<sup>632</sup> Hearing Transcript (27 February 2017), 73:17-78:20.

<sup>633</sup> Hearing Transcript (27 February 2017), 73:17-74:16, referring to May 2012 Constitutional Court Judgment (**Ex. CLA-15/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**).

<sup>634</sup> Hearing Transcript (27 February 2017), 73:17-74:16, referring to May 2012 Constitutional Court Judgment (**Ex. CLA-15/R-110**).

<sup>635</sup> Hearing Transcript (27 February 2017), 76:14-77:8.

<sup>636</sup> Counter-Memorial, para. 463, 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*").

<sup>637</sup> Counter-Memorial, para. 463, referring to *Mobil Canada*, para. 154 (**Ex. RLA-35**); *Arif*, para. 536 (**Ex. RLA-168**).

<sup>638</sup> Counter-Memorial, para. 464, nn. 822-825 referring to *Arif*, para. 533 (**Ex. RLA-168**); *Perenco*, para. 560 (**Ex. RLA-173**).

test:<sup>639</sup> First, the host State must have given a clear and unequivocal assurance.<sup>640</sup> Second, the State's assurance must apply to individual investors.<sup>641</sup> Third, the investor must have relied on the State's assurance.<sup>642</sup> Fourth, the investor's reliance must have been reasonable.<sup>643</sup>

464. 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.<sup>644</sup> 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.<sup>645</sup> Further, the Respondent alleges that legitimate expectations can only derive from specific legislative provisions.<sup>646</sup> 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.<sup>647</sup>
465. 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.<sup>648</sup> In addition, the Respondent notes that the Claimant does not discuss the purposes of specific provisions, but only refers to an alleged overall purpose.<sup>649</sup> Moreover, the Respondent argues that the Claimant has failed to provide any evidence that the Incentive Regime purported

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<sup>639</sup> Counter-Memorial, 465-466, 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-39); *Duke Energy v. Ecuador*, para. 340 (Ex. CLA-52); *Plama*, para. 176 (Ex. RLA-5).

<sup>640</sup> Counter-Memorial, 465-466., referring to *Duke Energy v. Ecuador*, para. 351 (Ex. CLA-52); *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).

<sup>641</sup> Counter-Memorial, para. 467, referring to *PSEG*, para. 243 (Ex. CLA-39); *El Paso*, paras. 395-396 (Ex. RLA-31); *EDF*, para. 217 (Ex. RLA-146).

<sup>642</sup> Counter-Memorial, para. 468, referring to *Waste Management*, para. 98 (Ex. RLA-191); *PSEG*, para. 241 (Ex. CLA-39); *AES*, para. 9.3.16-9.3.17 (Ex. RLA-41); *Duke Energy v. Ecuador*, para. 340 (Ex. CLA-52).

<sup>643</sup> Counter-Memorial, para. 469.

<sup>644</sup> Counter-Memorial, para. 469 referring to *Duke Energy v. Ecuador*, para. 340 (Ex. CLA-52).

<sup>645</sup> Counter-Memorial, para. 469.

<sup>646</sup> Rejoinder, para. 525, referring to *Arif*, para. 535 (Ex. RLA-168).

<sup>647</sup> Rejoinder, para. 525.

<sup>648</sup> Counter-Memorial, para. 492 referring to *PSEG*, para. 243 (Ex. CLA-39).

<sup>649</sup> Counter-Memorial, paras. 489-490.

to attract photovoltaic investors by providing stable incentives in order to achieve the 8% Indicative 2010 Target.<sup>650</sup> The Respondent emphasizes that the 8% target was non-binding on the EU Member States.<sup>651</sup> 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.<sup>652</sup> The extension of the estimated lifetime of photovoltaic plants from 15 years to 20 years was introduced to lower the FiT.<sup>653</sup> 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.<sup>654</sup> 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.<sup>655</sup> 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.<sup>656</sup>

466. 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"<sup>657</sup> – an understanding also shared by Dr. García, the Claimant's expert.<sup>658</sup> The Respondent emphasizes that in the present arbitration, the Claimant does not challenge the ERO's calculation of WACC at 7%.<sup>659</sup> Moreover, the Respondent points out that Mr. Senogles, the Claimant's expert, calculated WACC for the Claimant as below 7%.<sup>660</sup> The Respondent further submits that a 7% post-tax rate is within the range of WACCs set in other States.<sup>661</sup> The Respondent also submits

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<sup>650</sup> Counter-Memorial, para. 491.

<sup>651</sup> Hearing Transcript (27 February 2017), 139:12-17.

<sup>652</sup> Hearing Transcript (3 March 2017), 81:11-17, 82:8-16.

<sup>653</sup> Hearing Transcript (3 March 2017), 81:17-82:4.

<sup>654</sup> 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**).

<sup>655</sup> Hearing Transcript (27 February 2017), 142:5-143:5

<sup>656</sup> Hearing Transcript (3 March 2017), 83:15-85:5.

<sup>657</sup> Hearing Transcript (3 March 2017), 105:23-106:6.

<sup>658</sup> Hearing Transcript (3 March 2017), 105:23-106:6.

<sup>659</sup> Hearing Transcript (3 March 2017), 106:7-17.

<sup>660</sup> Hearing Transcript (3 March 2017), 133:6-7.

<sup>661</sup> Hearing Transcript (3 March 2017), 106:18-23.

that the adequacy of the 7% WACC for attracting investments is supported by a steady increase during the period from 2003 to 2005.<sup>662</sup>

467. 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.<sup>663</sup> First, the report is not a source of law and was submitted two years before the Act of Promotion's text was even finalized.<sup>664</sup> Second, the report is irrelevant to the incentives under the Act on Income Tax and does not even refer to the Shortened Depreciation Period.<sup>665</sup> 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.<sup>666</sup> 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.<sup>667</sup> 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.<sup>668</sup> 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.<sup>669</sup> Fourth, the Respondent observes that the Claimant offers no evidence that it actually relied on the Explanatory Report.<sup>670</sup>
468. The Respondent further relies on the decision by the tribunal in *Charanne*,<sup>671</sup> 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

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<sup>662</sup> Hearing Transcript (3 March 2017), 106:24-107:10.

<sup>663</sup> Counter-Memorial, para. 493.

<sup>664</sup> Counter-Memorial, para. 494.

<sup>665</sup> Counter-Memorial, para. 495; Rejoinder, para. para. 513.

<sup>666</sup> Counter-Memorial, para. 495.

<sup>667</sup> Rejoinder, paras. 520-521.

<sup>668</sup> Rejoinder, para. 513.

<sup>669</sup> Counter-Memorial, para. 496, referring to *Total* Decision on Liability, para. 122 (**Ex. RLA-28**); *Continental Casualty*, para. 261 (**Ex. RLA-34**).

<sup>670</sup> Counter-Memorial, para. 497 referring to *PSEG*, para. 241 (**Ex. CLA-39**); Rejoinder, para. 514.

<sup>671</sup> *Charanne*, para. 496 (**Ex. CLA-101**).

not constitute sufficient evidence to support the claimants' argument that stabilization was intended.<sup>672</sup> 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.<sup>673</sup>

469. With respect to the licensing process, the Respondent points out that the ERO issued a number of warnings regarding potential legislative changes before 18 October 2010, when Hutira SPV received the license.<sup>674</sup> 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.<sup>675</sup>

470. With regard to the Income Tax Provisions, the Respondent makes a number of points.<sup>676</sup> First, the Respondent contends that the Claimant has submitted no basis for its expectations as to the Income Tax Provisions.<sup>677</sup> Indeed, according to the Respondent, the alleged governmental campaigns did not make any reference to the Income Tax Provisions.<sup>678</sup> 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.<sup>679</sup> 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.<sup>680</sup> In addition, the Respondent submits that the Czech Technical University, in its study for ERO of 2007, already expected that the Income Tax Provisions would be modified.<sup>681</sup>

471. In the face of the influx of investors, the Czech caretaker government stated that measures would

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<sup>672</sup> Rejoinder, paras. 517-519.

<sup>673</sup> Hearing Transcript (27 February 2017), 176:20-177:7, *referring to* May 2012 Constitutional Court Judgment (**Ex. CLA-15/Ex. R-110**).

<sup>674</sup> Counter-Memorial, paras. 498-500

<sup>675</sup> Counter-Memorial, paras. 502, 503

<sup>676</sup> Counter-Memorial, paras. 480-486.

<sup>677</sup> Counter-Memorial, paras. 504-507.

<sup>678</sup> Counter-Memorial, paras. 504, 507.

<sup>679</sup> Counter-Memorial, para. 505.

<sup>680</sup> Counter-Memorial, para. 506.

<sup>681</sup> Hearing Transcript (27 February 2017), 148:10-16.

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**

472. 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.<sup>682</sup> In particular, the Claimant argues that its business model was based on the assumption that the stable inflation-adjusted Tariffs would be available for 20 years for plants commissioned by the end of 2010.<sup>683</sup> 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.<sup>684</sup>

**(2) The Respondent's Position**

473. 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.<sup>685</sup>

**(c) Whether the Claimant's Reliance on the Respondent's Promise was Reasonable**

**(1) The Claimant's Position**

474. 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.<sup>686</sup> In particular, it is reasonable for investors to expect that the promised scheme would not be changed in an irrational manner.<sup>687</sup>

475. 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

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<sup>682</sup> Memorial, para. 432; Reply, paras. 712, 715.

<sup>683</sup> Memorial, para. 434; Reply, para. 713.

<sup>684</sup> Memorial, paras. 434, 435.

<sup>685</sup> Counter-Memorial, para. 497; Rejoinder, paras. 514, 515.

<sup>686</sup> Memorial, paras. 447-450.

<sup>687</sup> Memorial, paras. 447-450

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.<sup>688</sup> Relying on a judgment of the English Court of Appeal, which decided that retroactive measures were unlawful,<sup>689</sup> the Claimant further asserts that its reliance was reasonable, even though there was no explicit commitment to stabilize the Incentive Regime.<sup>690</sup>

476. 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.<sup>691</sup> The Claimant emphasizes that the Act on Promotion did not set any cap on RES electricity entitled to FiT.<sup>692</sup> 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.<sup>693</sup>
477. 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.<sup>694</sup> The Claimant also argues that the same rationale applies to the Tariffs contained in the Act on Promotion.<sup>695</sup>
478. 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.<sup>696</sup> For instance, when discussing the change of the 5% rule, the Czech Government and the ERO expressed their concern about negative effects on existing investors.<sup>697</sup> The Claimant further alleges that its belief was strengthened by the moratorium period on new applications for grid connections as of

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<sup>688</sup> Reply, para.717.

<sup>689</sup> Judgment of the English Court of Appeals (Civil Division), Case No. C1/2012/0023, 25 January 2012, sections 48 et seq. (**Ex. CLA-103**).

<sup>690</sup> Reply, paras. 716, 720.

<sup>691</sup> Memorial, paras. 436, 437; Reply, paras. 718, 719

<sup>692</sup> Hearing Transcript (27 February 2017), 32:4-5.

<sup>693</sup> Reply, para. 721.

<sup>694</sup> Reply, para. 722, *referring to* Prof. JUDr. Aleš Gerloch, CSc's Opinion, 3 December 2010, pp. 10, 11 (**Ex. C-213**).

<sup>695</sup> Reply, para. 722.

<sup>696</sup> Memorial, para. 438; Reply, para. 724.

<sup>697</sup> Reply, para. 725.

February 2010; the 2010 National Renewable Action Plan published in July 2010<sup>698</sup>; and Act No. 330/2010 and the Explanatory Report<sup>699</sup> published in mid-September 2010.<sup>700</sup> Furthermore, the Claimant points out that the ERO's 2010 report explained that "investors expected a change to the law [...] for new plants".<sup>701</sup> 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.<sup>702</sup> 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.<sup>703</sup>

479. 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.<sup>704</sup> The Claimant further notes that its investment became "sunk" upon acquiring the SPV and entering an Engineering, Procurement and Construction contract.<sup>705</sup> 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.<sup>706</sup>
480. The Claimant objects to the Respondent's argument that the Claimant did not exercise sufficient advance due diligence, stating that it consulted a local expert and an independent energy auditor. In addition, it relied on the Czech Government's promotional activities.<sup>707</sup>
481. 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

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<sup>698</sup> 2010 Action Plan (**Ex. C-69**).

<sup>699</sup> Explanatory Report to Draft Act No. 330/2010 Coll., 15 September 2010 (**Ex. R-193**).

<sup>700</sup> Reply, para. 726.

<sup>701</sup> Reply, para. 727, *referring to* 2010 Report on the Activities and Finances of the Energy Regulatory Office, p. 7 (**Ex. C-224**).

<sup>702</sup> 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**).

<sup>703</sup> Hearing Transcript (3 March 2017), 12:5-15, *referring to* Letter from Mr. Portužak to Mr. Němeček, 28 August 2009 (**Ex. R-145**).

<sup>704</sup> Hearing Transcript (27 February 2017), 39: 22-41:7.

<sup>705</sup> Hearing Transcript (27 February 2017), 39: 22-41:7.

<sup>706</sup> Hearing Transcript (27 February 2017), 41:8-12.

<sup>707</sup> Reply, para. 728.

diligence.<sup>708</sup>

482. 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,<sup>709</sup> 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.<sup>710</sup> In particular, not only investors, but also Czech banks believed that the Tariffs level would be stable.<sup>711</sup> 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.<sup>712</sup> Moreover, the Claimant notes that the Czech banks and auditors also understood that the Tariffs level would apply to plants commissioned by the end of 2010 without considering the 15-year simple payback and the 7% rate of return.<sup>713</sup> In this regard, the Claimant submits that the ČEZ, a State-owned entity, also significantly invested in the photovoltaic market in 2009 and 2010.<sup>714</sup>
483. 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.<sup>715</sup> As evidence for this, the Claimant submits that the ERO officials repeatedly assured the FiT level would remain stable for the plants' lifetime.<sup>716</sup>
484. Lastly, the Claimant alleges that the fact that a caretaker government was in place between May 2009 and July 2010 is irrelevant.<sup>717</sup> In the Claimant's view, the caretaker government's lack of 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.<sup>718</sup> The Claimant submits that unelected caretaker governments existed frequently in

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<sup>708</sup> Hearing Transcript (3 March 2017), 32:19-33:4.

<sup>709</sup> Reply, para. 729, 735.

<sup>710</sup> Reply, para. 730 *referring to CMS*, para. 137 (**Ex. RLA-44**).

<sup>711</sup> Memorial, para. 446; Reply, para. 732.

<sup>712</sup> Reply, para. 732.

<sup>713</sup> Reply, paras. 733, 734.

<sup>714</sup> Hearing Transcript (3 March 2017) 21:18-22:3.

<sup>715</sup> Memorial, para. 440.

<sup>716</sup> Memorial, para. 440.

<sup>717</sup> Hearing Transcript (3 March 2017), 29:10-17.

<sup>718</sup> Hearing Transcript (3 March 2017), 30:21-31:9.

European and other countries.<sup>719</sup> 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.<sup>720</sup> 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.<sup>721</sup> 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.<sup>722</sup>

## (2) The Respondent's Position

485. The Respondent alleges that the Claimant's reliance on any alleged promises was unreasonable for a number of reasons.<sup>723</sup>
486. 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.<sup>724</sup> 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.<sup>725</sup> Moreover, the Respondent submits that on 24 August 2009, before the Claimant made its investment, the Ministry of Industry and Trade issued a press release that it was planning to amend the Act on Promotion.<sup>726</sup>

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<sup>719</sup> Hearing Transcript (3 March 2017), 77:16-19.

<sup>720</sup> Hearing Transcript (3 March 2017), 77:16-78:3.

<sup>721</sup> Hearing Transcript (3 March 2017), 78:4-9.

<sup>722</sup> Hearing Transcript (3 March 2017), 22:4-20.

<sup>723</sup> Rejoinder, para. 524.

<sup>724</sup> Rejoinder, paras. 526, 528, 530, 531.

<sup>725</sup> 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**).

<sup>726</sup> Hearing Transcript (27 February 2017), 152:4-8, *referring to* "Ministry of Industry and Trade will Equalize the Equalizes Support of Renewable Energy Sources," Ministry of Industry and Trade Press Release (mpo.cz), 24 August 2009 (**Ex. R-138**).

In addition, several other sources at the time of the solar ‘bubble’ indicated that a regime change might be in the offing.<sup>727</sup> 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.<sup>728</sup>

487. 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 late 2010, as the Claimant did. The Respondent points out that Mr. Koutý admits that he knew of the governmental discussions on retroactive changes to the FiT level and that the 7% WACC was used in setting the original FiT.<sup>729</sup> The Respondent argues that if tariffs are too beneficial, as in the present case, reasonable investors should expect so called-retroactive changes.<sup>730</sup>
488. The Respondent submits that the tribunals in *AES Summit Generation Limited and AES-Tisza Erömi Kft v. The Republic of Hungary*<sup>731</sup> and *Electrabel v. Hungary*<sup>732</sup> concluded that Hungary’s re-introduction of administrative pricing for electricity generators was permissible.<sup>733</sup> 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.<sup>734</sup> In response to the Claimant’s argument that these cases are distinguishable from the case at hand, 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.<sup>735</sup>
489. Second, the Respondent argues that legitimate expectations must exist at the time the contract to

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<sup>727</sup> Rejoinder, para. 527, referring to “Super income from the sun,” *Ekonom*, 1 July 2009, p. 1 (**Ex. R-142**); “Legal Aspects of Photovoltaic Power Plant Implementation,” Schönher, 25 June 2009, p. 9 (**Ex. R-104**); “Ministry of Industry and Trade equalises support for renewable energy sources,” Ministry of Industry and Trade Press Release ([www.mpo.cz](http://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**).

<sup>728</sup> Hearing Transcript (27 February 2017), 148:10-16.

<sup>729</sup> Hearing Transcript (3 March 2017), 131:24-132:5; Respondent’s Closing Statement Slides, 95-96.

<sup>730</sup> Hearing Transcript (3 March 2017), 124:24-125:7.

<sup>731</sup> *AES*, paras. 10.3.20, 10.3.31, 10.3.44 (**Ex. RLA-41**).

<sup>732</sup> *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*”).

<sup>733</sup> Rejoinder, para. 532.

<sup>734</sup> Rejoinder, para. 532.

<sup>735</sup> Rejoinder, para. 532.

supply energy is concluded.<sup>736</sup> In the present case, the Respondent submits that the Claimant should have been aware of the possibility of legislative changes when it became eligible for the Green Bonuses.<sup>737</sup>

490. 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.<sup>738</sup> The Respondent adds that the reimbursement of investment costs is not at issue in the present case.<sup>739</sup>

491. 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.<sup>740</sup> 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.<sup>741</sup>

492. Finally, the Respondent states that the Tribunal should not base its decisions on the Claimant's subjective comments.<sup>742</sup>

**(d) Whether the Respondent Violated the Claimant's Legitimate Expectations**

**(1) The Claimant's Position**

493. 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.<sup>743</sup>

494. 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

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<sup>736</sup> Rejoinder, para. 534, referring to *Ulysseas, Inc. v. Ecuador*, Final Award, 12 June 2012, para. 252 (**Ex. RLA-281**) ("*Ulysseas*").

<sup>737</sup> Rejoinder, para. 535.

<sup>738</sup> Rejoinder, para. 537.

<sup>739</sup> Rejoinder, para. 538.

<sup>740</sup> Hearing Transcript (3 March 2017), 83:5-9.

<sup>741</sup> Hearing Transcript (3 March 2017), 83:21-86:5.

<sup>742</sup> Rejoinder, para. 523, 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**).

<sup>743</sup> Memorial, paras. 451-454.

expectations.<sup>744</sup> The Claimant explains that the Act on Promotion guaranteed “revenue” at the stable Tariffs level, which is affected when the Solar Levy deducts a certain percentage from the revenue deriving from the Tariffs.<sup>745</sup> In this regard, the Claimant points out that the Respondent itself defined the Solar Levy as “a tax ‘imposed on revenue’ of solar installations”.<sup>746</sup> 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.<sup>747</sup>

495. Second, the Claimant notes that its legitimate expectations were not limited to the 7% return rate or the 15-year simple payback.<sup>748</sup> Rather, the relevant parameter is whether a stable FiT level for the 20-year lifetime of the project was guaranteed.<sup>749</sup>
496. 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*,<sup>750</sup> 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.<sup>751</sup> 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 administrative price regime.<sup>752</sup> 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.<sup>753</sup> 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.<sup>754</sup>

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<sup>744</sup> Reply, para. 736.

<sup>745</sup> Reply, paras. 737-740.

<sup>746</sup> Reply, para. 741.

<sup>747</sup> Reply, para. 740.

<sup>748</sup> Reply, paras. 742, 743.

<sup>749</sup> Reply, para. 744.

<sup>750</sup> *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*”).

<sup>751</sup> Reply, para. 745.

<sup>752</sup> Reply, para. 746.

<sup>753</sup> Reply, para. 747, referring to *Electrabel* Decision on Jurisdiction, para. 7.139 (Ex. RLA-39).

<sup>754</sup> Reply, para. 747, referring to *Electrabel* Decision on Jurisdiction, para. 7.38 (Ex. RLA-39).

## (2) The Respondent's Position

497. 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.
498. With regard to the Solar Levy, the Respondent first alleges that it did not change the level of the Tariffs 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.<sup>755</sup> 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.<sup>756</sup> 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.<sup>757</sup>
499. Referring to *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*,<sup>758</sup> 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."<sup>759</sup> In the present case, however, there was no such radical change.<sup>760</sup> In fact, the amendment measures only decreased overall returns for plants commissioned in 2009 and 2010 by 1.4% (8.4% to 7%) and 3% (11.4% to 8.4%) respectively.<sup>761</sup> 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.<sup>762</sup> In support of this position, the Respondent also relies on the award in *AES*<sup>763</sup> and the decision in *Electrabel*,<sup>764</sup> which concluded that Hungary's reduction of profits to the originally purposed level, covering costs and reasonable return only, was permissible under the ECT.<sup>765</sup>

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<sup>755</sup> Counter-Memorial, para. 471; Rejoinder, paras. 490, 507-510.

<sup>756</sup> Rejoinder, para. 510.

<sup>757</sup> Rejoinder, para. 511.

<sup>758</sup> *Toto Costruzioni*, para. 242 (Ex. RLA-33).

<sup>759</sup> Counter-Memorial, para. 475, referring to *Toto Costruzioni*, para. 244 (Ex. RLA-33).

<sup>760</sup> Counter-Memorial, paras. 473, 474.

<sup>761</sup> Hearing Transcript (3 March 2017), 132:11-132:5; Respondent's Closing Statement Slide, 105.

<sup>762</sup> Counter-Memorial, paras. 471-476.

<sup>763</sup> *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).

<sup>764</sup> *Electrabel* Decision on Jurisdiction, paras. 8.19, 8.2, 8.7 (Ex. RLA-39).

<sup>765</sup> Counter-Memorial, para. 477.

### 3. The Tribunal's Analysis

#### (a) Analysis of the Incentive Regime and of the Facts

500. 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.
501. 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.<sup>766</sup> 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 and Green Bonuses. 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 – pursuant to Article 6 of the Act on Promotion, which has been set out earlier in this Award.<sup>767</sup> The Green Bonus system compensated producers for the difference between the FiT and the market price.
502. 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.
503. 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.<sup>768</sup> 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

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<sup>766</sup> Article 19(1)(d), Act No. 586/1992 (Ex. C-18/R-1).

<sup>767</sup> See above paras. 140, 144.

<sup>768</sup> 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.

- 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.<sup>769</sup>  
(emphasis added)

504. 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.

505. 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 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.

506. The Tribunal notes that the same conclusion was reached by the Czech Constitutional Court in its May 2012 decision.<sup>770</sup>

507. 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

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<sup>769</sup> Technical Regulation (**Ex. R-6**).

<sup>770</sup> May 2012 Constitutional Court Judgment, para. 68 (**Ex. CLA-15/R-110**).

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.<sup>771</sup>

508. 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<sup>772</sup> and the ERO declared that a post-tax 7% WACC for 20 years would be a reasonable compensation.<sup>773</sup> 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.<sup>774</sup>
509. 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.
510. Between 2008 and 2010, when the Claimant entered into the PV plant business, the effect of the 5% limitation rule and the 2% annual increases, was to limit the decrease in the FiT and Green Bonuses to about 9%.<sup>775</sup> 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 and Green Bonuses 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.<sup>776</sup> In June 2009, the payback was said to be 6 years instead of 20 years<sup>777</sup>, and in July 2010 still 8 years instead of 20 years.<sup>778</sup>
511. Already in 2009, *i.e.*, well before the Claimant started its investment project, political and energy

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<sup>771</sup> Explanatory note to the draft ERO Regulation No. 364/2007 (**Ex. C-83**).

<sup>772</sup> ERO Regulation No. 364/2007 Coll. (**Ex. C-29**).

<sup>773</sup> Methodology for Determination of Purchasing Prices and Green Bonuses (**Ex. C-218/R-62**).

<sup>774</sup> ERO Regulation 140/2009, 25 May 2009 (**Ex. C-31**).

<sup>775</sup> 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).

<sup>776</sup> Letter from electricity companies (ČEZ, E.ON and PRE) to the Chamber of Deputies, 12 March 2010, p. 9 (**Ex. R-152**).

<sup>777</sup> "E15: ERO wants to significantly decrease feed-in tariffs for solar energy," finance.cz, 19 June 2009 (**Ex. R-311**).

<sup>778</sup> "1st PV Legal Status Report," PV Legal, July 2010, p. 9 (**Ex. R-137**).

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.<sup>779</sup> 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.

512. 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.<sup>780</sup> On 24 August 2009, the Ministry of Industry issued a press release to draw attention to the fact that the current subsidy system had become untenable and announced that it would abolish the 5% limitation rule as of 1 January 2010.<sup>781</sup>
513. 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. However, the entities which had already obtained an authorisation could still sell them to investors. In this manner, on 19 July 2010, the Claimant acquired 51% of the shares of Hutira, which had already entered into a Grid Connection Agreement in May 2010.<sup>782</sup>
514. In March 2010, the PV sector had sent an open letter to the Czech Parliament about the problem.<sup>783</sup> 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

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<sup>779</sup> “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.

<sup>780</sup> Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009, 1 July 2009 (**Ex. C-113**). *See also* Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Hüner (Deputy Minister of Industry and Trade), 4 July 2008 (**Ex. C-112**).

<sup>781</sup> “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**).

<sup>782</sup> Agreement on transfer of securities between Enkory, a.s., as seller, and the Claimant, as buyer, 19 July 2010 (**Ex. C-89**); Grid Connection Agreement, 26 May 2010 (**Ex. C-106**).

<sup>783</sup> Hearing Transcript (3 March 2017), 83:21-84:10.

that the Minister of Finance was considering the withdrawal of the Tax Holiday.<sup>784</sup>

515. As stated above, three days before the publication of the newsletter, on 19 July 2010, Claimant had acquired 51% of the shares of Hutira for the relatively small amount of CZK 1,020,000 (some EUR 41,000). However, by that date, the Claimant had also lent CZK 4,500,000 (some EUR 182,000) to Hutira.<sup>785</sup> The decisive step in the investment in the eyes of the Tribunal was, however, the conclusion by Hutira of the Engineering, Procurement and Construction Contract on 2 August 2010, whereby Hutira committed itself to pay the construction company CZK 14,779,800 and EUR 2,639,250 (*i.e.*, in total EUR 3,839,000) for the installation of the power plant.<sup>786</sup> The works started on 2 August and had to be terminated on 24 September 2010, the moment by which nearly the full amount should have been paid.<sup>787</sup>
516. The construction was for the greatest part financed through a senior bank loan of CZK 54,131,000 (some EUR 2,190,000), dated 29 October 2010, from Komerční Banka.<sup>788</sup> However, the Claimant also loaned Hutira funds, which were largely used to finance the construction: CZK 4,500,000 (some EUR 182,000) before 2 August 2010<sup>789</sup>; CZK 31,000,000 (some EUR 1,258,000) after 2 August 2010. Unquestionably, the lion's share was thus loaned by the Claimant to Hutira after 2 August 2010. Moreover, while the Claimant had purchased 51% of Hutira's shares on 19 July for CZK 1,020,000, it purchased the remaining 49% of the shares after 2 August 2010 for the more substantial amount of CZK 8,800,000. Consequently, although the Claimant had spent some funds on the project before 2 August 2010, 87% of its funds were spent after 2 August 2010, the date that the construction started and the point of no return was reached. The Tribunal therefore considers 2 August 2010 as the relevant date for the investment.

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<sup>784</sup> “Commentary: Solar Boom Will Cost Us Dearly. There is Still Time for Changes” (IDNES.cz), 22 July 2010 (**Ex. R-205**).

<sup>785</sup> Loan agreement between the Claimant, lender, and the SPV, as borrower, 28 May 2010, for CZK 2,500,000 (**Ex. C-92**), Loan agreement between the Claimant, lender, and the SPV, as borrower, 22 June 2010, for CZK 500,000 (**Ex. C-93**); and Loan agreement between the Claimant, lender, and the SPV, as borrower, 19 July 2010, for CZK 1,500,000 (**Ex. C-94**).

<sup>786</sup> EPC contract, 2 August 2010 (**Ex. C-105**).

<sup>787</sup> Schedule 7 of the Engineering, Procurement and Construction Contract, containing the Payment Schedule, was not annexed to the contract. However, the payment can be assumed to have to been substantially made before and during construction.

<sup>788</sup> Loan agreement between Komerční banka a.s. and Hutira Fve-Omice a.s. (**Annex II to First Koutný Statement**).

<sup>789</sup> Loan agreement between the Claimant, as lender, and the SPV, as borrower, 11 August 2010, for CZK 16,500,000 (**Ex. C-95**); Loan agreement between the Claimant, as lender, and the SPV, as borrower, 13 September 2010, for CZK 2,000,000 (**Ex. C-96**); Loan agreement between the Claimant, as lender, and the SPV, as borrower, 21 September 2010, for CZK 2,500,000 (**Ex. C-97**); and Loan agreement between the Claimant, as lender, and the SPV, as borrower, 25 October 2010, for CZK 10,000,000 (**Ex. C-98**).

517. The Tribunal observes that the Claimant itself admits that, as a small business, it could not carry out extensive due diligence. It refers to statements, made prior to 19 July and 2 August 2010, by ERO and other official bodies, which indicated that the support regime, as it was then applicable, included a stable FiT and Green Bonuses for 20 years. But that does not constitute proof that these statements were specifically addressed to the Claimant, nor that the Claimant relied on them. It remains unknown to what extent the Claimant saw the inevitability of an amendment of the support regime because of the substantial decrease in the costs of solar panels and the flood of new investors in solar energy production. The Claimant might well have recognised that the Czech authorities would like to end the solar boom, but that the changes would not be introduced in 2009 because of the political situation.<sup>790</sup> Or it could have been aware that in July 2009, the ERO proposed the amendment of the Act on Promotion and indicated that in some parts of the country connections of PV plants to the grid were effectively refused.<sup>791</sup> Or it could have known that in November 2009, the ERO discussed the objections against the solar support system from non-solar RES producers and the ancillary costs consumers had to bear for the solar support system. Or it could (or should) have rung a bell that in February 2010 a national moratorium was put in place, which had the effect of freezing any new authorisations for future connections to the grid. In fact, it is telling that Hutira had audited the profitability of the project well after the installation contract was concluded on 2 August 2010.<sup>792</sup>
518. 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 all of these changes were already long foreshadowed by the time that Hutira embarked on the erection of the solar panel plant on 2 August 2010.
519. The possibility that the 5% rule would be abolished had been mentioned already in June 2009<sup>793</sup>

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<sup>790</sup> “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.

<sup>791</sup> Letter from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade), 1 July 2009 (**Ex. C-113**).

<sup>792</sup> Energy Audit prepared by EkoWATT CZ s.r.o., 31 August 2010 (**Annex XXII to Second Koutný Statement**); Auditors’ report, 31 October 2012 (**Annex XXIII to Second Koutný Statement**); Auditors’ report, 31 October 2013 (**Annex XXIV to Second Koutný Statement**).

<sup>793</sup> *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**).

and in August 2009, this change was announced.<sup>794</sup> On 8 September 2009, the ERO insisted that the 5% rule be abolished.<sup>795</sup>

520. As for the Tax Incentives, the Tribunal observes that they are not covered by the ECT because of Article 21 ECT. Besides, it considers that they had no 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.<sup>796</sup> Thereafter, Act 346/2010 amending the Income Tax Act was introduced, and on 12 November 2010, approved.
521. 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 ERO Regulation 2007 that the economic and technical parameters would have to change over the course of time and would not remain fixed.<sup>797</sup>
522. 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.

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<sup>794</sup> “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**).

<sup>795</sup> 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-116**).

<sup>796</sup> P. Novotný, “The Minister of Environment Wants to Tax Solar Power Plants,” Mlada Fronta Dnes, 23 July 2010 (**Ex. R-206**).

**(b) Discussion of the Claims**

523. 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:

524. 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 [...].

525. 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**

526. 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. 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.

527. 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.

528. 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.<sup>798</sup> Had the Tribunal found that such 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.

529. 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.
530. 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.<sup>799</sup> 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".<sup>800</sup>
531. The next issue is whether the Respondent violated its obligation in the circumstances of the present case.
532. 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

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<sup>798</sup> See paras. 502 to 506.

<sup>799</sup> See, e.g., *Continental Casualty*, para. 258 (Ex. RLA-34) and *AES*, para. 9.3.29 (Ex. RLA-41).

<sup>800</sup> *Total Decision on Liability*, para. 164 (Ex. RLA-28).

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 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.

533. 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 both a stable FiT and Green bonuses. The Solar Levy had either to be paid quarterly by the energy producer or it could be withheld by the energy distributor.
534. 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.
535. 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.
536. 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.<sup>801</sup> The return for the reference plant without the amendments would have been

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<sup>801</sup> 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 8.8 years with the Claimant’s inputs or 8.3 years with adjusted

11.4%, while - with the amendments - the return amounted to 8.4%, and hence remained well above the promised 7% return rate.<sup>802</sup> 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

537. 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.
538. 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.
539. 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.<sup>803</sup>

540. 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

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inputs without amendments, and was 11.4 or 10.8 years respectively with the amendments, *i.e.*, also well below the promised 15 years.

<sup>802</sup> First Peer Report, para. 4.8.3: The return for the Claimant would have been 9.7% with the Claimant's inputs or 10.5% on the basis of adjusted inputs without the amendments and was 6.6% or 7.3% 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.

<sup>803</sup> *Micula*, para. 666 (Ex. CLA-3).

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 relevant laws and regulations would not be changed in his or her respect.<sup>804</sup>

541. 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.<sup>805</sup>

542. 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 circumstances<sup>806</sup> 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.<sup>807</sup> This test is consistent with the elements considered by other international tribunals.<sup>808</sup>

543. 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.

544. 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

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<sup>804</sup> *Micula*, para. 673 (Ex. CLA-3).

<sup>805</sup> *Duke Energy v. Ecuador*, para. 340 (Ex. CLA-52).

<sup>806</sup> 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-57): "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".

<sup>807</sup> Memorial, para. 392; Counter-Memorial, para. 462.

<sup>808</sup> See, e.g., *Micula*, para. 668 (Ex. CLA-3).

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 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.

545. 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.
546. 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.
547. 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
548. 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.

549. 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 EPC contract was concluded and the works for the installation started. 87% of the required funds were spent after 2 August 2010. The Claimant appears to agree that this is the relevant moment for the Tribunal's assessment.<sup>809</sup> Therefore, the relevant time period for the Tribunal's enquiry is between August and September 2010.
550. The Tribunal has seen no evidential basis that either (a) when the Claimant acquired from Enkory a.s. 51% of the shares of Hutira on 19 July 2010 or (b) when it actually concluded the EPC contract on 2 August 2010, the Claimant was, in fact, aware of the statements of the Czech Authorities to which it now refers, or that it actually relied upon them.
551. In any event, the promotional activities, upon which the Claimant allegedly relied, contained a warning that the legislation may change.
- c) Any such reliance would not have been reasonable
552. 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.
553. 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.
554. 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.
555. Further still, and as explained at some length above, the Tribunal finds that already at the relevant times (August/September 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.
556. It was manifest in 2009-2010 that the FiT could no longer be maintained unchanged. It was clear

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<sup>809</sup> Hearing Transcript (27 February 2017), 41:8-11 (Claimant's opening statement).

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.

557. 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

558. 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.

559. 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.

560. 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.

561. 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.<sup>810</sup>

562. 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.<sup>811</sup> 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.<sup>812</sup>
563. 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

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<sup>810</sup> Counter-Memorial, para. 247.

<sup>811</sup> 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**).

<sup>812</sup> 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 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.

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.<sup>813</sup>

564. 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.

565. 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 procedure set out in Article. 108 TFEU.”<sup>814</sup>

566. 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”.<sup>815</sup> 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.

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<sup>813</sup> 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**).

<sup>814</sup> 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”

<sup>815</sup> Explanatory Report on the bill of the Act on Promotion, 12 November 2003, p. 6 (**Ex. C-78**).

567. 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.<sup>816</sup>
568. The Claimant argues that the 27 July 2004 Letter was a sufficient basis for its legitimate expectations.<sup>817</sup> 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.<sup>818</sup> 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.<sup>819</sup> Referring to *Athinaiki Techniki v Commission*, the Claimant further submits 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.<sup>820</sup>
569. 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.<sup>821</sup>

570. 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.<sup>822</sup> 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

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<sup>816</sup> Reply, para. 395.

<sup>817</sup> Reply, paras. 395-396.

<sup>818</sup> Reply, para. 396.

<sup>819</sup> Reply, paras. 442-444.

<sup>820</sup> Reply, para. 448, *referring to Athinaiki Techniki v. Commission*, Case C-521/06P, 17 July 2008 (**Annex X to Quigley Report**) (“*Athinaiki*”).

<sup>821</sup> Reply, para. 441, *referring to Quigley Report*, para. 149.

<sup>822</sup> Rejoinder, paras. 320-329.

concerned by the competent authorities of the European Union”.<sup>823</sup> Contrary to the Claimant’s argument, the Respondent maintains that the EC’s 27 July 2004 Letter was insufficient to create legitimate expectations.<sup>824</sup> 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.<sup>825</sup>

571. Moreover, the 27 July 2004 Letter was not intended to bring an end to the investigation. Nor did it constitute a formal decision.<sup>826</sup> To this end, the decision of the Court of Justice in *Athinaiiki*<sup>827</sup> is to be distinguished, since in that case it was held that a letter issued by the EC, which did, in fact, close the file on a complaint, constituted a formal decision.<sup>828</sup> 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.<sup>829</sup> Finally, according to the Respondent, the Claimant did not directly rely on the 27 July 2004 Letter in any event.<sup>830</sup> 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.<sup>831</sup>
572. 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.<sup>832</sup> 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

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<sup>823</sup> 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**).

<sup>824</sup> Rejoinder, para. 315, 316.

<sup>825</sup> Counter-Memorial, para. 276-277; Rejoinder, para. 331.

<sup>826</sup> Rejoinder, para. 328.

<sup>827</sup> *Athinaiiki* (**Annex X to Quigley Report**).

<sup>828</sup> Counter-Memorial, paras. 274-277; Rejoinder, para. 314.

<sup>829</sup> Rejoinder, para. 318.

<sup>830</sup> Rejoinder, paras. 319-322.

<sup>831</sup> Rejoinder, paras. 335-337.

<sup>832</sup> Counter-Memorial, paras. 278, 279.

did not bind its future position.<sup>833</sup>

573. 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.<sup>834</sup> 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.<sup>835</sup> 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”<sup>836</sup> In all the 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.
574. 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.<sup>837</sup> 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).
575. 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.
576. In summary, when the investments were made, the Incentive Regime, although State aid, had not

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<sup>833</sup> Counter-Memorial, para. 279.

<sup>834</sup> Letters from the Czech Society of Wind Energy EUROSOLAR respectively to Mr. Monti and Mr. Loyola de Palacio, 16 December 2003 (**Ex. C-75**).

<sup>835</sup> Counter-Memorial, para. 277; Rejoinder, para. 318.

<sup>836</sup> Letter from the EC to EUROSOLAR, 27 July 2004 (**Ex. C-77**).

<sup>837</sup> *Athinaiki*, paras. 48-51 (**Annex X to Quigley Report**).

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

577. In a third step, the Tribunal must next consider whether the Respondent breached its obligation towards the Claimant to act in a transparent manner.
578. 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”.
579. 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.”<sup>838</sup> 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.
580. As noted above, it is the investor’s expectations at the time of the investment that are relevant for the Tribunal’s assessment. And as noted previously, the Tribunal considers that the relevant date for the investment is 2 August 2010.
581. The possibility that a Solar Levy would be introduced by 1 January 2011 was considered on 23 July 2010<sup>839</sup> and was formally announced on 20 October 2010.<sup>840</sup> 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.
582. 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

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<sup>838</sup> Dolzer/Schreuer, p. 149 (**Ex. CLA-29**).

<sup>839</sup> 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**).

<sup>840</sup> See Government of the Czech Republic, “Electricity prices will increase by 5.5% at maximum” (*vlada.cz*), 20 October 2010 (**Ex. R-219**).

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.

583. 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**

584. 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.<sup>841</sup> The obligation to provide FPS is contained in Article 10(1) of the ECT.<sup>842</sup>

585. 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 [...].<sup>843</sup>

586. 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.<sup>844</sup> In particular, referring to *CME Czech Republic B.V. v. Czech Republic*,<sup>845</sup> *Azurix Corp. v. Argentine Republic*,<sup>846</sup> *National Grid P.L.C. v. Argentina Republic*,<sup>847</sup> and *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*,<sup>848</sup> the Claimant submits that the FPS standard requires host States to provide a secure and stable investment environment to protect investors.<sup>849</sup>

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<sup>841</sup> Memorial, paras. 352, 353; Rejoinder, para. 626.

<sup>842</sup> Memorial, paras. 356-358.

<sup>843</sup> Memorial, para. 357.

<sup>844</sup> Memorial, para. 369, referring to Dolzer/Schreuer, p. 149 (**Ex. CLA-32**).

<sup>845</sup> *CME Czech Republic B.V. v. Czech Republic*, Partial Award, 13 September 2001, para 613 (**Ex. CLA-44**).

<sup>846</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 408 (**Ex. CLA-40**).

<sup>847</sup> *National Grid P.L.C. v. Argentina Republic*, Award, 3 November 2008, para. 189 (**Ex. RLA-17**).

<sup>848</sup> *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 730 (**Ex. CLA-25**).

<sup>849</sup> Memorial, paras. 370-373.

587. 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.<sup>850</sup>

## **2. The Respondent's Position**

588. 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.<sup>851</sup>

## **3. The Tribunal's Analysis**

589. Given the way this particular allegation has been framed, it can be addressed briefly.

590. 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.

591. 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**

592. 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

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<sup>850</sup> Memorial, para. 359, 374, referring to *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 89 (**Ex. CLA-37**); *Occidental*, para. 187 (**Ex. CLA-38**); *PSEG*, para. 258 (**Ex. CLA-39**); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 334 (**Ex. CLA-41**); *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-42**).

<sup>851</sup> Counter-Memorial, paras. 456-462.

unreasonable and inconsistent manner.<sup>852</sup>

593. 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] [...]

594. 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*,<sup>853</sup> suggests that any negative impact on investment is sufficient to constitute an impairment.<sup>854</sup>

595. In the present case, the Claimant contends that irrespective of the additional 24% share purchase in November 2013, after the installation of the amendment measures, its project was significantly impaired since the Respondent's measures severely damaged the SPV's value by delaying the payment of and impairing the value of the SPV's outstanding loan repayment, and the Claimant lost an opportunity to sell the shares at a reasonable price that it expected at the time of the additional purchase.<sup>855</sup>

**(b) The Respondent's Position**

596. 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.<sup>856</sup> The Respondent rejects the Claimant's argument that any negative effects on investments, however minor, satisfy the impairment requirement.<sup>857</sup> In the Respondent's view, the impairment must be "significant" before it can amount to a violation of the treaty standard.<sup>858</sup> A mere imposition of tax measures or a simple repeal of a tax exemption is not sufficient to satisfy this requirement.<sup>859</sup>

597. The Respondent alleges that the Claimant fails to establish any such significant impact.<sup>860</sup> The

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<sup>852</sup> Memorial, para. 467; Reply, para. 749.

<sup>853</sup> *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006, para. 458 (Ex. CLA-49).

<sup>854</sup> Reply, para. 751.

<sup>855</sup> Memorial, paras. 493-495; Reply, paras. 749, 750.

<sup>856</sup> Counter-Memorial, paras. 508-510.

<sup>857</sup> Rejoinder, paras. 543, 544.

<sup>858</sup> Rejoinder, para. 545.

<sup>859</sup> Rejoinder, para. 545 referring to *Occidental*, paras. 2-3, 161 (Ex. CLA-38); *Perenco*, paras. 596-599 (Ex. RLA-173); Counter-Memorial, para. 511 referring to *AES*, para. 10.3.3 (Ex. RLA-41); *Electrabel* Decision on Jurisdiction, para. 7.152 (Ex. RLA-39).

<sup>860</sup> Rejoinder, para. 545.

Claimant “was free to use the solar power plants to generate substantial revenue” even after the introduction of the amendment measures.<sup>861</sup> 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.<sup>862</sup>

598. Moreover, the Respondent objects to the Claimant’s argument that the Tax Measures significantly impacted on the loan repayment, pointing out that the SPV had repaid six out of seven loans from the Claimant before the installation of the Tax Measures.<sup>863</sup> Furthermore, the Respondent submits that the Claimant’s additional 24% share purchase in November 2013, at a price approximately eight times higher than the normal price, is at odds with the Claimant’s argument that the Taxation Measures severely affected its project value and deprived it of its sales opportunities.<sup>864</sup> 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”,<sup>865</sup> 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.<sup>866</sup>

## **2. Whether the Respondent’s Measures were Arbitrary or Discriminatory**

### **(a) Whether the Respondent Pursued a Rational Policy**

#### **(1) The Claimant’s Position**

599. 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.<sup>867</sup>

600. Relying on *AES*,<sup>868</sup> 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

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<sup>861</sup> Rejoinder, para. 545, *referring to Perenco*, paras. 597-599 (**Ex. RLA-173**).

<sup>862</sup> Counter-Memorial, para. 512.

<sup>863</sup> Counter-Memorial, para. 512; Rejoinder, para. 546.

<sup>864</sup> Counter-Memorial, para. 513.

<sup>865</sup> Rejoinder, para. 547.

<sup>866</sup> Rejoinder, para. 568.

<sup>867</sup> Memorial, paras. 470-472; Reply, para. 770.

<sup>868</sup> *AES*, paras. 10.3.7, 10.3.8, 10.3.9 (**Ex. RLA-41**).

state's policy objective and the measure adopted to achieve it”<sup>869</sup>.

601. 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.<sup>870</sup>
602. First, the Claimant alleges that the Incentive Regime did not give rise to windfall profits.<sup>871</sup> The photovoltaic investors only received a 10-15% return, which is consistent with return rates in other EU markets.<sup>872</sup> 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.<sup>873</sup>
603. 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.<sup>874</sup> However, the Claimant alleges that the Respondent has not shown that any specific harm existed at the time of the adoption of the measures.<sup>875</sup> 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.<sup>876</sup> Industrial production in the Czech Republic was growing in 2010.<sup>877</sup> The budget deficits of the Czech Republic were at the lowest level among the EU Member States.<sup>878</sup> 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”<sup>879</sup>.

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<sup>869</sup> Memorial, para. 440, 442.

<sup>870</sup> Memorial, paras. 475, 487.

<sup>871</sup> Memorial, para. 480; Reply, paras. 771, 772, 775.

<sup>872</sup> Reply para. 773.

<sup>873</sup> Hearing Transcript (27 February 2017), 70:19-71:4, *referring to* Explanatory Report on Act No. 402/2010 Coll, 2010 (Ex. R-15).

<sup>874</sup> Memorial, para. 477.

<sup>875</sup> Memorial, para. 478.

<sup>876</sup> Reply, para. 774.

<sup>877</sup> Hearing Transcript (2 March 2017), 15:6-13.

<sup>878</sup> Hearing Transcript (27 February 2017), 47:10-11.

<sup>879</sup> Memorial, paras. 476-478.

604. 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.<sup>880</sup> In support of this argument, the Claimant relies on the award in *AES*,<sup>881</sup> in which the tribunal found that Hungary was not obliged to limit potential State aid before the EC issued its decision.<sup>882</sup> 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.<sup>883</sup>
605. 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.<sup>884</sup> 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.<sup>885</sup>
606. 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.<sup>886</sup>

## (2) The Respondent's Position

607. According to the Respondent, a measure is reasonable, if it is reasonably connected to a rational policy.<sup>887</sup> 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.<sup>888</sup>
608. 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.'"<sup>889</sup> In this regard, the Respondent objects to the Claimant's allegation that the Respondent must prove

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<sup>880</sup> Memorial, paras. 483-485.

<sup>881</sup> *AES*, para. 10.3.16 (**Ex. RLA-41**).

<sup>882</sup> Memorial, para. 485.

<sup>883</sup> Memorial, para. 486.

<sup>884</sup> Memorial, para. 481.

<sup>885</sup> Memorial, para. 481.

<sup>886</sup> Memorial, para. 479.

<sup>887</sup> Counter-Memorial, para. 514; Rejoinder, paras. 541, 549-553.

<sup>888</sup> Rejoinder, para. 554; Hearing Transcript (27 February 2017), 231:8-11.

<sup>889</sup> Rejoinder, para. 556; Counter-Memorial, para. 527 referring to *AES*, para 10.3.8 (**Ex. RLA-41**) and *Micula*, para. 525 (**Ex. CLA-3**).

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.”<sup>890</sup> 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.”<sup>891</sup>

609. 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.<sup>892</sup> 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.<sup>893</sup> 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 support.<sup>894</sup>
610. 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.<sup>895</sup>

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<sup>890</sup> Counter-Memorial, para. 526.

<sup>891</sup> Counter-Memorial, para. 515, *referring to AES*, para. 10.3.31 (**Ex. RLA-41**); *Micula*, para. 825 (**Ex. CLA-3**); *Paushok*, paras. 319-321 (**Ex. RLA-180**).

<sup>892</sup> Rejoinder, para. 558.

<sup>893</sup> Rejoinder, para. 559.

<sup>894</sup> Hearing Transcript (2 March 2017), 84:16-86:23; Mr. Jones’ Presentation, slides 10-12.

<sup>895</sup> Hearing Transcript (3 March 2017), 106:9-109:9

**(b) Whether the Respondent Acted in a Reasonable Manner When Implementing the Policy**

**(1) The Claimant's Position**

611. 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."<sup>896</sup> In the present case, the Claimant argues that the contested measures do not satisfy either of these requirements.<sup>897</sup>
612. 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.<sup>898</sup> 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.<sup>899</sup> On the other hand, in the Claimant's view, the measures had significantly negative effects on photovoltaic investors.<sup>900</sup> For example, and most relevant to this case, the sale of the Claimant's plant became impossible after the measures were introduced.<sup>901</sup>
613. Finally, according to the Claimant, the Respondent was the first EU Member State that employed the retroactive measures to deal with the solar boom.<sup>902</sup> 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.<sup>903</sup> 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

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<sup>896</sup> Memorial, paras. 473 *referring to Micula*, para. 525 (**Ex. CLA-3**); *Electrabel Award*, para. 179 (**Ex. CLA-131**).

<sup>897</sup> Reply, para. 793, *referring to Occidental*, para. 163 (**Ex. CLA-38**).

<sup>898</sup> Memorial, para. 489; Reply, para. 778.

<sup>899</sup> Memorial, para. 490; Reply, para. 779.

<sup>900</sup> Memorial, para. 491; Reply, para. 780.

<sup>901</sup> Memorial, para. 470.

<sup>902</sup> Reply, para. 269.

<sup>903</sup> Reply, para. 255-267, 785, *referencing* the regulatory practice in Germany, Portugal, France, UK, Austria, Denmark, The Netherlands, and Slovenia.

Trade of 11 January 2011.<sup>904</sup>

## (2) The Respondent's Position

614. According to the Respondent, a measure is reasonable if the measure is “appropriately tailored” to meet the policy.<sup>905</sup> 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.”<sup>906</sup> 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.<sup>907</sup>
615. 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.<sup>908</sup> 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.<sup>909</sup>
616. 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 the financial crisis.<sup>910</sup> 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.<sup>911</sup> These measures were implemented to correct good faith mistakes in the design of the original scheme.<sup>912</sup>
617. The Respondent argues that the Solar Levy was meant to mitigate the negative impact on the

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<sup>904</sup> 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-118**)).

<sup>905</sup> Counter-Memorial, para. 516 *referring to* *Micula*, para. 525 (**Ex. CLA-3**); Rejoinder, para. 561.

<sup>906</sup> Counter-Memorial, para. 517 *referring to* *El Paso*, para. 290 (**Ex. RLA-31**).

<sup>907</sup> Counter-Memorial, paras. 518-519, *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**).

<sup>908</sup> Counter-Memorial, para. 522 *referring to* *AES*, paras. 10.3.9-13 (**Ex. RLA-41**) and *Micula*, paras. 825-826 (**Ex. CLA-3**).

<sup>909</sup> Counter-Memorial, paras. 524, 525.

<sup>910</sup> Counter-Memorial, paras. 529-530; Rejoinder, para. 558.

<sup>911</sup> Counter-Memorial, para. 531.

<sup>912</sup> Counter-Memorial, para. 531.

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.<sup>913</sup> The Tax Exemption was not economically justifiable, because, without it, the photovoltaic installations were still sufficiently profitable and the 2010 EU target was achievable.<sup>914</sup> 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.<sup>915</sup> The changes to the depreciation period were intended to address an abuse of the measure by PV investors.<sup>916</sup>

618. To support its view, the Respondent submits that Czech domestic courts have confirmed that the amendment measures served the public interest.<sup>917</sup> 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.<sup>918</sup> In the Respondent's view, these solar producers should have been aware of the possibility of modifications in the investment scheme.<sup>919</sup>
619. 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 unreasonable.<sup>920</sup> On the contrary, the Respondent submits that the measures were economically effective and that other EU Member States adopted comparable measures.<sup>921</sup> 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.<sup>922</sup> Moreover, the Respondent notes that the novelty of a measure is irrelevant to the reasonableness analysis.<sup>923</sup> The Respondent also reiterates that the Tribunal is not in a position to second guess whether the

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<sup>913</sup> Rejoinder, paras. 561, 562.

<sup>914</sup> Rejoinder, para. 564.

<sup>915</sup> Rejoinder, para. 565.

<sup>916</sup> Rejoinder, para. 565.

<sup>917</sup> Counter-Memorial, para. 532 *referring to* May 2012 Constitutional Court Judgment, paras. 72, 83 (**Ex. CLA-15/R-110**).

<sup>918</sup> Counter-Memorial, para. 532.

<sup>919</sup> Counter-Memorial, para. 533 *referring to* First Expert Report by Mr. Wynne Jones, dated 7 October 2015, paras. 6.36, 6.48.

<sup>920</sup> Rejoinder, para. 572.

<sup>921</sup> Counter-Memorial, para. 534; Rejoinder, para. 572.

<sup>922</sup> Hearing Transcript (2 March 2017), 81:15-20, Mr. Jones' Presentation, slide 5.

<sup>923</sup> Rejoinder, para. 574 *referring to* Philip Morris, para. 430 (**Ex. RLA-273**); *Invesmart*, para. 459 (**Ex. RLA-286**).

measures could have been better designed.<sup>924</sup> Referring to *Mesa Power*,<sup>925</sup> 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.<sup>926</sup>

620. Finally, the Respondent submits that legislation does not become unreasonable simply because States enact it quickly.<sup>927</sup> 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.<sup>928</sup> 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.<sup>929</sup>

### **3. Whether the Respondent's Measures were Intrinsically Unreasonable**

#### **(a) The Claimant's Position**

621. The Claimant alleges that the repeal of incentive assurances was intrinsically unreasonable,<sup>930</sup> 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.<sup>931</sup>
622. In addition, the Claimant argues that the Respondent's measures were irrational, because they changed the fundamental features of the Incentive Regime.<sup>932</sup> In support of its argument, the Claimant relies on the general principle articulated in *Charanne*<sup>933</sup> that "the existence of a guaranteed tariff throughout the lifetime of the facility is an essential characteristic of an incentive

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<sup>924</sup> Rejoinder, para. 575 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**).

<sup>925</sup> *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-07, Award, 24 March 2016, para. 587 (**Ex. RLA-285**) ("*Mesa Power*").

<sup>926</sup> Rejoinder, para. 576 referring to *Mesa Power*, para. 587 (**Ex. RLA-285**).

<sup>927</sup> Rejoinder, para. 578 referring to *AES*, para. 9.3.66 (**Ex. RLA-41**).

<sup>928</sup> Rejoinder, para. 577.

<sup>929</sup> Rejoinder, para. 577.

<sup>930</sup> Reply, para. 752.

<sup>931</sup> Reply, paras. 753, 754.

<sup>932</sup> Reply, para. 755.

<sup>933</sup> *Charanne*, paras. 514, 539 (**Ex. CLA-101**).

regime.”<sup>934</sup> 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.<sup>935</sup>

**(b) The Respondent’s Position**

623. The Respondent rejects the Claimant’s argument that the Taxation Measures are unreasonable, because they had the effect of withdrawing the promised incentives.<sup>936</sup> 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.<sup>937</sup>
624. 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. The Respondent relies on the decision of the Czech Constitutional Court, which concluded that the Solar Levy did not alter the RES scheme.<sup>938</sup>
625. 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 2010 Target.<sup>939</sup>

**4. Whether the Respondent Acted in an Inconsistent Manner**

**(a) The Claimant’s Position**

626. 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.<sup>940</sup>
627. 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

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<sup>934</sup> Reply, paras. 756, 757, 762.

<sup>935</sup> Reply, paras. 758-761.

<sup>936</sup> Rejoinder, para. 568.

<sup>937</sup> Rejoinder, para. 568.

<sup>938</sup> Rejoinder, para. 567, referring to May 2012 Constitutional Court Judgment, para. 68 (**Ex. CLA-15/R-110**).

<sup>939</sup> Rejoinder, para. 557.

<sup>940</sup> Reply, para. 763.

made between 1 January 2009 and 31 December 2010.<sup>941</sup> 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.<sup>942</sup> 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.<sup>943</sup>

**(b) The Respondent's Position**

628. The Respondent dismisses the Claimant's argument that, since the Respondent's measures were "inconsistent", the measures were unreasonable.<sup>944</sup> 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.<sup>945</sup>

**5. Whether the Respondent Contributed to the Rise of the Solar Boom**

**(a) The Claimant's Position**

629. 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.<sup>946</sup> The Claimant submits that Article 25(2)(b) of the ILC Draft Articles on the Responsibility of States for Internationally 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.<sup>947</sup>

630. 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.<sup>948</sup> 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

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<sup>941</sup> Reply, paras. 764-766.

<sup>942</sup> Reply paras. 767, 768.

<sup>943</sup> Reply, para. 769.

<sup>944</sup> Rejoinder, para. 552.

<sup>945</sup> Rejoinder, para. 553.

<sup>946</sup> Memorial, para. 492; Reply, para. 781.

<sup>947</sup> Reply, para. 782.

<sup>948</sup> Reply, para. 783.

Scheme would not have become necessary.<sup>949</sup> 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%.<sup>950</sup> 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.<sup>951</sup>

**(b) The Respondent's Position**

631. The Respondent rejects the Claimant's position that the solar boom was caused by the Respondent's mismanagement.<sup>952</sup>
632. 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.<sup>953</sup>
633. 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.<sup>954</sup> The moratorium for grid connection in February 2010 was also timely, because the Czech Government needed to obtain sufficient data before imposing it.<sup>955</sup> 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.<sup>956</sup>
634. 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.<sup>957</sup>

**6. The Tribunal's Analysis**

635. The Parties are divided as to whether the Respondent's withdrawal of the Tax Incentives and the

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<sup>949</sup> Reply, paras. 784-788.

<sup>950</sup> Hearing Transcript (3 March 2017), 9:18-11:14, *referring to* Hearing Transcript (2 March 2017), 148:8-19, 131:19-23.

<sup>951</sup> Hearing Transcript (27 May 2017), 44:14-20.

<sup>952</sup> Rejoinder, para. 571.

<sup>953</sup> Hearing Transcript (2 March 2017), 81:15-82:8.

<sup>954</sup> Hearing Transcript (27 February 2017), 157:12-22.

<sup>955</sup> Hearing Transcript (3 March 2017), 128:7-19.

<sup>956</sup> Rejoinder, para. 571.

<sup>957</sup> Rejoinder, paras. 569, 570.

introduction of the Solar Levy amount to violations of the prohibition of arbitrary and discriminatory treatment.

636. 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.
637. 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.”<sup>958</sup> 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.<sup>959</sup>
638. 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 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.
639. 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.
640. 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 and the Green

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<sup>958</sup> *AES*, para. 10.3.8 (Ex. RLA-41).

<sup>959</sup> *AES*, para. 10.3.9 (Ex. RLA-41).

Bonuses 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 2010, without the legislative amendments, the reference plant would have received a full payback in 7.8 years.<sup>960</sup> Following the amendments, a payback could still be achieved in 10.8 or 11.4 years, and therefore well below the promised 15 years. The return for the reference plant without amendments would have been 11.4% in 2010, while the return with the amendments amounted to 8.4% in 2010, and therefore was exactly in line with or well above the promised 7% return rate.<sup>961</sup> 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.

641. In this context, it is also worth noting that while the return for the reference plant decreased by 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.
642. 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.
643. 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.

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<sup>960</sup> First Peer Report, para. 4.8.1: the pay back for the Claimant would have been without amendments 8.8 years with the Claimant’s inputs and 8.3 years with adjusted inputs years and was 8 years with amendments, *i.e.*, also well below the promised 15 years.

<sup>961</sup> First Peer Report, para. 4.8.3: The return for the Claimant would have been 9.7% with the Claimant’s inputs and 10.5% with adjusted inputs 6.6% with the Claimant’s inputs and 7.3% with adjusted inputs 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.

## VII. COSTS

### A. THE CLAIMANT'S POSITION

644. The Claimant submits that its total costs amount to EUR 307,599.87, which includes the arbitration deposit of EUR 100,000.00 to date.<sup>962</sup>

645. 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.<sup>963</sup>

646. 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.<sup>964</sup> 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”.<sup>965</sup> As for the costs of legal representation, Article 40(2) provides the tribunal a broader discretion to decide the allocation of the costs.<sup>966</sup>

647. 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.<sup>967</sup> For the costs of arbitration,

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<sup>962</sup> Claimant’s Updated Schedule of Costs, annexed to the Claimant’s Supplemental Submission on Costs

<sup>963</sup> Claimant’s Submission on Costs, para. 2.

<sup>964</sup> Claimant’s Submission on Costs, para. 4.

<sup>965</sup> Claimant’s Submission on Costs, para. 5.

<sup>966</sup> Claimant’s Submission on Costs, para. 6.

<sup>967</sup> Claimant’s Submission on Costs, para. 7.

this follows from the “costs follow the event” rule.<sup>968</sup> 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.<sup>969</sup> 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.<sup>970</sup> 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.<sup>971</sup> In addition, the Claimant bore the burden of proof regarding several novel and complex issues for which no precedent existed.<sup>972</sup> 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.<sup>973</sup> Finally, the Respondent must bear the costs associated with the unsuccessful challenge to Mr. Beechey.<sup>974</sup>

648. 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.<sup>975</sup> 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.<sup>976</sup> 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.”<sup>977</sup>
649. In scenario 3, the Claimant submits that it should not bear any of the Respondent’s costs.<sup>978</sup> The

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<sup>968</sup> Claimant’s Submission on Costs, para. 8.

<sup>969</sup> Claimant’s Submission on Costs, paras. 9-10.

<sup>970</sup> Claimant’s Submission on Costs, paras. 11-14.

<sup>971</sup> Claimant’s Submission on Costs, paras. 16-17.

<sup>972</sup> Claimant’s Submission on Costs, paras. 18-19.

<sup>973</sup> Claimant’s Supplemental Submission on Costs, paras. 3, 6-7.

<sup>974</sup> Claimant’s Supplemental Submission on Costs, paras. 8-10.

<sup>975</sup> Claimant’s Submission on Costs, para. 2.

<sup>976</sup> Claimant’s Submission on Costs, para. 20.

<sup>977</sup> Claimant’s Submission on Costs, para. 21.

<sup>978</sup> 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.<sup>979</sup>

650. The Claimant submits that its legal costs are reasonable pursuant to Article 38(e) of the UNCITRAL Rules.<sup>980</sup> 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.”<sup>981</sup> The Claimant adds that if the Respondent’s legal costs exceed those of the Claimant, any excess amount would be unreasonable.<sup>982</sup>

#### **B. THE RESPONDENT’S POSITION**

651. 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.<sup>983</sup>
652. 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.”<sup>984</sup>
653. 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”.<sup>985</sup> 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”.<sup>986</sup>
654. In the Respondent’s view, the “loser pays” principle does not only apply to arbitration costs, but

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<sup>979</sup> Claimant’s Submission on Costs, para. 23; Claimant’s Supplemental Submission on Costs, paras. 3, 7.

<sup>980</sup> Claimant’s Submission on Costs, para. 24.

<sup>981</sup> Claimant’s Submission on Costs, para. 24.

<sup>982</sup> Claimant’s Submission on Costs, para. 25.

<sup>983</sup> Respondent’s Submission on Costs, para. 1; Respondent’s Updated Submission on Costs, paras. 1-3.

<sup>984</sup> Respondent’s Submission on Costs, para. 2. *See also* Respondent’s Updated Submission on Costs, para. 2.

<sup>985</sup> Respondent’s Submission on Costs, paras. 3-4.

<sup>986</sup> 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.”<sup>987</sup> The Respondent further alleges that the application of the “loser pays” principle “is not limited to the context of ‘abusive’ or ‘frivolous’ claims.”<sup>988</sup>

655. 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’”.<sup>989</sup> The concept of “relative success” should only be employed, however, if “a tribunal has genuine difficulty in identifying the prevailing party.”<sup>990</sup> 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)”.<sup>991</sup> In such case, so argues the Respondent, it “should be awarded most or all of its reasonable costs”.<sup>992</sup>
656. 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)”.<sup>993</sup>
657. Against this background, the Respondent argues that the Claimant has caused such an “unnecessary aggravation of costs”.<sup>994</sup> The Claimant, for example, (1) submitted “massively overbroad document production requests”;<sup>995</sup> (2) disclosed funding sources of its investment in an untimely manner, creating a comparable situation to *Plama*, in which the Tribunal ordered the

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<sup>987</sup> 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.

<sup>988</sup> Respondent’s Submission on Costs, para. 7.

<sup>989</sup> Respondent’s Submission on Costs, para. 8.

<sup>990</sup> Respondent’s Submission on Costs, para. 8.

<sup>991</sup> Respondent’s Submission on Costs, para. 9.

<sup>992</sup> Respondent’s Submission on Costs, para. 9.

<sup>993</sup> Respondent’s Submission on Costs, para. 17, quoting *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, 17 December 2015, para. 1038. (Ex. RLA-276).

<sup>994</sup> Respondent’s Submission on Costs, para. 18.

<sup>995</sup> Respondent’s Submission on Costs, para. 18(a).

- claimant to bear arbitration costs and the respondent's legal costs;<sup>996</sup> 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.<sup>997</sup>
658. 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."<sup>998</sup>
659. The Respondent also states that the reasonableness of its costs is supported by the following four factors.<sup>999</sup> 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.<sup>1000</sup> Second, the case at hand has presented "a number of complex factual and legal issues".<sup>1001</sup> 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."<sup>1002</sup> 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.<sup>1003</sup> 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.<sup>1004</sup>
660. 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

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<sup>996</sup> Respondent's Submission on Costs, para. 18(b).

<sup>997</sup> Respondent's Submission on Costs, para. 18(c).

<sup>998</sup> 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.

<sup>999</sup> Respondent's Submission on Costs, para. 11. *See also* Respondent's Updated Submission on Costs, paras. 9-10.

<sup>1000</sup> Respondent's Submission on Costs, para. 12.

<sup>1001</sup> Respondent's Submission on Costs, para. 13.

<sup>1002</sup> Respondent's Submission on Costs, para. 14.

<sup>1003</sup> Respondent's Submission on Costs, para. 15.

<sup>1004</sup> 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”.<sup>1005</sup>

661. 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”.<sup>1006</sup>
662. 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.”<sup>1007</sup>

### **C. THE TRIBUNAL’S DECISION**

663. 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**

664. 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.
665. 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.
666. 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.
667. The fees of Mr. John Beechey CBE, co-arbitrator, amount to EUR 5,250. Mr. Beechey did not have any expenses.
668. The fees of Mr. Toby Landau QC, co-arbitrator, amount to EUR 39,135.42 and his expenses amount to EUR 653.49.
669. The fees of Professor Hans van Houtte, presiding arbitrator, amount to EUR 64,442.50 and his

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<sup>1005</sup> Respondent’s Updated Submission on Costs, paras. 6-7.

<sup>1006</sup> Respondent’s Updated Submission on Costs, para. 8.

<sup>1007</sup> Respondent’s Updated Submission on Costs, para. 11.

expenses amount to EUR 121.50.

670. 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.
671. PCA fees amount to EUR 36,500. The PCA incurred no expenses.
672. Each Party paid advances on costs in the amount of EUR 100,000, *i.e.*, a total advance of EUR 200,000.
673. As for the Parties' respective costs of legal representation and assistance, the Claimant's costs related to this arbitration amount to EUR 207,599.87. 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**

674. 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**

675. 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.
676. 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.
677. 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.

678. 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.
679. 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**

680. 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”.
681. 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.
682. 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**

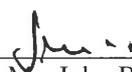
683. Based on the considerations set out above, the Tribunal rules as follows:

- (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 15<sup>th</sup> day of May 2019

  
\_\_\_\_\_  
Mr. John Beechey CBE  
Co-Arbitrator

  
\_\_\_\_\_  
Mr. Toby Landau QC  
Co-Arbitrator

  
\_\_\_\_\_  
Professor Dr. Hans van Houtte  
Presiding Arbitrator