GOVERNMENT ATTORNEY'S OFFICE
DIRECTORATE FOR STATE LEGAL SERVICES

SUBDIRECTORATE-GENERAL OF LITIGATION SERVICES

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

AND

UNDER THE ENERGY CHARTER TREATY
(ICSID ARBITRATION CASE No. ARB/15/42)

BETWEEN:

HYDRO ENERGY 1 S.À R.L.
HYDROXANA SWEDEN AB
Claimants

and

THE KINGDOM OF SPAIN
Respondent

RESPONDENT'S REJOINDER ON THE MERITS AND REPLY ON JURISDICTION

ARBITRATORS:
Lord Collins of Mapesbury, LL.D., F.B.A.
Prof. Rolf Knieper
Mr. Peter Rees, QC

Submitted on behalf of the Respondent by:

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16 February 2018

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I. LIST OF PRINCIPAL ABBREVIATIONS

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

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

"**Act 54/1997" or "LSE 54/1997":** Act 54/1997, of 27 November 1997, on the Electricity Sector. It was repealed by Act 24/2013, of 26 December 2013, on the Electricity Sector, in the terms stipulated in its sole Repealing Provision.

"**AEE**": by its Spanish acronym, Spanish Wind Energy Association.

"**APPA**": By its Spanish acronym, Association of Renewable Energy Producers.

"**ASIF**": By its Spanish acronym, Photovoltaic Industry Association.

"**BIT**": Bilateral Investment Treaty.

"**CJEU**": Court of Justice of the European Union.

"**CNE**": By its Spanish acronym, National Energy Commission. The Regulatory Body of the energy systems in Spain. Since 7 October 2013, its functions have been taken over by the National Markets and Competition Commission.

"**CNMC**": National Markets and Competition Commission, by its Spanish acronym.

"**CPI**": Consumer Price Index.

"**CPI-IP**": Consumer Price Index at constant tax rates, excluding unprocessed food and energy products.

"CT of the Water Act": Consolidated Text of the Water Act, approved by Legislative Royal Decree 1/2001, of 20 July 2001.

"**DCF**": *Discounted cash flow, or the current value of future cash flows.*

"**Directive 2001/77/EC**": 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.

"**Directive 2009/28/CE**": Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

"**ECT**": Energy Charter Treaty, executed in Lisbon on 17 December 1994.

"**EU**": European Union.

"**FET**": Fair and Equitable Treatment.

"**First Econ One Expert Report**": First Report of Econ One Research, Inc., 24 February 2017.

"**First Witness statement of Ms Carmen López"**: Witness Statement of Ms Carmen López, 20 February 2017.

"**Intra-EU Dispute**": the dispute between an investor of the EU and an EU State.

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

"**IT**": Standard Facility, by its Spanish acronym.

"**MCPS**": Most Constant Protection and Security.

"**Ministerial Order HAP/703/2013":** Ministerial Order HAP/703/2013, of 29 April 2013, approving Form 583 "Tax on the value of the production of electricity. Self-assessment and Instalment Payments" and establishing the manner and procedure for its submission.

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

"**OR**": Ordinary Regime.

"**PANER**": By its Spanish acronym, Spain's National Renewable Energy Action Plan.

"**PER**": By its Spanish acronym, Renewable Energy Plan.

"**PFER**": Renewable Energy Promotion Plan.

"**PV**": photovoltaic.

"**RAIPRE**": By its Spanish acronym, Administrative Registry of electricity production facilities.

"**RD 1432/2002**": Royal Decree 1432/2002, of 27 December, on the methodology of the Average Reference Electricity Tariff.

"**RD 1565/2010**": Royal Decree 1565/2010, of 19 November 2010, which regulates and modifies certain aspects of the electricity production activities under the special regime.

"**RD 1578/2008**": RD 1578/2008, of 26 September, on remuneration for production of electricity using solar photovoltaic technology for facilities after the deadline for maintaining the remuneration of Royal Decree 661/2007, of 25 May, for such technology.

"**RD 1614/2010**": Royal Decree 1614/2010, of 7 December, which regulates and modifies certain aspects of the activity of electricity production through solar thermoelectric and wind

power technologies.

"**RD 198/2015**": Royal Decree 198/2015, of 23 March, which implements Article 112 *bis* of the Consolidated Text of the Water Act and regulates the Levy on the use of continental waters for the production of electrical energy in interregional boundaries.

"**RD 2818/1998**": Royal Decree 2818/1998, of 23 December 1998, on the production of electrical energy by facilities supplied with renewable energy, waste or cogeneration resources or sources.

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

"**RD 436/2004**": Royal Decree 436/2004, dated 12 March 2004, establishing the methodology for the updating and systematisation of the legal and economic regime for the activity of electricity production under the special regime.

"**RD 661/2007**": Royal Decree 661/2007, of 25 May 2007, regulating the activity of electricity production under the special regime.

"**RD-Act 1/2012**": RD-Act 1/2012, 27 January 2012, which proceeds to the suspension of the remuneration pre-assignment procedures and the elimination of the economic incentives for new electrical energy production plants based on cogeneration, renewable energy sources, and waste.

"**RD-Act 14/2010**": Royal Decree Act 14/2010, of 23 December, establishing urgent measures for the correction of the tariff deficit in the electricity sector published in the Official State Gazette of 24 December 2010.

"**RD-Act 2/2013**": RD-Act 2/2013, of 1 February 2013, on urgent measures in the electricity sector and in the financial sector.

"**RD-Act 20/2012**": Royal Decree-Act 20/2012, of 13 July, on measures to guarantee budgetary stability and promotion of competitiveness.

"**RD-Act 6/2009**": RD-Act 6/2009, of 30 April 2009, which adopts certain measures in the energy sector and which approves the Social Tariff.

"**RD-Act 7/2006**": RD-Act 7/2006, of 23 June, establishing urgent measures in the energy sector.

"**RD-Act 9/2013**": RD-Act 9/2013 of 12 July 2013, establishing urgent measures to ensure the financial stability of the electricity system.

"**REIO**": Regional Economic Integration organizations.

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

"**RREE**" or "**RE**": Renewable Energies.

"**Second Econ One Expert Report**": Second Report of Econ One Research, Inc., 19 February 2018.

"Second Witness statement of Ms Carmen López": Witness statement of Ms Carmen López, 16 February 2018.

"Spanish Cabinet Meeting Decision of 2009": Decision of 19 November 2009, proceeding to the management planning of the projects or facilities submitted to the administrative register for pre-assignment of remuneration for electrical energy production plants, specified in Royal Decree Act 6/2009, of 30 April.

"**SR**": Special Regime.

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

"The Claimants" o "the **claimant Party**" o "**The Claimant**": Hydro Energy 1 S.À R.L. and Hydroxana Sweden AB.

"**This arbitration**" or the "**present arbitration**": ICSID Arbitration CASE no. ARB/15/42, formally raised by the Claimants.

"This Memorial", "this statement" or the "**present statement**": Rejoinder on the Merits and Reply on Jurisdiction of the Kingdom of Spain, dated 19 February 2018.

"**TMR**": Average Reference Electricity Tariff, by its Spanish acronym.

"**TVPEE**": Tax on the value of the production of electricity. It was created with effect from 1 January 2013 by Act 15/2012 and is regulated in Articles 1 to 11 of such Act 15/2012.

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

"Water Levy": Levy on the use of continental waters for the production of electrical energy. It is regulated by Article 112 bis of the CT of the Water Act which was introduced by Article 29 of Act 15/2012.

"**REE**": By its Spanish acronym, Spanish Electricity System

"**SES**": Spanish Electricity System.

II. INTRODUCTION

1. In accordance with the provisions of Procedural Order No. 1 and Annex 1, the Kingdom of Spain (hereinafter the "**Respondent**" or the **"Respondent Party"**) submits its Rejoinder on the Merits and Reply on Jurisdiction.

2. Hydro Energy 1 S.À R.L. and Hydroxana Sweden AB (hereinafter, the **"Claimants"** or the **"Claimant Party"** or the **"Claimant"**) argue that the Kingdom of Spain has failed to fulfil its obligations under the Energy Charter Treaty (hereinafter **"ECT"**) through the adoption of various legislative and regulatory measures affecting the producers of electricity from photovoltaic energy.

3. In particular, the Claimants maintain that Spain has breached the obligations contained in section (1) of Article 10 of the ECT concerning: (a) Fair and equitable treatment, (b) Not to impair in any way by unreasonable or discriminatory measures, the management, maintenance, use, enjoyment or liquidation of investments, and (c) the duty to grant full protection and certainty. In addition, the Claimants contend that Spain has violated Article 13 of the ECT by means of the indirect expropriation of their investment.

4. The Kingdom of Spain will request that the Tribunal reject the Claimant's claims in their entirety on their merits and sentence them to pay for the costs of this Arbitration. Nevertheless, and before it does so, we submit to the analysis of the Honourable Tribunal, the two Preliminary Objections relating to the jurisdiction of the Arbitral Tribunal set out below.

(a) Jurisdictional Objections

5. Firstly, in the **Jurisdictional Objection of section III.A** of this Memorial, the Kingdom of Spain reiterates the lack of jurisdiction of the Arbitral Tribunal to hear this dispute as there are no protected investors under the ECT. Both Luxemburg and Sweden, the Countries of the Claimants, and the Kingdom of Spain are member States of the European Union (hereinafter "**EU**"). The EU is a Contracting Party to the ECT and hence the Claimants are not from "another Contracting Party", as required by Article 26 of the ECT to be able to resort to arbitration. The arbitration dispute resolution mechanism stipulated in Article 26 of the ECT is not applicable to an intra-EU dispute like the present one.

6. Secondly, in the **Jurisdictional Objection of section II.B** of this Memorial, the Kingdom of Spain reiterates the lack of jurisdiction of the Arbitral Tribunal to hear the claim on an alleged breach of the protection standards of FET, MCPS and Non-impairment through the introduction of the Tax on the Value of the Production of Electrical Energy (hereinafter, **"TVPEE"**) and the Levy on the use of continental waters for the production of electrical energy (hereinafter, **"Water Levy"**) by Act 15/2012, of 27 December 2012, on tax measures for energy sustainability (hereinafter, **"Act 15/2012"**).

7. In accordance with Article 21 of the ECT, the protection standards of FET, MCPS and Non-Impairment are not applicable with respect to the TVPEE and the Water Levy neither by virtue of section (1) of Article 10 of the ECT nor by virtue of section (7) of Article 10 of the ECT.

8. According to Article 21 of the ECT, section (1) of Article 10 of the ECT does not generate obligations with respect to taxation measures of the Contracting Parties, such as the TVPEE and the Water Levy. Moreover, the Most Favoured Nation treatment of section (7) of Article 10 of the ECT may only be applied, if the case, to indirect taxes and neither the TVPEE nor the Water Levy are indirect taxes.

9. It should be recalled that the Jurisdictional Objection of section III.A of this Memorial is an objection of total character, that is, it affects the entirety of the dispute raised by the Claimants. Thus, the estimation of this objection would entail the exclusion of the entire dispute from the jurisdiction of the Arbitral Tribunal. The Jurisdictional Objection of section III.B of this Memorial is an objection of partial nature, that is, it only affects a certain part of the dispute raised by the Claimants.

(b) Merits of this Case

(i) Facts that are incorrect and omitted by the claimants to the Arbitral Tribunal.

10. The Claimants state that upon making their investment in May and December 2011, they had the Expectation that (i) the economic system of subsidies for production from Renewable Energies ("RE") would always be maintained and that (ii) RD 661/2001 could not be altered for plants in operation. The Claimant party upholds that the Government agreed to maintain a Fixed FIT indefinitely for its renewable energy production Plants that are registered in the RAIPRE, these only being updatable by the CPI. However, the Claimant party does not provide either a legal or regulatory Due Diligence to support this theory. The facts, included in the various Due Diligence managed by the Claimants, prove otherwise.

11. The Kingdom of Spain shall demonstrate that the Claimants, upon investing in 2011, did not rest their investments on the existence of a "*commitment*" to maintain RD 661/2007 in favour of their minihydraulic plants. The Kingdom of Spain shall demonstrate that the RE Sector does not support the theory of the Claimant. In 2006 and 2007, the most important RE Sector Associations in Spain considered the existence of a regulatory risk in the regulatory Framework. This was the reason they issued severe criticism of the Government through 2006, 2007 and 2008.

12. Furthermore, the Claimants' claim is based on facts that are incorrect or hidden from the Arbitral Tribunal:

    a. The Claimants maintain that RD 661/2007 contains commitments to maintain its remuneration regime throughout the entire operational life of the SR plants. Disregarding any applicable standards of International Law, the Claimants aim to freeze the remunerations in Article 36 of RD 661/2007 and (ii) the updating of the remuneration as per the CPI for their plants (i). This also involves disregarding EU regulations which they must have known at the time of their investment and which prohibit having rights acquired to a certain level of subsidies.

    b. The Claimants reiterate in their Reply on the Merits that the only significant regulation in the Spanish regulatory Framework for RE producers was exclusively Royal Decree 661/2007. This is particularly important in this case, as the Claimants omit numerous regulations subsequent to RD 661/2007 which involved warnings of potential interventions by the Government in the event of unsustainability of the System or over-remuneration. These regulations could not be ignored by a diligent investor in 2011, as they were all prior to the Claimants' investment: RD-Act 7/2006; RD 1578/2008; RD-Act 6/2009; RD 1565/2010; RD 1614/2010; RD-Act 14/2010 and the *Sustainable* Economy Act 2/2011. All of these regulations were set out in the Counter-Memorial without the claimants having refuted the warnings they implied for

III. JURISDICTIONAL OBJECTIONS

A. Lack of ratione personae jurisdiction of the Arbitral Tribunal to hear the dispute filed by the Claimant due to the absence of a protected investor under the ECT. The Claimants are not from the territory of another Contracting Party, since both Luxembourg and Sweden, like the Kingdom of Spain are Member States of the European Union. The ECT does not apply to disputes relating to Intra-EU disputes

(1) Introduction

76. As the Kingdom of Spain explained in its Memorial on Jurisdiction,[2] the Arbitral Tribunal, with all due respect, lacks jurisdiction to rule on the intra-EU dispute posed in this arbitration by Luxemburg and Sweden companies against the Kingdom of Spain.

77. Both Luxemburg and Sweden are member States of the EU, and therefore the requirement is not met that is foreseen in Article 26.1 of the ECT which states that to access arbitration the dispute must be between a Contracting Party and investors from different Contracting Parties.

78. The Claimants, in their Reply on the Merits[3], reject the arguments of Spain in that regard. However, the reasons given do not invalidate the objection to the jurisdiction of the Arbitral Tribunal raised by the Kingdom of Spain, as shown below. This is said without prejudice to the explanations given in our Memorial on Jurisdiction, to which reference is made in order to avoid unnecessary repetition.

79. Moreover, it must be borne in mind that there are two pending cases to be put before the Court of Justice of the EU regarding the compatibility between the BITs and EU Law[4]. While the CJEU does not rule on these issues (and also on the compatibility between the arbitration of the ECT for intra-EU relations and EU Law), the Respondent shall maintain this jurisdictional objection by virtue of the Principle of institutional loyalty that derives from Article 4 of the EU Treaty[5], particularly taking into account the recent Decision of the European Commission in the State Aid dossier of the Czech Republic to which we shall refer in due course.[6]

(2) The Claimants ignore the Principle of the primacy of EU law in Intra-EU relations

80. In their Reply on the Merits, the Claimants ignore the essential Principles of EU Law and of the ECT itself. Essentially, they forget the essential Principle which the objection to the Arbitral Tribunal jurisdiction raised by the Kingdom of Spain rests upon the Principle of Primacy of EU law.

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[2] Counter-Memorial on the Merits and Memorial on Jurisdiction, of 24 February 2017, section III.A.
[3] Reply on the Merits and Counter-Memorial on Jurisdiction, of 9 October 2017, section I.
[4] (R-0331 Preliminary judgment. 23 May 2016 — Case Achmea BV. Case C-284/16) (R-0332 Appeal filed on 6 November 2015 — European Food and others/Commission. Case T-624/15 relating to the application for annulment of the European Commission decision of 30 March 2015 in case SA 38517)
[5] (RL-0068 EU Treaty, Treaty on the Functioning of the EU and Charter of Fundamental Rights of the EU. 26 October 2012. Consolidated).
[6] (RL-0003 European Commission C(2016) 7827 final, 28 November 2016 State Aid SA.40171 (2015/NN) – Czech Republic Promotion of electricity production from renewable energy sources)

81. The CJEU established the Principle of primacy in the judgment in *Costa v. ENEL* of 15 July 1964[7]. In it, the CJEU protected the rights of an investor in the common electricity market opposed to the nationalisation practised by Italy. According to the CJEU, *"unlike ordinary International Treaties, the EEC Treaty established an integrated legal system of the Member States since the entry into force of the Treaty and linking their own law courts. By creating an unlimited duration community, having its own Institutions, personality, legal capacity, capacity for international representation, and more particularly, real powers stemming from a limitation of competition or a transfer of powers from the States to the Community, they have limited their sovereign rights and have thus created a regulatory body applicable to their national regulations and themselves, which takes precedence over national rights."*[8]

82. Preferential treatment means, thus, that EU Law is applied to intra-community relations in preference to or prevailing over any other Law, displacing any other national or international provision. The preference given to community Law does not admit comparisons with other laws. Simply put, EU Law is given preference over any other dealing with regulating internal EU relations.

83. The Principle of primacy of EU Law in Intra-EU relations has an explicit recognition in the ECT, as stated in Article 25 that:

    (1) The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as "EIA") to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any ***preferential treatment*** *applicable between the parties to that EIA as a result of their being parties thereto.*

    (2) For the purposes of paragraph (1), "EIA" means an agreement substantially liberalizing, inter alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame."[9] *(Emphasis added)*

84. That Article 25 of the ECT refers to EU Law is not questionable. In fact, the only Declaration contained in the ECT in relation to this Article is the one made by the European Communities and its Member States to say:

    "(…) the application of Article 25 of the Energy Charter Treaty will allow only those derogations necessary to safeguard the preferential treatment resulting from the wider process of economic integration resulting from the Treaties establishing the European Communities".[10] *(Emphasis added)*

85. In addition, to enshrine the Principle of primacy of EU law, the CJEU Judgment of 15 July 1964, issued in the case *Costa v. ENEL* case ruled on questions of EU Law that are also of importance when resolving this procedure, which, without any doubt, affects EU Law. In this respect, it must be remembered that what the Claimant party is requesting this Arbitral

[7] (RL-0081 CJEU Judgment of 15 July 1964, in case 6/64, Flaiminio Costa v. ENEL)
[8] Ibid, on the interpretation of Article 102 of the (RL-0068 EU Treaty, Treaty on the Functioning of the EU and Charter of Fundamental Rights of the EU. 26 October 2012. Consolidated)
[9] (RL-0068 EU Treaty, Treaty on the Functioning of the EU and Charter of Fundamental Rights of the EU. 26 October 2012. Consolidated), article 25.
[10] Ibid. (RL-0068 EU Treaty, Treaty on the Functioning of the EU and Charter of Fundamental Rights of the EU. 26 October 2012. Consolidated)

Tribunal to do, is to guarantee that the companies that produce renewable energies in Spain and in which it invested, should receive, throughout their entire respective useful life, a specific unmodifiable amount of State Aid, even if that distorts competition in the Common Electricity Market. As we noted in our Memorial on Jurisdiction, following the CJEU Judgment on the ELCOGAS Case, there is no doubt that *"the amounts financed by all end users of electricity established in the country and distributed to companies in the power sector by a public body under predetermined legal criteria*", constitute state aid.[11]

86. Well, the judgment by the CJEU in the *Costa v. ENEL* Case has already warned that the European Commission had to be informed promptly of any plans to grant or alter aid[12]. *In this case, the aid received by companies producing renewable energy, although initially allowed by the EU, should be granted by the States taking into account the Guidelines on State aid for environmental protection and energy 2014-2020, approved by European Commission Communication 2014/C 200/01, as well as those repealed by these (European Commission Communication 2008/C 82/01).*[13] *The purpose of these subsidies is to ensure that renewable energy producers are placed in a level playing field. Granting these producers aid which distorts competition on the market in their favour would, therefore, be contrary to EU law. Any pronouncement made in relation with the right of producers of renewable energies who are the subject of this arbitration to receive this specific amount of aid, will affect, as stated, an essential pillar of the EU: the competition law.*

87. Article 26 of the ECT establishes that in order to resolve any discrepancies in the ECT, this Treaty and the regulations and principles of international law must be applied not according to a relationship of hierarchy but on the same level. EU law is threefold and must be applied (i) as international law applicable to the case, (ii) as part of the regulatory framework of the Member States (iii) and as a relevant fact in the case. Thus, the Electrabel Award states that:

    "The Tribunal further concludes that EU law (not limited to EU Treaties) forms part of the rules and principles of international law applicable to the Parties´ dispute under Article 26(6) ECT. Moreover, EU law, as part of the Respondent´s national law, is also to be taken into account as a fact relevant to the Parties' dispute"[14]

88. The Tribunal in the Electrabel case also established that in the event of any discrepancy between the ECT and EU law, the latter shall prevail over the former[15]. In accordance with the foregoing, the Arbitral Tribunal, as required by Article 26 (6) ECT, must apply EU law in order to resolve this case. This means that the resolution adopted cannot, under any circumstances, be contrary to the EU law regulating the State aid for the development of renewable energy in Member States.

89. In the recent award handed down in the case Blusun v. Italy, the applicability of EU regulations was declared.

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[11] (R-0033 Order TFEU ELCOGAS, of 22 October 2014)
[12] (RL-0081 CJEU Judgment of 15 July 1964, in case 6/64, Flaiminio Costa v. ENEL).
[13] (R-0032 Guidelines on Government subsidies relating to environmental protection and energy 2014-2020, 2014/C200/01) and (R-0031 Community guidelines on State Aid for environmental protection 2008/C82/01, European Commission).
[14] (RL-0048 Electrabel v. Hungary. Award 25 November 2015.)
[15] Ibid para. 4.189: "Article 307 EC precludes inconsistent pre-existing treaty rights of EU Member States and their own nationals against other EU Member States; and it follows, if the ECT and EU law remained incompatible notwithstanding all efforts at harmonization, that EU law would prevail over the ECT's substantive protections and that the ECT could not apply inconsistently with EU law to such national's claim against a EU Member" (RL-0048 Electrabel v. Hungary. Award 25 November 2015.)

"The Parties in effect agree that the applicable law in determining this issue is international law [...]. The Tribunal [...] would observe that this does not exclude any relevant rule of EU law, which would fall to be applied either as part of international law or as part of the law of Italy. The Tribunal evidently cannot exercise the special jurisdictional powers vested in the European courts, but it can and, where relevant, should apply European law as such." [16]

90. Renewable energy companies in Spain have invoked the EU Law and not the ECT to protect their interests in light of the regulatory measures adopted by the Government of Spain. The claims made the Spanish Wind Association (hereinafter the "**AEE**"), should be highlighted in this regard, which were filed during the processing of RD 1614/2010, before the proposal to introduce a provision in the Regulation that would restrict the "*changes of ownership and the right transmission (Eighth additional provision)."*[17] The AEE considered this proposal unacceptable for being contrary to Directive 2009/28/EC because:

"Restricts the free circulation of capital expressed in Article 63 (previously, Article 56) of the current Treaty on the Functioning of the European Union (TFEU). [...] The Court of Justice of the European Union has stated that movements of capital, projects, 'direct' investments in particular, namely investments in the form of participation in a company through the ownership of shares which confers the possibility to participate effectively in its management and control, as well as 'portfolio' investments, namely investments in the form of acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the company (see Judgment Commission/Netherlands, cited above, paragraph 19 and the case-law cited therein)."[18] *(Emphasis added)*

91. In short, under the Principle of primacy, it is the EU Law and not the ECT which must be applied to resolve this dispute. The Claimants, of Luxembourgish and Swedish nationality, are not guaranteed under the ECT a certain type of treatment in relevant national law with regards to, as is the case, the issue of state aid; however, they do have the full protection of EU law, both at the time of the investment and in its subsequent management. The fact is that the Claimants have carried out their entire investment under the regulations of EU Law and protected by them, and they have only had recourse to the ECT and international arbitration because they are aware that the claim they have brought here would be rejected by the EU Courts of Justice.

92. This dispute also affects essential elements of EU Law (State Aid, free movement of capital and freedom of establishment), which affect the basic pillars of the EU, which prevents the Arbitral Tribunal ruling on it, this power is reserved to the EU's own judicial system and, ultimately, to the CJEU. The latter emphasised this in its Opinion 1/91.[19]

(3) Issues pending before the CJEU and recent decision of the European Commission

93. The Kingdom of Spain is not unaware of the Awards that have been handed down by other Arbitral Tribunals concerning the so-called intra-community objection and in which said jurisdictional objection has been rejected.

[16] (RL-0075 Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award 27 December 2016) para. 278.
[17] (R-0245 AEE claims to the CNE during the Spanish National Energy Commission hearing process on the Proposed RD 1614/2010 which regulates and modifies certain aspects of the special regime.)
[18] Ibid. (R-0245 AEE claims to the CNE during the Spanish National Energy Commission hearing process on the Proposed RD 1614/2010 which regulates and modifies certain aspects of the special regime.)
[19] (R-0001 CJEU Opinion 1/91. 14 December 1991)

94. Without prejudice to the above, the question being dealt with in this objection is by no means a non-contentious issue.

95. We should remember that two issues are pending before the Court of Justice of the EU on the compatibility between the BITs and EU Law. Specifically, the first one is the Prejudicial Question concerning the Achmea case on the compatibility between the BIT signed in 1991 by the Netherlands and Slovakia.[20] The second is the case concerning the request to repeal the decision of the European Commission of 30 March 2015 in case SA 38517 (Arbitral Award in the Micula vs. Romania, 11 December 2013).[21]

96. While the CJEU does not rule on these issues (and also on the compatibility between the arbitration of the ECT for intra-EU relations and EU Law), the Respondent shall maintain this jurisdictional objection by virtue of the Principle of institutional loyalty that derives from Article 4 of the EU Treaty.[22]

97. We must likewise take into account the recent Decision of the European Commission, of 28 November 2016, rendered in the case of State Aid of the Czech Republic, regarding the "Promotion of electricity production from renewable energy sources". In said Decision, the European Commission makes an interpretation as to the application of the ECT with respect to intra-EU conflicts that is particularly relevant:

"(147) In case of the Energy Charter Treaty, it is also clear from the wording, the objective and the context of the treaty that it does not apply in an intra-EU situation in any event. In general, when negotiating – as in the case of the Energy Charter Treaty – multilateral agreements as a "block", the Union and its Member States only intend to create international obligations vis-à-vis third countries, but not inter se. That has been particularly clear in case of the Energy Charter Treaty, which had been initiated by the Union in order to promote investment flows from the then European Communities to the East, and energy flows in the opposite direction, as part of the external action of the European Communities. It is also borne out by the wording of Articles 1(3) and 1(10) of the Energy Charter Treaty, which defines the area of a regional economic integration organisation as the area of that organisation. The lack of competence of Member States to conclude inter se investment agreements and the multiple violations of Union law set out above in recitals (143) to (145) also constitute relevant context for the interpretation of the Energy Charter Treaty in harmony with Union law, so as to avoid treaty conflict.

(148) For those reasons, the ten investors cannot rely on the Energy Charter Treaty or the German-Czech BIT.

(149) In any event, there is also on substance no violation of the fair and equitable treatment provisions. First, as explained above, the Czech Republic has not violated the principles of legitimate expectation and equal treatment, neither under its domestic law nor under Union law. As both under the Energy Charter Treaty and the German-Czech BIT Union law is part of the applicable law, the principle of legitimate expectation under the

[20] (R-0331 Preliminary judgment. 23 May 2016 — Case Achmea BV. Case C-284/16)
[21] (R-0332 Appeal filed on 6 November 2015 — European Food and others/Commission. Case T-624/15 relating to the application for annulment of the European Commission decision of 30 March 2015 in case SA 38517)
[22] (R-0041 EU Treaty, Treaty on the Functioning of the EU and Charter of Fundamental Rights of the EU. 26 October 2012. Consolidated), Article 4(3): *"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*".

fair and equitable treatment provision has to be interpreted in line with the content of that principle under Union law. Second, in case of the Energy Charter Treaty, it has been expressly recognized by Arbitral Tribunals that the provisions of the Energy Charter Treaty have to be interpreted in line with Union law, and that in case of conflict, Union law prevails. It is settled case-law that a measure that does not violate domestic provisions on legitimate expectation generally does not violate the fair and equitable treatment provision.

(150) Finally, the Commission recalls that any compensation which the Arbitral Tribunals were to grant would constitute in and of itself State aid. However, the Arbitral Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they were to award compensation, they would violate Article 108(3) TFEU, and any such award would not be enforceable, as that provision is part of the public order"[23] *(emphasis added).*

98. We should not forget that Article 26(6) of the ECT requires the Arbitral Tribunal to settle issues under litigation in accordance with the ECT itself and "with the applicable rules and principles of international Law".[24] EU Law is applicable international Law that cannot therefore be ignored.

(4) Regarding the preliminary observations on the relevance of previous awards and other legal precedents

99. Although what was indicated above would suffice to justify the lack of jurisdiction of the Arbitral Tribunal to hear this dispute, we shall refer to the lack of relevance of certain recent awards for the purposes of this case.

100. These recent awards do not resolve issues which fully coincide with the present case for the following reasons: a) they either refer to Bilateral Investment Treaties which have nothing to do with a multilateral and mixed treaty promoted and signed by the EU; b) or because when referring to the ECT, they regulate the maintenance of the obligations assumed by states that were not yet members of the EU when they signed the ECT, c) or because when referring to the ECT and the obligations assumed by Spain, they omit the analysis of the principle of primacy specifically invoked in this arbitration.

101. Hence, the Eureko v. Slovakia award expressly recognises the impossibility of extrapolating its conclusions to Treaties like the ECT, and to intra-community disputes arising after the Treaty of Lisbon of 2007 took effect:

"This award is thus necessarily confined to the specific circumstances of the present case; and the Tribunal does not here intend to decide any general principles for other cases, however ostensibly analogous to this case they might be. For example, this case arises from a BIT concluded in 1991 before the CSFR Association Agreement, the Association Agreement and the Accession Treaty; it does not arise from a multi-lateral treaty or a treaty to which the EU is a party or signatory; and, moreover, these arbitration proceedings were instituted in 2008 before the Lisbon Treaty came into force, amending the EU Treaty and the EC Treaty (now the TFEU).[25]*"*

[23] (RL-0003 European Commission C(2016) 7827 final, 28 November 2016 State Aid SA.40171 (2015/NN) – Czech Republic Promotion of electricity production from renewable energy sources).
[24] (RL-0070 SP "ECT". 17 December 1991. Consolidated)), article 26(6)).
[25] (R-0119 Judgment from the Third Chamber of the Supreme Court, of 20 March 2007. (Appeal 11/2005)), para. 218.

VII. PETITUM AND RESERVATION OF RIGHTS

1284. In light of the arguments expressed therein, the Kingdom of Spain respectfully requests the Arbitral Tribunal to:

a) declare its lacks of jurisdiction to hear the claims of the Claimant, or if applicable their inadmissibility, in accordance with what is set forth in Section III of the present Memorial, referring to Jurisdictional Objections; and

b) Subsidiarily, in the event that the Arbitral Tribunal decides that it has jurisdiction to hear this dispute, to dismiss all the Claimants' claims regarding the Merits, as the Kingdom of Spain has not breached the ECT in any way, pursuant to Sections IV and V herein, referring to the Facts and the Merits, respectively;

c) Secondarily, to dismiss all the Claimant's claims for damages as the Claimant has no right to compensation, in accordance with Section V herein; and

d) Order the Claimant to pay all costs and expenses derived from this arbitration, including ICSID administrative expenses, arbitrators' fees, and the fees of the legal representatives of the Kingdom of Spain, their experts and advisers, as well as any other cost or expense that has been incurred, all of this including a reasonable rate of interest from the date on which these costs are incurred until the date of their actual payment.

1285. The Kingdom of Spain reserves the right to supplement, modify or complement these pleadings and present any and all additional arguments that may be necessary in accordance with the ICSID rules of arbitration, procedural orders and the directives of the Arbitral Tribunal in order to respond to all allegations made by the Claimant in regards to this matter.

Madrid, 19 February 2018.

Respectfully submitted,