PCA CASE Nº 2014-01

IN THE MATTER OF AN ARBITRATION

- pursuant to –

THE ENERGY CHARTER TREATY

- and –

THE AGREEMENT BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE CZECH AND SLOVAK FEDERAL REPUBLIC ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS SIGNED ON OCTOBER 2, 1990, IN FORCE AS OF OCTOBER 2, 1992

- between -

(1) ANTARIS GMBH (GERMANY)

(2) DR MICHAEL GÖDE (GERMANY)

(the "Claimants")

- and -

THE CZECH REPUBLIC

(the "Respondent", and together with the Claimants, the "Parties")

AWARD

ARBITRAL TRIBUNAL:

Lord Collins of Mapesbury (Presiding Arbitrator)

Mr Gary Born

HE Judge Peter Tomka

REGISTRY:

The Permanent Court of Arbitration

2 May 2018

CONTENTS

LIST OF DEFINED TERMS

5% Break-Out Rule	Rule established by Section 6(4) of the Act on Promotion under which the FiT set by the ERO in a given year may not drop by more than 5% of the value of the FiT in the previous year
2001 Directive	Directive 2001/77/EC of the European Parliament and of the Council of September 27, 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market
2003 Treaty of Accession	Treaty of Accession to the European Union of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia of April 16, 2003
2005 UN Report	The Fourth National Communication of the Czech Republic on the UN Framework Convention on Climate Change of 2005
2009 Directive	Directive 2009/28/EC of the European Parliament and of the Council of April 23, 2009 on the Promotion of the Use of Energy from Renewable Sources Amending and Subsequently Repealing Directive 2001/77/EC and 2003/30/EC
2010 Action Plan	"National Renewable Energy Action Plan" which the Ministry of Industry and Trade published in July 2010
Act on Income Tax	The Act on Income Tax of 1992 (The Act No. 586/1992)
Act on Promotion	The Act for the Promotion and Use of Renewable Sources (Act No. 180/2005 Coll.)
Antaris	Antaris GmbH
Antaris AG	Antaris Solar AG
Antaris ZNL	Antaris Solar GmbH, Zweigniederlassung Kreuzlingen
BIT	The Agreement between the Federal Republic of Germany and the Czech and Slovak Federal Republic on the Promotion and Reciprocal Protection of Investments Signed on October 2, 1990, in force as of October 2, 1992
Counter-Memorial	Respondent's Counter-Memorial dated January 29, 2016
Czech SPVs	Special Purpose Vehicle Companies, which were incorporated or of which the shares were purchased by the Claimants, all of which operated Photovoltaic Power Installations in the Czech Republic
Dr Göde	Dr Michael Göde

ECT	Energy Charter Treaty
ERO	Energy Regulatory Office
EU Commission	European Commission
EU Commission Submission	EU Commission written *amicus curiae* submission dated February 2, 2015
EU Commission's 2016 Decision	Decision of the EU Commission in case SA.40171 (2015/NN) — Czech Republic Promotion of electricity production from renewable energy sources
First [redacted] Report	Expert report of [redacted] dated April 15, 2016
First [redacted] Report	Expert report of [redacted] dated October 19, 2015
First Göde Statement	Witness statement of Michael Göde dated October 21, 2015
First Jones Report	Expert report of Wynne Jones (Frontier Economics) dated January 29, 2016
First Peer Report	Expert report of Michal Peer dated January 29, 2016
First [redacted] Report	Expert report of [redacted] dated October 23, 2015
Fiřt Statement	Witness statement of Josef Fiřt dated January 25, 2016
FiT	Feed-in tariff established by the Act on Promotion
FET	Fair and equitable treatment
FPS	Full protection and security
[redacted] Report	Expert report of [redacted] dated January 27, 2016
Holýšov	FVE Holýšov I s.r.o.
ILC Draft Articles	Draft articles on Responsibility of States for Internationally Wrongful Acts
Income Tax Exemption	Article 19(1) of the Act on Income Tax, exempting the income from photovoltaic power plants from income tax during the prescribed period
Kotáb Report	Expert Report of Petr Kotáb dated August 29, 2016
Memorial	Claimants' Memorial dated October 23, 2015
Minčič Statement	Witness Statement of Ladislav Minčič dated August 26, 2016
Mozolov	FVE Mozolov s.r.o.

Osečná	FVE Osečná s.r.o.
PCA	Permanent Court of Arbitration
Pricing Regulation	ERO Regulation No. 140/2009 Coll.
[redacted] **Report**	Expert report of [redacted] dated May 9, 2016
Rejoinder	Respondent's Rejoinder dated August 30, 2016
Reply	Claimants' Reply dated May 16, 2016
RES	Renewable energy sources
Second Bacon Report	Expert report of Kelyn Bacon QC dated August 16, 2016
Second [redacted] **Report**	Expert report of [redacted] dated April 6, 2017
Second [redacted] **Report**	Expert report of [redacted] dated April 21, 2016
Second Göde Statement	Witness statement of Michael Göde dated May 15, 2016
Second Jones Report	Expert report of Wynne Jones dated August 30, 2016
Second Peer Report	Expert report of Michael Peer dated August 29, 2016
Second [redacted] **Report**	Expert report of [redacted] dated May 16, 2016
Shortened Depreciation Period	A shorter depreciation period (5 to 10 years) under the Act on Income Tax, pertaining to photovoltaic power plants with certain technological components
Solar Levy	The levy revenues generated by photovoltaic power plants stipulated in Section 7(a) of the Act on Promotion amended by Act 402/2010
Solar Levy Extension Claim	Claimants' claim as to the Extension of the Solar Levy by the Act No. 310/2013 Coll
[redacted] **and** [redacted] **Report**	Expert report of [redacted] and [redacted] dated March 31, 2016
Stříbro	FVE Stříbro s.r.o.
Supplemental [redacted] **Report**	Supplemental report of [redacted] dated April 6, 2017
Taurus	TCS Taurus Service s.r.o.

Technical Regulation	ERO Regulation No. 475/2005 Coll.
Third [redacted] Report	Expert Report of [redacted] dated April 6, 2017
TFEU	Treaty on the Functioning of the European Union
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law
Úsilné	FVE Úsilné s.r.o.
VCLT	Vienna Convention on the Law of Treaties, done in Vienna, done in Vienna on the 23 May 1969, 1155 U.N.T.S. 331

I. Introduction

A. The Treaties

1. Article 10(1) of the Energy Charter Treaty (the "**ECT**") provides:

> 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 and no Contracting State shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal …[1]

2. Articles 2(1), 2(2) and 2(3) of the Agreement between the Federal Republic of Germany and the Czech and Slovak Federal Republic on the Promotion and Reciprocal Protection of Investments signed on October 2, 1990[2] (the "**BIT**") provides that:

> Article 2
>
> (1) Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its legislation. Each Contracting Party shall in all cases accord investments fair and equitable treatment. …
>
> (2) Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, or enjoyment of investments in its territory by investors of the other Contracting Party
>
> (3) Investments and returns from investment and, in the event of their reinvestment, the returns therefrom shall enjoy full protection under this Treaty.

and Article 4(1) provides

> Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

B. The Parties

3. The first Claimant in the present arbitration is Antaris GmbH ("**Antaris**"), a German company. Its registered address is Am Heerbach 5, D-63857 Waldaschaff, Germany. Prior to a change of name on July 16, 2013, Antaris was previously called Antaris Solar GmbH. The Second Claimant

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[1] The ECT was negotiated on the basis of the European Energy Charter which envisaged the formulation of "stable and transparent legal frameworks creating conditions for the development of energy resources". Title III ("Implementation") of the European Energy Charter provided: "In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade. They affirm that it is important for the signatory States to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security and enable the use of investment risk guarantee schemes."

[2] The BIT entered into force on August 2, 1992. By exchange of Notes of December 18, 1992 and January 1, 1993 respectively, the Federal Republic of Germany and the Czech Republic have agreed that the BIT should remain in force between the two States after the dissolution of Czechoslovakia.

in this arbitration is Dr Michael Göde ("**Dr Göde**", together with Antaris, the "**Claimants**"), a German national. His address is [redacted]

4. Antaris is the ultimate parent company of Antaris Solar AG ("**Antaris AG**"), a Swiss company, which owns FVE Úsilné s.r.o. ("**Úsilné**"), FVE Mozolov s.r.o. ("**Mozolov**"), FVE Stříbro s.r.o. ("**Stříbro**") and FVE Holýšov I s.r.o. ("**Holýšov**"). Antaris AG is wholly owned by Antaris Solar GmbH, Zweigniederlassung Kreuzlingen ("**Antaris ZNL**"), the Swiss branch of Antaris.

5. TCS Taurus Service s.r.o. ("**Taurus**"), which is owned by Dr Göde and Antaris ZNL, purchased 100 % of the shares in FVE Osečná s.r.o. ("**Osečná**"). These s.r.o. companies (the "**Czech SPVs**") are special purpose vehicle companies incorporated in the Czech Republic.

6. Antaris is owned by Göde Holding GmbH & Co. KG, which is owned by Dr Göde.

7. The Claimants are represented in these proceedings by:

[redacted]

8. The Respondent in the present arbitration is the Czech Republic (the "**Respondent**"). Its address is Ministry of Finance of the Czech Republic, Letenská 15, 118 10 Prague 1, Czech Republic.

9. The Respondent is represented in these proceedings by:

Ministry of Finance
Marie Talašová
Head of Department of International Legal Services
Letenská 15
11810 Praha 1
Czech Republic

Ms. Karolína Horáková
Weil, Gotshal & Manges s.r.o.
Advokátní kancelář
Charles Bridge Center
Krizovnicke nam. 193/2
Prague
Czech Republic

From July 17, 2015, the Respondent has been represented by:

Paolo Di Rosa
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington DC 20001-3743
United States

Dmitri Evseev
Arnold & Porter Kaye Scholer (UK) LLP
Tower 42
25 Old Broad Street
London EC2N 1HQ
United Kingdom

Until July 16, 2015, the Respondent was represented by

David Alexander
Squire Sanders (US) LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215
United States

Stephen P. Anway
Squire Sanders (US) LLP
30 Rockefeller Plaza
New York, New York 10112
United States

Rostislav Pekař
Mária Lokajová
Squire Sanders
Václavské náměstí 57/813
110 00 Prague 1
Czech Republic

Prof. Zachary Douglas
Matrix Chambers
Rue de Candolle 9
1205 Geneva
Switzerland

C. Overview of the dispute

10. The Claimants submit that the Respondent breached its obligations under the ECT and the BIT by repealing incentive arrangements to attract investors in photovoltaic power generation contrary to its guarantees.

11. The Respondent asserts that the Tribunal is not competent to hear the claims under the ECT. It further submits that the Tribunal has no jurisdiction over the claims relating to the Mozolov plant because its operating licence was acquired "through improper means" and the Holýšov plant because the "Claimants have failed to establish a *prima facie* case in support of their claims

relating to that plant".[3] On the merits, the Respondent submits that the measures did not violate either the ECT or the BIT on the grounds that "(a) the Czech Republic never made [a] stabilization commitment to the Claimants, (b) the Czech Republic did not otherwise violate any legitimate expectations, and (c) the measures were reasonably tailored to achieve appropriate and rational state objectives."[4]

II. Procedural history

12. On May 8, 2013, the Claimants, together with eight other claimants, served upon the Respondent a Notice of Arbitration, with accompanying evidence[5], pursuant to Article 26 of the ECT, Article 10 of the BIT and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL Rules**").

13. In their Notice of Arbitration, the Claimants appointed Mr Doak Bishop as arbitrator.

14. By letter dated June 10, 2013, in response to the Notice of Arbitration, the Respondent objected to the Claimants' consolidation of their claims with those of the eight other claimants and appointed Judge Tomka as arbitrator only in the proceeding involving the Claimants.

15. On June 24, 2013, the Claimants invited the Respondent to appoint a single arbitrator for all the claimants listed in the Notice of Arbitration.

16. By letter dated July 5, 2013, the Claimants requested that the Secretary-General of the Permanent Court of Arbitration (the "**PCA**") designate an appointing authority on the grounds that the Respondent had failed to appoint an arbitrator for all the claimants listed in the Notice of Arbitration as required by the UNCITRAL Rules. By letter dated July 9, 2013, the Respondent objected to the Claimants' request, noting that "there is no single arbitration agreement in existence that could possibly give a single arbitral tribunal authority over all the 10 claimants". In a letter dated July 22, 2013, the Claimants objected to the Respondent's position.

17. On August 13, 2013, the Secretary-General of the PCA rejected the Claimants' request, holding that "the Respondent ha[d] actively participated and responded to the Notice of Arbitration […] in a timely manner by appointing the second arbitrator in accordance with the procedure foreseen in each of the investment treaties invoked by the Claimants".

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3 Rejoinder, para 443.

4 Counter-Memorial, para 9.

5 Exhibits C-1-C-60.

18. On December 20, 2013, Mr Bishop and Judge Tomka jointly appointed Lord Lawrence Collins of Mapesbury PC, FBA as the presiding arbitrator after consultation with the Parties.

19. On August 1, 2014, Mr Bishop tendered his resignation as arbitrator.

20. On September 24, 2014, the Claimants informed the Tribunal that they had appointed Mr Gary Born as arbitrator to replace Mr Bishop.

A. Written Procedure

21. By letter dated January 10, 2014, the Tribunal proposed to the Parties draft Terms of Appointment, which included a proposed term concerning the place of arbitration, and invited the Parties' comments on the draft by January 17, 2014.

22. By letter dated January 17, 2014, the Claimants proposed that Geneva, Switzerland be the place of arbitration, as proposed in the Notice of Arbitration dated May 8, 2013, and stated that they would welcome the opportunity to provide "more ample reasons for their position on this point".

23. By letter dated January 17, 2014, the Respondent proposed that the seat of the arbitration be Paris, France, and stated the reasons for that proposal.

24. The Terms of Appointment were agreed between the Parties and were adopted on January 31, 2014. Paragraph 6.1 of the Terms of Appointment provides: "[p]ursuant to Article 16 of the Rules, the Tribunal will determine the place of arbitration having regard to the circumstances of the case, after consultation with the Parties".

25. By letter dated February 6, 2014, the Tribunal *inter alia* (i) invited the Claimants to confirm whether they agreed that their Statement of Claim was contained in their Notice of Arbitration; and (ii) proposed to decide on the place of arbitration in advance of the first procedural meeting on the basis of written submissions and invited the Claimants to provide their further comments on the place of arbitration.

26. By letter dated February 12, 2014, the Claimants confirmed that the Notice of Arbitration included their Statement of Claim and presented their "Submission on the Seat of Arbitration" of the same date.

27. By letter dated February 21, 2014, the Respondent contended that the Notice of Arbitration was not specific enough to be treated as Statement of Claim and submitted its comments in reply to the Claimants' Submission on the Seat of Arbitration, in which it provided reasoning in support of its proposal of Paris as the seat.

28. By letter dated March 10, 2014, the Tribunal invited the Respondent to clarify whether it intended

to object to the Tribunal's jurisdiction on the grounds that such did not extend to disputes between EU investors and EU Member States.

29. In the same letter, the Tribunal directed the Claimant to serve within 28 days a full Statement of Claim including, in particular, details of (a) their investments in the Czech companies; (b) the manner in which the alleged measures affected the investments; and (c) the financial consequences thereof, including the quantum of their alleged losses.

30. By letter dated March 17, 2014, the Respondent stated that it did not intend to object to the Tribunal's jurisdiction in this matter on the grounds that such does not extend to disputes between EU investors and EU Member States.

31. By letter dated March 26, 2014, the Tribunal fixed The Hague, The Netherlands, as the place of the arbitration.

32. On April 7, 2014, the Claimants submitted their Statement of Claim with accompanying evidence.[6]

33. By letter dated April 17, 2014, the Tribunal directed the Respondent to submit its Statement of Defense by June 17, 2014; directed that "the Tribunal shall conduct a procedural hearing in early July for the future timetabling of those matters which are not agreed"; and invited the Parties to indicate whether they agreed to these directions by April 28, 2014.

34. By letter dated April 23, 2014, the Respondent reserved the right to seek additional time to file its Statement of Defense in the event that the Claimants produced the expert reports referred to in its Statement of Claim but not annexed thereto.

35. On June 24, 2014, the Respondent submitted its Statement of Defense with accompanying evidence.[7]

36. On July 11, 2014, the European Commission (the "**EU Commission**") submitted an Application for Leave to Intervene as a Non-disputing party, requesting the opportunity to present its views *inter alia* on the jurisdiction of the Tribunal.

37. On July 28, 2014, upon invitation by the Tribunal, each of the Parties submitted their comments on the Application for Leave. The Claimants requested *inter alia* that the Tribunal reject the Application for Leave and that in the alternative intervention by the EU Commission be limited

6 Exhibits C-61-C-110.

7 Exhibits R-1-R-33; Legal Authorities RLA-1-RLA-52.

to written submissions and that the EU Commission must bear its own costs and reimburse those of the Parties. The Respondent stated that it did not oppose the EU Commission's Application for Leave.

38. On December 4, 2014, the Tribunal issued **Procedural Order No. 1 (EC Intervention and Place of Arbitration)**, granting the EU Commission leave for its *amicus curie* submission and changing the place of arbitration from The Hague to Geneva. In Procedural Order No. 1, the Tribunal ruled *inter alia* as follows:

> (1) the European Commission is granted leave to intervene as amicus curiae (subject to the condition in (6) below) in the present proceedings by way of one set of written submissions only;
>
> (2) the European Commission shall, by 19 January 2015, file its written *amicus curiae* submission on the three points of law set forth in the EC Commission Application for Leave: (i) "The Tribunal is invited to decline jurisdiction"; (ii) "As a matter of fact, the Czech Republic, by adopting the contested measure, may have merely complied with its obligation under European Union State Aid law"; and (iii) "The enforcement of a possible award may amount itself to State aid, and in that case would only be possible after an authorization by the EU Commission"
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> […]
>
> (6) the European Commission should be required to undertake, prior to consideration of its submission, to pay in full the reasonable costs of both parties resulting from the submissions[.]
>
> (7) the place of arbitration shall be Geneva, Switzerland.

39. On February 2, 2015, the EU Commission filed its written *amicus curiae* submission (the "**EU Commission Submission**"). By letter of the date accompanying the EU Commission Submission, the EU Commission stated that it "cannot undertake to pay in full the reasonable costs of both Parties resulting from the submissions and would respectfully ask the Tribunal to reconsider its decision on this point".

40. By letter dated February 3, 2015, the Claimants requested that the Tribunal decline to accept the EU Commission Submission unless the EU Commission accepted the undertaking set forth at paragraph 30(6) of Procedural Order No. 1.

41. On February 13, 2015, the Tribunal issued **Procedural Order No. 2 (EC Intervention)**, in which it ruled that the EU Commission "may apply to vary Procedural Order No. 1, upon its undertaking to pay the reasonable costs of the Parties resulting from such application if so determined by the Tribunal" by February 27, 2015. The Tribunal did not receive any such application from the EU Commission.

42. By letter dated March 5, 2015, the Tribunal informed the EU Commission that, pursuant to paragraph 30(6) of Procedural Order No. 1, the Tribunal would not consider the EU Commission Submission on the ground that the EU Commission did not undertake to pay in full the reasonable

costs of the Parties resulting from the Submission.

43. By letter dated March 12, 2015, the Tribunal circulated a draft Procedural Order No. 3, which included proposed procedural directions, and invited the Parties to provide their comments.

44. By e-mail dated March 27, 2015, the Claimants provided the Tribunal with the Parties' joint proposal as to the draft Procedural Order No. 3, including an agreed procedural timetable. By e-mail of the same date, the Respondent confirmed its agreement on the proposal.

45. On May 22, 2015, the Claimants submitted their completed Redfern Schedule, setting out nine document production requests to which the Respondent had objected and requesting a ruling from the Tribunal regarding those disputed requests. On the same day, the Respondent filed its application for document production attaching the completed Redfern Schedule, requesting "the Tribunal to issue an order that the Claimants produce all documents responsive to Respondent's requests".

46. On June 9, 2015, the Tribunal issued its decision on the documents requested by the Parties.

47. On June 12, 2015, the Parties informed the Tribunal that they had agreed to alter the existing schedule of the proceedings.

48. On July 6, 2015, the Tribunal issued **Procedural Order No. 3 (Procedural Directions)**, setting forth *inter alia* the agreed amended schedule of further proceedings.

49. On October 23, 2015, the Claimants submitted their **Memorial** with accompanying evidence.[8]

50. By their Memorial of October 23, 2015, the Claimants requested the production of all correspondence and documentation exchange between the European Commission (the "**EU Commission**") and the Czech Republic and waiver of the confidentiality related to the State aid proceedings pending before the EU Commission.[9] The Claimants alleged that the Tribunal had granted such a production in relation to no. 13 of the Claimants' document request of May 22, 2015, on which the Tribunal decided that "[p]roduction ordered but limited to Solar RES" in its order of June 9, 2015. Nevertheless, according to the Claimants, the Respondent failed to comply this order, raising objections based on confidentiality.

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8 Exhibits C-111-C-209; Legal authorities CLA-1-CLA-60; Expert report of [redacted] dated October 23, 2015 ("**First [redacted] Report**"), Expert report of [redacted] dated October 19, 2015 ("**First [redacted] Report**"), Witness statement of Michael Göde dated October 21, 2015 ("**First Göde Statement**").

9 Memorial, paras 91-103.

51. On January 29, 2016, the Respondent submitted its **Counter-Memorial** with accompanying evidence.[10]

52. On May 16, 2016, the Claimants submitted its **Reply** with accompanying evidence.[11]

53. On August 30, 2016, the Respondent submitted its **Rejoinder** with accompanying evidence.[12]

54. On October 28, 2016, the Parties jointly requested that the hearing, which was scheduled to take place from November 14 to 18, 2016, be re-scheduled [redacted] By e-mail of the same date, the Tribunal confirmed the postponement of the hearing.

55. By e-mail dated November 1, 2016, the Tribunal proposed to set the new dates for hearing as May 2 to 5, 2017. The Claimants and the Respondent confirmed their availability for the proposed dates by e-mails of November 11 and 14, 2016, respectively.

56. By e-mails dated November 2 and 11, 2016, the Claimants requested that the Tribunal and the Respondent confirm that all non-refundable costs arising from the cancellation of the November hearing would be charged exclusively and entirely to the Respondent, stating, among others, that their agreement to the postponement had been made under such an assumption.

57. By e-mail dated November 14, 2016, the Respondent suggested that submissions concerning the final allocation of such costs should be deferred until the end of the proceeding.

58. By e-mail dated November 16, 2016, the Tribunal informed the Parties that it would address this issue following submissions to be made at or after the adjourned hearing.

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10 Exhibits R-34-R-254; Legal authorities RLA-53-RLA-186; Expert report of Wynne Jones (Frontier Economics) dated January 29, 2016 ("**First Jones Report**"), Expert report of Kelyn Bacon QC dated January 26, 2016 ("**First Bacon Report**"), Expert report of Michal Peer dated January 29, 2016 ("**First Peer Report**"), Expert report of [redacted] dated January 27, 2016 ("[redacted] **Report**"); Witness statement of Josef Fiřt dated January 25, 2016 ("**Fiřt Statement**").

11 Exhibits C-210-C-267; Legal authorities CLA-61-CLA-117; Expert report of [redacted] dated April 15, 2016 ("[redacted] **Report**"), Expert report of [redacted] and [redacted] dated March 31, 2016 ("[redacted] **and** [redacted] **Report**"), Expert report of [redacted] dated May 9, 2016 ("[redacted] **Report**"), Expert report of [redacted] dated April 21, 2016 ("**Second** [redacted] **Report**"), Expert report of [redacted] dated May 16, 2016 ("**Second** [redacted] **Report**"); Witness statement of Michael Göde dated May 15, 2016 ("**Second Göde Statement**").

12 Exhibits R-255-R-365; Legal authorities RLA-188-RLA-245; Witness Statement of Ladislav Minčič dated August 26, 2016 ("**Minčič Statement**"), Expert report of Wynne Jones dated August 30, 2016 ("**Second Jones Report**"), Expert report of Kelyn Bacon QC dated August 16, 2016 ("**Second Bacon Report**"), Expert report of Petr Kotáb dated August 29, 2016 ("**Kotáb Report**"), Expert report of Michael Peer dated August 29, 2016 ("**Second Peer Report**").

59. By e-mail dated January 31, 2017, the Respondent informed the Tribunal that the Parties had agreed and jointly requested to submit (1) the EU Commission's decision in case "SA.40171 (2015/NN) — Czech Republic Promotion of electricity production from renewable energy sources" of November 28, 2016 (the "**EU Commission's 2016 Decision**") into the record of the present cases as exhibit R-366; and (2) each Party's written comments on the Decision. By e-mail of the same date, the Tribunal accepted and authorized the submissions as requested.

60. On February 15, 2017, the Claimants submitted their Comments on the EU Commission's 2016 Decision and accompanying documents.[13] At paragraph 6 of their Comments, the Claimants renewed their document production request of October 23, 2015, requesting that the Tribunal order that the Respondent produce all missing documents responsive to the Claimants' document request no. 13 of May 22, 2015.

61. On the same date, the Respondent submitted its Comments on the EU Commission's 2016 Decision.

62. By letter of March 28, 2017 the Claimants requested that they be given an opportunity to submit an additional Rejoinder on Jurisdiction on the ground that the Respondent in its Rejoinder of August 30, 2016 "surprisingly addressed the ECT carve-out with the aid of an opinion on Czech law prepared by a *new* expert, Mr Kotáb". The Claimants further requested the exclusion of Mr [redacted] report from the record pursuant to paragraph 7.8 of Procedural Order No. 3. They further requested a leave for filing "a short 'Supplemental Report' on quantum."

63. In letter of March 29, 2017 the Respondent raised objections to the above requests.

64. The Claimants addressed the Respondent's objections in their letter of March 31, 2017.

65. On March 31, 2017 the Tribunal informed the Parties of its decision on the Claimants' requests. The Tribunal denied the requests to file further pleadings, with further reports, as being too late. However, it granted the Claimants' request to file "the same reports on quantum and Czech tax law as in the parallel matters". The Tribunal further ruled that Mr [redacted] report would not be excluded, but that it would take into account, in weighing its utility, that he did not appear.

66. On the same day the Respondent requested that it be authorized to file its own expert report responding to the Claimants' supplemental quantum expert report.

67. On April 4, 2017 the Tribunal informed the Parties that the Respondent's request was granted.

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13 Exhibits C-268 and C-269; CLA-118.

68. By e-mail dated April 6, 2017, Claimants submitted, in accordance with the Procedural Order No. 3 (Procedural Directions), a letter to the Tribunal enclosing three additional expert reports.[14]

69. By email of April 26, 2017 the Respondent submitted, as authorized by the Tribunal, a letter to the Tribunal with a supplemental expert report.[15]

70. By Respondent's email of April 27, 2017 the Tribunal was informed that the Parties had agreed to add to the record a number of new or amended exhibits and legal authorities.[16]

B. Hearing

71. The Hearing was held at the Peace Palace in The Hague from May 2 to 5, 2017 and was attended by the following persons.

Arbitral Tribunal
Lord Collins of Mapesbury (Presiding Arbitrator)
Mr Gary Born
H E. Judge Peter Tomka

Claimants	**Respondent**
[redacted]	Ms. Anna Bilanová
Mr [redacted]	Mr Tomáš Munzar
Mr [redacted] o	*Ministry of Finance of the Czech Republic*
Mr [redacted]	
Ms. [redacted]	Mr Paolo Di Rosa, Partner
Ms. [redacted]	Mr Dmitri Evseev, Partner
[redacted]	Ms. Mallory Silberman, Associate
	Mr Peter Nikitin, Consultant
Mr [redacted]	Mr Bart Wasiak, Associate
[redacted]	Mr John Muse-Fisher, Associate
	Ms. Aimee Kneiss, Senior Legal Assistant II
Mr [redacted]	Mr Eugenio Cruz Araujo, Legal Assistant
[redacted]	Mr Nathaniel Castellano (On Friday 5 May only)
Dr Michael Göde	*Arnold & Porter Kaye Scholer (UK) LLP*
Witness	
[redacted]	Ms. Karolina Horáková, Partner
	Mr Libor Morávek, Partner
	Mr Pavel Kinnert, Associate
Client representative	*Weil, Gotshal & Manges s.r.o. Advokátní Kancelář*
Mr [redacted] - Ernst & Young CZ	
Mr [redacted] - Compass Lexecon	Mr Josef Fiřt

[14] Expert report of [redacted] dated April 6, 2017 ("**Third [redacted] Report**"), Expert report of [redacted] dated April 6, 2017 ("**Second [redacted] Report**"), Supplemental report of [redacted] dated April 6, 2017 ("**Supplemental [redacted] Report**").

[15] Expert report of Michael Peer, dated April 26, 2017 ("**Third Peer Report**").

[16] Exhibits C-223a ; C-270-C-286 ; CLA-119-CLA-122 ; R-32a, R-296a, R-367-R-388 ; RLA-5a ; RLA-246-RLA-249.

Dr [redacted]
Mr [redacted] - Compass Lexecon
Mr [redacted] - Charles River Associates
Mr [redacted] - Charles River Associates (non-testifying colleague of Mr [redacted])
Experts

Mr Ladislav Minčič
Witnesses

Mr Wynne Jones, Frontier Economics Ltd.
Mr Petr Kotáb, Dentons Europe CS LLP
Mr Michael Peer, KPMG Česká republika, s.r.o.
Mr Jiří Urban, KPMG Česká republika, s.r.o. (non-testifying colleague of Mr Peer)
Experts

Permanent Court of Arbitration

Ms. [redacted] Legal Counsel
Mr [redacted], Assistant Legal Counsel
Mr [redacted] Intern

Interpreters

Ms. [redacted]b
Ms. [redacted]
Ms. [redacted]
Dr [redacted]

Court Reporter

Mr [redacted]

C. Post-hearing Proceedings

72. On May 8, 2017, pursuant to the Tribunal's request at the hearing, the Parties submitted electronic copies of their presentation slides and demonstratives. On June 16, 2017, the Parties submitted their **Submissions on Costs**.

73. On March 13, 2018 the Respondent made an application to the Tribunal to admit the judgment of the Court of Justice of the European Union in *Slovak Republic v Achmea BV*, March 6, 2018, into the record and to establish a schedule for its jurisdictional objection. On March 15, 2018, the Tribunal refused the Respondent's application on the basis that it was too late, since in its Counter-Memorial, paragraph 472, it had waived any objection on the EU jurisdictional point, when it stated: "Accordingly, the Czech Republic does not pursue the jurisdictional objection articulated by the Commission before this Tribunal."

III. The Parties' requests for relief

A. The Claimants

74. The Claimants' Statement of Claim requested that the Tribunal:

(a) Declare that the Respondent's actions and, in particular, the progressive dismantling of the Incentive Regime:

(i) constitute unfair and inequitable treatment in violation of the ECT and the Germany BIT;

(ii) were implemented through unreasonable and arbitrary measures which impaired the maintenance, use, enjoyment and disposal of the Claimants' investments in violation of the ECT and the Germany BIT;

(iii) potentially amount to indirect or creeping expropriation in violation of the ECT and the Germany BIT; and

(iv) constitute a failure to observe the Respondent's obligations in relation to the Claimants' investments in violation of the umbrella clauses contained in the ECT and the Germany BIT.

(b) Order the Czech Republic to:

(i) compensate the Claimants for all losses caused to them by the Czech Republic's breaches, in an amount that will be determined more precisely during the proceedings, but that shall not be less than EUR [redacted]

(ii) pay to the Claimants pre-award and post-award interest on any amount of damages awarded; and

(iii) reimburse the Claimants 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.[17]

75. In their Memorial, the Claimants requested that the Tribunal:

(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 Germany BIT;

(ii) were implemented through unreasonable and arbitrary measures which impaired the maintenance, use, enjoyment and disposal of the Claimants' investment in violation of the ECT and the Germany BIT;

(b) Order the Czech Republic to:

[17] Statement of Claim, para 178.

(i) compensate the Claimants for all losses caused to them by the Czech Republic's breaches, in an amount of not less than CZK [redacted] (inclusive of pre-award interest);

(ii) pay to the Claimants post-award interest on any amount of damages awarded, from the date of the final award until its full payment; and

(iii) reimburse the Claimants 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. [18]

76. In their Reply, the Claimants requested that the Tribunal:

(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 Germany BIT;

(ii) were implemented through unreasonable and arbitrary measures which impaired the maintenance, use, enjoyment and disposal of the Claimants' investment in violation of the ECT and the Germany BIT;

(c) Order the Czech Republic to:

(i) compensate the Claimants for all losses caused to them by the Czech Republic's breaches, in an amount of not less than CZK [redacted] (inclusive of pre-award interest and tax gross-up);

(ii) pay to the Claimants post-award interest on any amount of damages awarded, from the date of the final award until its full payment; and

(iii) reimburse the Claimants for all costs and expenses of this arbitration, including legal and expert fees, the fees and expenses of any experts appointed by the Arbitral Tribunal, the fees and expenses of the Arbitral Tribunal, and all other costs of the arbitration, including any expenses arising from the participation of third parties.[19]

77. In their letter dated April 6, 2017, the Claimants adjusted their request for the relief of compensation from CZK [redacted] (inclusive of pre-award interest and tax gross-up) to CZK 306.53 million (inclusive of pre-award interest and tax gross-up).[20]

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18 Memorial, para 563.

19 Reply, para 950.

20 Claimants' letter to the Tribunal dated April 6, 2017, pp. 3-4.

B. The Respondent

78. The Respondent's Statement of Defense requested that the Tribunal:

(a) Declare that the Tribunal does not have jurisdiction over Claimants' claims regarding taxation measures under the ECT;

(b) Declare that the Tribunal does not have jurisdiction over the Solar Levy Extension Claim;

(c) Declare that the Tribunal does not have jurisdiction over Claimants' claims as they fail to disclose a prima facie case on the merits;

(d) Declare that the Czech Republic did not violate the ECT;

(e) Declare that the Czech Republic did not violate the Treaty;

(f) Dismiss Claimants' claims in their entirety;

(g) Order that Claimants pay the costs of these arbitral proceedings, including the cost of the Tribunal and the legal and other costs incurred by the Czech Republic, on a full indemnity basis; and

(h) Order Claimants to pay interest on any costs awarded to the Czech Republic, in an amount to be determined by the Tribunal.[21]

79. In its Counter-Memorial, the Respondent requested that the Tribunal:

(a) Declare Claimants' ECT and BIT claims barred for lack of jurisdiction;

(b) With respect to any claims over which the Tribunal concludes that it has jurisdiction, 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 Claimants' claims and finds the Czech Republic liable, declare that Claimants are not entitled to damages;

(d) Order Claimants 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 such additional relief as it may consider just and appropriate.[22]

80. In its Rejoinder, the Respondent stated its request for a declaration of lack of jurisdiction as following:: Declare Claimants' ECT claims, and their claims (under either treaty) in respect of the Mozolov and Holýšov plants, barred for lack of jurisdiction.[23]

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21 Statement of Defense, para 229.

22 Counter-Memorial, para 608.

23 Rejoinder, para 589.

IV. The incentive regime

A. The Act on Income Tax 586/1992

81. In 1992, following the conclusion of the 1992 United Nations Framework Convention on Climate Change, the Czech Republic implemented two tax incentives through Act 586/1992 (the "**Act on Income Tax**").[24] Section 19(1)(d) provided an exemption from income tax for the year in which solar facilities were put into operation and the following five calendar years (the "**Income Tax Exemption**"). Section 30, with Annex I, provided an accelerated depreciation period (between 5 to 10 years) for specific categories of electrical equipment and components for photovoltaic installations, such as solar panels, inverters, switchboards, fuse boxes, cut-out boxes and security camera systems (the "Shortened Depreciation Period").[25]

B. The Act on Promotion 180/2005

82. So far as is material the Act on the Promotion of Energy Production from Renewable Energy Sources, which was adopted on March 31, 2005 and entered into force on August 1, 2005 (the "**Act on Promotion**"),[26] provided that

(1) investors would have a connection to the grid on a preferential basis (Section 4(1));

(2) investors would have a period of 15 years for recovery of their investment through the feed-in tariff (the "**FiT**") (Section 6(1)(b)(1));

(3) the level of revenues per unit of electricity from renewable sources would be maintained, as a minimum, with promotion by FiT, for a period of 15 years from the year of putting the plant into operation, taking into account the price index of industrial products (Section 6(1)(b)(2));

(4) As from 2007, the FiT set by the Energy Regulatory Office (the "**ERO**") for the subsequent calendar year was not to be lower than 95% of the value of the FiT valid in the year during which a decision was made on their new values (Section 6(4)), the effect of which was that the FiT granted to photovoltaic plants put into operation in any given year could not be

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24 C-18, Section 19 of Act on Income Tax.

25 C-18, Section 19 of Act on Income Tax. The Claimants make no claim for repeal of this advantage: Reply, para 67. The reason is that the SPVs were financed through sale and lease back agreements with UC Leasing providing for a monthly rent, which accounted for depreciation and therefore excluded a direct impact of changes to the depreciation period on the SPVs' business: First Göde Statement, para 36.

26 C-26, Act No. 180/2005 Coll. on the promotion of electricity production from renewable energy sources and amending certain acts, March 31, 2005.

reduced by more than 5% with respect to the FiT granted to photovoltaic plants put into operation in the previous year (the "**5% Break-Out Rule**").

83. The Explanatory Report on a November 2003 draft of the Bill of the Act on Promotion also stated that the "support system is based: … On maintaining the tax reliefs to the extent set out in the Acts on Income Tax …".[27]

C. ERO Regulations

84. Section 4 of ERO Regulation 475/2005 (the "**Technical Regulation**") provided[28]

> In order for the 15-year pay-back period to be assured through the support by Purchasing 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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> (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.

85. In May 2005, the ERO made available on its website its "Report on the procedure of specification of basic parameters of the regulatory formula and price specification for the 2nd regulatory period in the field of electrical energy." In the section "Subsidy for Electrical Generation From Renewables" the Report stated:[29]

> Minimum purchase prices of electricity from individual renewable resources are specified in relation to the amounts of investment and operation costs of the individual categories of resources. The calculation was based on the method of net present value of the generated project cash flows (NPV CF) for the period of the given technology life equal to zero at the discount rate of 7%. …

86. The weighted average cost of capital ("**WACC**") was defined by the Technical Regulation as:

> … weighted average of the expected interest rate on lending for investment in projects designed for using renewable sources for electricity generation and the expected return on equity of an investor in a project designed for using renewable sources for electricity generation.

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27 C-120, Explanatory Report on the bill of the Act on Promotion of November 12, 2003 (extended version), p 4.

28 C-28, ERO Regulation No. 475/2005 Coll.; R-6, The Technical Regulation, Section 4(1).

29 R-365, ERO Report on the procedure of specification of basic parameters of the regulation formula and price specification for the 2nd regulatory period in the field of electrical energy, May 2005, para 5.6.1. There is a dispute between the Parties on whether there was a 7% cap on the rate of return for investors. The Claimants say that neither the Act on Promotion nor the subsequent implementing regulations contained any provision on the profitability or rate of return of RES investments, and that the 7% "discount factor" was simply one of many indicative parameters used by the ERO as a benchmark to establish the initial level of FiT.

87. The Technical Regulation was subsequently amended by ERO Regulations 364/2007 and 409/2009,[30] which modified the technical and economic parameters and fixed the estimated lifetime of new photovoltaic plants at 20 years.

88. Article 2(9) of ERO Regulation 140/2009 (the "**Pricing Regulation**") provided that (1) FiTs would be applied throughout the estimated lifetime of plants (i.e. 20 years); and (2) the FiT was to increase each year by between 2% and 4% taking into account the inflation price index for industrial producers throughout the lifetime of the plant. The FiT was to be set by the end of November for the following year.

V. State aids

89. State aid concerns over the incentive regime were raised on December 16, 2003 in a complaint filed with the EU Commission by the Czech Society of Wind Energy and the European Association for Renewable Energies (EUROSOLAR), alleging that the draft Act on Promotion contravened the Czech Republic's obligations under EU state aid law. On July 27, 2004, the EU Commission informed the complainants that it did not consider the incentives foreseen by the Act on Promotion to constitute State aid, but invited the Czech Republic to inform the EU Commission of any new particulars which might demonstrate the existence of State aid.

90. The EU Commission did not take the matter further until the Czech Republic amended the Act on Promotion in 2010, when the funding mechanism was changed from a consumer-funded one to a hybrid one involving direct use of State resources. On November 18, 2011 the EU Commission expressed the concern that the proposed amendments might constitute State aid.

91. On May 30, 2012 Act 165/2012 was enacted, which replaced the Act on Promotion as of January 1, 2013. On June 11, 2014 the EU Commission authorized the support scheme for electricity produced from RES by installations commissioned as of January 1, 2013 as compatible State aid.

92. On December 11, 2014 the Czech Republic notified to the EU Commission, the support scheme for electricity production from RES by installations commissioned between January 1, 2006 and December 31, 2012.

93. On November 28, 2016 the EU Commission ruled that Act 180/2005 constituted State aid under Article 107(1) of the Treaty on the Functioning of the European Union ("**TFEU**"), and that by implementing Act 180/2005 on January 1, 2006, before a final EU Commission decision, the

[30] C-29, ERO Regulation No. 364/2007 Coll.; C-30, ERO Regulation No. 409/2009 Coll.

Czech Republic had breached the stand-still obligation in Article 10(3) TFEU, but that no objection to the aid would be made because it was compatible with the internal market pursuant to Article 107(3)(c) TFEU. But it also said (para 150):

> … 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 public order.

VI. The changes to the Incentive Regime

A. Abolition of 5% rule for plants connected to the grid from 2011

94. Act 137/2010 entered into force on May 20, 2010.[31] It repealed Section 6(4) of the Act on Promotion pursuant to which the FiT could not decrease the FiT by more than 5% per year. It abolished the 5% rule only for those solar plants connected to the grid from 2011 onwards.

95. The four plants in question were constructed and commissioned after the Act came into force but were connected to the grid before the critical date of 2011.

B. Adoption of Solar Levy

96. Act 402/2010 entered into force on January 1, 2011 introducing Sections 7(a)-(i) in the Act on Promotion, establishing a levy on revenues generated by photovoltaic power plants (the "**Solar Levy**"). It applied from January 1, 2011 to December 31, 2013 to revenues generated by photovoltaic power plants put into operation between January 1, 2009 and December 31, 2010. It was extended beyond December 31, 2013 by Act 310/2013 for photovoltaic power plants put into operation between January 1, 2010 and December 31, 2010.

97. The Solar Levy was originally set at 26% and 28% for payments to solar energy producers respectively under the FiT system and under the Green Bonuses system. It was withheld by the grid operator who paid the FiT or Green Bonuses to the RES producers for the electricity produced.

98. Act 310/2013 set the Solar Levy at 10% for FiTs and 11% for Green Bonuses.

99. Article I(2) of Act 310/2013 also cancelled all incentives for electricity generated by solar power plants placed into service after January 1, 2014.

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[31] C-36, Act No. 137/2010 Coll.

C. Amendment of Act on Income Tax

100. Act 346/2010,[32] which entered into force on January 1, 2011, amended the Act on Income Tax by repealing the Income Tax Exemption for RES producers, and the favourable depreciation allowances. Although it was prospective, it had the effect of removing tax exemptions and depreciation allowances which would otherwise have accrued.

D. Repeal of Act on Promotion

101. Act 165/2012[33] on Promoted Power Sources" which partly entered into force on January 1, 2013 and partly upon its publication on May 30, 2012 repealed the Act on Promotion. It left in place the method for determining FiT and Green Bonuses, as amended at the end of 2010, for plants put into operation before January 1, 2013, and introduced new rules for plants put into operation thereafter. It confirmed the Solar Levy and contained several provisions which the Claimants say negatively affected RES producers that put their plants into operation before January 1, 2013 (including the Claimants).[34]

E. Extension of Solar Levy

102. Act 310/2013[35] was adopted on September 13, 2013, and extended the Solar Levy beyond December 31, 2013, at a new decreased 10% rate (but only applying to 2010 PV plants and for the entire lifetime) and 11% levy on Green Bonuses. It also imposed new obligations concerning disclosure of major shareholders and conversion of shares only on foreign joint stock companies producing electricity from RES. It cancelled RES support for PV plants commissioned after January 1, 2014.

F. Subsequent developments

103. On November 19, 2015, the ERO issued Price Decision 5/2015, which set the FiT applicable as of January 1, 2016 only to plants commissioned from 2013 to 2015, but not to plants put into operation from 2006 to 2012, thereby in effect removing the FiT. But on December 28, 2015, the Czech Government adopted Regulation 402/2015,[36] which overruled Price Decision 5/2015 and

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32 C-38, Act No. 346/2010 Coll.

33 C-39, Act No. 165/2012 Coll.

34 See Reply, paras 240-241.

35 C-107, Act No. 310/2013 Coll.

36 C-249, Government Regulation No. 402/2015 Coll. of December 21, 2015.

provided that the incentives to RES plants commissioned before 2013 must be paid, pending any decision by the EU Commission on their compliance with EU State aid law. On December 29, 2015 the ERO issued Price Decision 9/2015 setting FiT and Green Bonuses for RES plants commissioned since 2006, including the Claimants' plants.[37]

VII. The background and history

A. Development of the incentives

104. In 1997, following the 1997 Kyoto Protocol, the EU Commission released its White Paper for Community Strategy and Action Plan, which aimed to encourage governmental measures supportive of the development of Renewable Energy Sources ("**RES**").[38]

105. On March 30, 2000, the European Parliament adopted its resolution on Electricity from renewable energy sources and the internal electricity market, in which it, among others, requested that the EU Commission submit a proposal of a Directive to "establish a suitable and stable legal framework for renewable energies to underpin the rapid development of these energy sources."[39]

106. It was followed by the Directive 2001/77/EC of the European Parliament and of the Council on the promotion of electricity produced from renewable energy sources in the internal electricity market (the "**2001 Directive**"), which invited Member States to "take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with the national indicative target."[40] The indicative targets for the consumption of electricity produced from RES which had to be attained by 2010 were laid down in the Annex to the 2001 Directive.[41]

107. On May 1, 2004 the Czech Republic became a Member State of the EU pursuant to the Treaty of Accession to the European Union of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia of April 16, 2003 (the "**2003 Treaty of**

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37 C-251, ERO Price Decision No. 9/2015 of December 29, 2015.

38 C-212, EU Commission, White Paper for a Community Strategy and Action Plan COM(97)599, para 1.1.3.

39 C-214, European Parliament's Resolution on Electricity from renewable energy sources and the internal electricity market, March 30, 2000, para R(3).

40 C-20, Directive 2001/ 77/EC of the European Parliament and of the Council on the promotion of electricity produced from renewable energy sources in the internal electricity market, September 27, 2001, Art. 3(1).

41 C-20, Directive 2001/ 77/EC of the European Parliament and of the Council on the promotion of electricity produced from renewable energy sources in the internal electricity market, September 27, 2001, Annex.

Accession").[42] Annex II to the 2003 Treaty of Accession fixed at 8% the Czech Republic's national target for the contribution of electricity produced from RES to the gross electricity consumption by 2010.[43]

108. Following a proposal made in November 2003[44] the Act on Promotion (Act 180/2005)[45] was adopted on March 31, 2005 and entered into effect on August 1, 2005.

109. Section 1(2) stated that the purpose of the Act was in the interest of protection of the climate and protection of the environment, (inter alia) to promote the use of RES, and renewable energy sources (hereinafter referred to as "renewable sources") and create conditions for fulfilment of the indicative target for the share of electricity from RES in the gross consumption of electricity in the Czech Republic amounting to 8 % in 2010, and for further increase of this share after 2010.

110. Section 6 provided under the heading "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
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> (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
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> (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,
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> 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

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42 C-21, Treaty of Accession to the European Union of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, 2003.

43 C-22, Annex II to Treaty of Accession to the European Union of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, 2003 - Energy, Part A.

44 The 2003 Explanatory Report stated that the support system was based "on providing a guarantee to investors … ensuring that the amount of revenue per unit of electricity produced from renewable sources acquired by producers from the support will be maintained for 15 years from placing the facility in service": C-120, Explanatory Report on the bill of the Act on Promotion of November 12, 2003 (extended version), p.4.

45 R-5, (Respondent's translation) and C-26 (Claimants' translation), Act No. 180/2005 Coll. on the promotion of electricity production from renewable energy sources and amending certain acts, March 31, 2005.

> 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,
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> 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.
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> (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.
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> (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. This provision shall be used for the prices set for 2007.

111. During its passage, the Minister of Environment was quoted as describing the Act as "a step towards a more stable environment,"[46] and on June 1, 2005 Mr Martin Bursík, former Minister of Environment (described by the Claimants as one of the co-authors of the Act) published an article stating that the most important principle of the law for producers was the guarantee of a stable FiT for a 15 year period, thereby removing the risk that the ERO would reduce the FiT on a year on year basis and that the producers' cash flow and ability to repay loans would be threatened.[47]

112. Pursuant to Section 6(1)(b)(1) of the Act on Promotion, the ERO was to adopt implementing regulations to determine the technical and economic parameters for the Incentives for each RES technology.

113. These parameters were set by the Technical Regulation (ERO Regulation 475/2005).[48] By Section 4 of the Technical Regulation:

> (1) In order for the 15-year pay-back period to be assured through the support by Purchasing Prices 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.

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46 C-25, "The state is to support renewable power resources," Newspaper article in "Ihned.cz", February 23, 2005.

47 C-32, Newspaper article in "Moderniobec.cz", June 1, 2005.

48 C-28, ERO Regulation No. 475/2005 Coll.

> (2) Indicative values of technical and economic parameters, separately for individual supported categories of renewable sources and selected technologies allowing to meet the required economic criteria under subsection (1) in electricity production from renewable sources, are listed in Annex No. 3 hereto.[49]

114. Annex 3 of the Technical Regulation proceeded on the basis that photovoltaic power plants had an expected lifetime of 15 years. It was amended by ERO Regulation 364/2007 which increased the expected lifetime to 20 years.

115. In the 2005 Fourth National Communication of the Czech Republic on the UN Framework Convention on Climate Change (the "**2005 UN Report**"), the Czech Republic described the purpose of Section 6(1)(b)(2) of the Act on Promotion as:[50]

> providing guarantees to the investors and owners of installations, producing electricity from renewable sources who are subject to support pursuant to the Act, that the amount of revenue per unit of produced electricity from renewable sources acquired by the producers from the support will be maintained for a period of 15 years from bringing the installation into operation (or for a period of 15 years for installations that were brought into operation prior to the date of effect of the Act)

116. In accordance with Articles 4 and 8 of the 2001 Directive, on December 7, 2005 the EU Commission issued a Communication addressing the progress made by each Member State in achieving the targets, and suggesting a way forward.[51] The Commission said:

> Member States shall optimize and fine tune their support schemes by:
>
> **Increasing legislative stability and reducing investment risk.** One of the main concerns with national support schemes is any stop-and-go nature of a system. Any instability in the system creates high investment risks, normally taking the form of higher costs for consumers. Thus, the system needs to be regarded as stable and reliable by the market participants in the long run in order to reduce the perceived risks. Reducing investment risk and increasing liquidity is an important issue, notably in the green certificate market. The design of a support mechanism must minimise unnecessary market risk. Increased liquidity could improve the option of long term contracts and will give a clearer market price.[52].

117. In this period the Czech Government promoted the scheme abroad.[53]

118. On April 23, 2009 the European Parliament and the Council of the EU adopted Directive 2009/28/EC (the "**2009 Directive**"), which repealed the 2001 Directive and fixed new mandatory targets for the contribution of electricity produced from RES by 2020. The Czech Republic's new

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49 Translation in R-6, The Technical Regulation, Section 4(1).

50 C-72, Fourth National Communication of the Czech Republic on the UN Framework Convention on Climate Change of 2005, p 35.

51 C-216, EC's Communication of December 7, 2005, *The support of electricity from renewable energy sources*.

52 C-216, EC's Communication of December 7, 2005, *The support of electricity from renewable energy sources*, para 8.2.

53 For Germany see C-230, ERO presentation of October 9, 2008 by Mr. Stanislav Trávníček.

target was set at 13% by 2020 (Annex I, Part A). The Recitals to the 2009 Directive emphasized (paras 14 and 25) that the main purpose of mandatory national targets was to provide certainty for investors and that Member States had to guarantee national support schemes to maintain investor confidence.

119. On May 11, 2009 the ERO adopted the Pricing Regulation (ERO 140/2009), Article 2(9) of which provided as follows:

> 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.

B. The solar boom and proposals for change: 2009-2010

120. Initially investment in solar power was not especially attractive because of the relatively high price of PV panels and the relatively poor irradiation profile of the Czech Republic. No significant volume of PV plants was installed prior to 2009.[54] The significant drop in the price of PV panels began in 2008 and accelerated in 2009. In early 2009 the ERO learned that the electricity transmission and distribution companies began receiving a significantly increasing number of preliminary applications for connection to the grid for solar installations. It took the view that an uncontrolled increase in solar energy would be highly undesirable because (1) it would increase the price of RES support paid by consumers; (2) it would lead to significantly higher profits for solar investors compared with other RES producers; and (3) it would threaten the stability of the grid because of the unpredictable and volatile nature of solar electricity production.[55]

121. On January 29, 2009 Mr Fiřt, the then Chairman of the ERO, alerted the Prime Minister to these problems and to the need to amend the Act on Promotion to remove the 5% cap.[56]

122. On March 1, 2009 the European Photovoltaic Industry Association published a study predicting 8% annual decrease in PV system prices for 2009, and a halving of costs every 8 years.[57]

123. The ERO Report on the Fulfilment of the Indicative Target for Electricity Production from Renewable Energy Sources for 2008 (prepared in 2009) said that in a year-on-year comparison,

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54 R-8, The ERO Yearly Report on the Operation of the Czech Electricity Grid for 2012, Chapter 7 (Electricity generation from renewable energy sources (RES) since 2004), section 8.

55 Fiřt Statement, paras 11-14.

56 Fiřt Statement, para 15.

57 C-36, Act No. 137/2010 Coll., p 16.

2007/2008 recorded an almost ten-fold rise in installed capacity of PV systems in the Czech Republic, which had been caused in particular by a fall in the prices of photovoltaic panels by over 40% and the retention of very favourable prices. It went on:

> The massive interest shown by investors in photovoltaic systems is already causing significant problems both in the form of disadvantaging the other categories of RES or the speculative blocking of connection capacities at grid level and also a significant increase in ancillary costs for RES, which are subsequently transferred to the final prices of electricity for consumers.[58]

124. But it recognized that the Act on Promotion brought a guarantee of long-term and stable promotion necessary for decision-making by businesses, a guarantee of revenues per unit of electricity produced for a period of 15 years from the date it is put into operation, and retention of the level of purchase prices for equipment already in operation for a period of 15 years, and a maximum year-on-year fall in purchase prices of electricity for new equipment of 5%.[59]

125. The Prime Minister told Mr Fiřt that he would take steps to amend the Act on Promotion in accordance with Mr Fiřt's recommendation,[60] but following a vote of censure, in March 2009 the Government had to resign and elections were fixed for October 2009 (postponed by decision of Constitutional Court on September 10, 2009 to May 2010). In May 2009 the Fischer caretaker government was formed.

126. According to Mr Fiřt, in mid-2009 many banks temporarily suspended the financing of new solar installations, anticipating a possible change in legislation.[61]

127. On July 1, 2009 Mr Fiřt wrote to the Minister of Industry and Trade and to the Minister of Environment pointing to the "fairly dramatic" rise in preliminary connection requests for photovoltaic installations and urging the Government to abolish the 5% Break-Out Rule so that the ERO could reduce the incentives for investments made in 2010.[62] The letter said:

> I am writing to you with an urgent request concerning Act No. 180/2005 Coll., on promotion of production of power generated from renewable energy sources.
>
> The Energy Regulatory Office is responsible for promotion of power generated from renewable energy sources under the law. The situation with regard to requests for connecting new sources to the grid (primarily photovoltaic plants) is currently fairly dramatic. The growth in installed capacity for photovoltaic plants between 2007 and 2008 amounted to nearly 1,500% (starting at 3.4 MW and finishing at 54.29 MW). The installed capacity hit 77 MW at the end of June this year. Regional distribution system operators predict that at least

58 C-230, ERO presentation of October 9, 2008 by Mr. Stanislav Trávníček, para 3.6.2.

59 C-230, ERO presentation of October 9, 2008 by Mr. Stanislav Trávníček, para 5.1.

60 Fiřt Statement, para 15.

61 Fiřt Statement, para 19.

62 C-200, Letter of July 1, 2009 from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade).

> another 250 MW will be connected and put into operation by the end of 2009.
>
> At the same time, photovoltaic plants have seen a sharp decline in specific investment costs by approx. 30%. However, the Energy Regulatory Office cannot respond to this situation with the appropriate decrease in the feed-in tariff for power generated from these sources, which puts investors in this area at an unprecedented advantage over investors and producers of other types of renewable resources.
>
> This situation also leads to a speculative block of connection capacities at the level of the distribution systems. For this reason it is no longer possible to grant a request for connection for any applicant in a large part of the Czech Republic for the foreseeable future. This applies not only to renewable resources, but also to sources for combined power and heat production.
>
> The provisions of Section 6(4) need to be amended, because at present they are making it impossible for the Energy Regulatory Office to lower the feed-in tariff on power from renewable resources by more than 5% year-on-year.
>
> I would also like to stress the financial and social aspect of this problem, since the current uncontrollable growth in photovoltaic plants already means that all customers in the Czech Republic, including households, will be making a contribution of more than CZK 3 billion in 2010 just for new photovoltaic plants, while the total fund for promoting all types of renewable resources for 2008 was CZK 2.658 billion. In simplified terms, all customers in the Czech Republic will pay about CZK 50/MWh more for power just due to the growth in photovoltaics.
>
> For the reasons stated above, the Energy Regulatory Office proposes that Section 6(4) of Act No. 180/2005 Coll. should be repealed. This will make it possible to adjust the feed-in tariff for photovoltaics to match the actual situation.
>
> In my opinion the issue described in this letter is extremely serious. I am also sending this letter to the Minister for the Environment as the co-sponsor of Act No. 180/2005 Coll. I will be happy to meet in person to discuss the issue, if needed.

128. On July 22, 2009 the Minister of Environment replied to Mr Fiřt to agree that the current market situation was unsustainable and that it was necessary to decrease a disproportionate economic profit of large-scale outdoor photovoltaic systems which these installations currently had compared to other renewable sources. But he disagreed with the proposal to amend Section 6(4) of the Act on Promotion, because it was necessary to preserve the trust of investors. [63]

129. On July 29, 2009, the Minister of Industry and Trade replied to Mr Fiřt stating that the Government would "indeed make efforts to amend [Section 6(4)] as soon as possible."[64]

130. On August 10, 2009 the ERO's Vice Chairman, Mr Němeček, wrote to the Acting Director of the Electric Power Department in the Ministry of Industry and Trade calling for the repeal of Section 6(4) to "make it possible to adjust the purchase price for photovoltaics to match the actual situation."[65]

131. On August 24, 2009 the Ministry issued a press release stating that "the grant policy from the

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63 R-306, Letter from L. Miko to J. Fiřt (Czech Original and English translation), July 22, 2009.

64 R-135, Letter from V. Tošovský to J. Fiřt (Czech original and English translation), July 29, 2009.

65 R-136, Letter from B. Němeček to R. Portužák, August 10, 2009.

part of the state 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," that it was "planning to change the maximum 5% limit by which the ERO can reduce the purchase price of electricity from renewable energy sources annually" and that it was "trying to ensure that the new act comes into force on 1 January next year."[66] The press release read:

> **Ministry of Industry and Trade equalises support for renewable energy sources**
>
> The Ministry of Industry and Trade is preparing an amendment to Act No 180/2005 Coll., concerning support for electricity generation from renewable energy sources. The Ministry of Industry and Trade is planning to change the maximum 5% limit by which the Energy Regulation Office can reduce the purchase price of electricity from renewable energy sources annually. The system for support of renewable energy sources must guarantee a fair competition environment for all renewable sources, it must respect the realistic technical—economic parameters of the individual types of RES, and it must also ensure a commensurate attractiveness for investors. The Ministry of Industry and Trade is trying to ensure that the new act comes into force on 1 January next year.
>
> The reason for the amendment of the act is primarily the situation in the area of photovoltaic devices, where the grant policy from the part of the state 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.
>
> Between the years 2007 and 2008 the installed capacity of solar power stations grew by almost 1500 % from an original 3.4 MW to 54.29 MW. By the end of June this year the installed capacity had risen to 80 MW.
>
> The ongoing reduction in the prices of photovoltaic panels is leading to the uncontrolled development of solar power stations. Whereas technological advances have reduced the price of photovoltaic panels by more than 40%, by law the Energy Regulation Office can only reduced the purchase price of electricity for new renewable sources by 5% per year. So at present a significant advantage is being provided to newly built photovoltaic power stations compared to other sources of renewable energy.
>
> Given the current parameters, customers in the Czech Republic, including households, will contribute more than CZK 3 billion in support of electricity generation from new photovoltaic sources alone in 2010. If the law were to remain unchanged, in the years to come the contribution for photovoltaic devices would rise dramatically.
>
> Put simply, if the current state were maintained the price for the delivery of electricity would rise by more than CZK 50/MWh for all customers in the Czech Republic just as a result of increase in photovoltaic devices. In 2011 the price for customers would be even higher.
>
> The purchase prices for electricity from photovoltaic devices are guaranteed for 15 years, but thanks to new technology in certain cases the return on the investment is a mere 5 years. The level of the purchase price for electricity from a photovoltaic device is almost CZK 13/kWh, whereas the market price for electricity is around CZK 2/kWh.

132. On August 28, 2009, the Acting Director of the Department in the Ministry of Industry and Trade wrote, in reply to Mr Němeček's letter of August 10, 2009:

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66 R-138, "Ministry of Industry and Trade will equalize the support of renewable energy sources," Ministry of Industry and Trade Press Release (www.mpo.cz), August 24, 2009.

> I … believe that the preferential treatment of investors and potentially adverse impact on the regulated part of electricity price mentioned by you are hardly sustainable in the future.
>
> On the other hand, it is appropriate to realize that the goal of section 6(4) … was to ensure the investors in renewable sources certainty of payback of their investments, transparency and predictability. A simple cancellation could thus entail a risk of suits filed by investors against the Czech Republic on grounds of lost investments.[67]

133. On September 8, 2009 in an open letter to the Chairman of the Economic Committee of the Chamber of Deputies Mr Fiřt again proposed an amendment to the Act on Promotion to enable the ERO to lower the incentives, subject to ensuring "a reasonable vacatio legis period" whereby the change would take effect only from 2011, so that "Investors 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."[68]

134. ERO made presentations dealing with the solar boom issue. In an October 2009 presentation, ERO said that "the economic return [for solar investors] at the current prices is in conflict with the guaranteed return pursuant to the law and is almost half [of the original 15-year period]." ERO drew attention to the technical parameters specified in the Technical Regulation and explained that an appropriate drop in the 2010 FiT to reflect cost developments would amount to 29.5%.[69]

135. In November 2009, the ERO adopted Regulation 409/2009, which modified the technical and economic parameters of the Technical Regulation.[70] The expected lifetime for photovoltaic plants was kept as 20 years, as set out in Regulation 364/2007.

136. In the same month, the ERO issued its Report, in which it said that "the construction of installed capacity in biomass (around 352 MW), wind (around 269 MW), photovoltaics (around 131 MW) and biogas (around 70 MW) [was] of key importance for the fulfilment of the [8%] indicative target [for 2010]."[71]

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67 R-145, Letter from Mr Portužák to Mr Němeček, August 28, 2009.

68 C-201, Letter of September 8, 2009 from Mr. Fiřt (Chairman of the ERO) to Mr. Vojiř (Chairman of the Economic Committee of the Chamber of Deputies), p. 2.

69 R-156, Legislative environment and the promotion of the electricity produced from photovoltaic power plants in 2009," ERO Presentation, October 15, 2009, p. 14.

70 C-30, ERO Regulation No. 409/2009 Coll.

71 C-203, "Report on the Fulfilment of the Indicative Target for Electricity Production from Renewable Energy Sources for 2008" of November 2009, prepared by the Ministry of Industry and Trade.

137. On November 16, 2009 the Government put forward a proposal to amend Act 180/2005.[72] The Explanatory Report says that the aims of the legislation were to adjust the prices for solar power as of January 1, 2011, to eliminate the current discrimination against other types of renewable sources and repeating Mr Fiřt's formula about investors preparing in advance so as to eliminate the risk of potential lawsuits against the Czech Republic.

138. During a press conference on the same day,[73] the Minister of Industry and Trade, Mr Vladimír Tošovský, said that reduction of the promotion from 2011 was chosen to avoid changing the terms and conditions under which existing investors had invested.

139. On November 23, 2009, the ERO issued Price Decision 5/2009, which set the FiT for 2010 plants.[74]

140. The Tribunal was referred to many published articles from June 2009 onwards recording that the Government wanted to end the boom,[75] and reporting opposition to its plans.[76]

141. In this period there was a geometric increase in installed solar capacity, as many investors (most of them domestic rather than foreign) took advantage, according to Mr Fiřt, of what was widely perceived as an opportunity to earn very high profits.[77]

142. As a result of the rise in the number of applications to connect new solar installations, from February 2010 the national transmission system operator and the regional distribution system operators started to limit the issuance of "binding statements", i.e. the preliminary agreements which assured investors that their plants would be connected to the grid upon completion. The national moratorium on new applications was widely announced and reported.[78]

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72 R-147, Explanatory Report to Draft Act No. 137/2010 Coll., November 16, 2009.

73 C-197, Czech Government's press conference of November 16, 2009, p. 2.

74 R-49, The ERO Price Decision No. 5/2009, November 23, 2009.

75 R-363, "State wants to stop solar power plants boom," Mladá fronta; R-364, "ERO is preparing purchase price reductions" (greensolar.webnode.cz), June 24, 2009; R-143, M. Petříček, "Solar boom is slightly excessive," Hospodářské Noviny, August 13, 2009; R-139, Právo, "Ministry of Industry and Trade wants to reduce support of solar power plants", August 25, 2009; R-140, "Is there any danger of reduction of support for solar power plants", Radio Praha, September 3, 2009; R-181, "Additional payments for solar energy reached three billion; the state may curtail their boom" (Novinky.cz), November 2, 2009; R-155, "Solar energy 2010: no solution to the crisis in sight" (nazeleno.cz), March 24, 2010.

76, R-144, "We will pay dearly for the sun, Ekonom, October 7, 2009; R-362, "What is the adequate decrease of photovoltaic electricity purchase prices?", oze.tzb-info.cz, October 19, 2009.

77 Fiřt Statement, para 22.

78 Press releases: R-225, "CEPS calls for the suspension of connections for new renewable energy sources," AF Power press release, February 10, 2010; R-224, "CEZ Distribuce responds to CEPS's demand," CEZ press release, February 16, 2010; R-230, "Boom development of solar power plants must be balanced with

143. On March 12, 2010 the three regional distribution companies wrote an open letter to Parliament urging it to adopt the amendment to the Act on Promotion to curtail "excessive profits" of solar generators.[79]

144. On March 17, 2010 the Chamber of Deputies approved Act 137/2010, which entered into force on May 20, 2010.[80] This measure abolished the 5% rule for plants connected to the grid from January 1, 2011 onwards (Article II).

145. The Czech Republic published its 2010 National Renewable Energy Action Plan in July 2010 (the "**2010 Action Plan**").[81] It stated that, in relation to solar plants, the "fixed tariffs" (including the FiT set for 2010) were guaranteed for a period of 20 years and that there was no cap "on the total volume of electricity produced per year or of installed capacity that is entitled to the tariff"[82]. In the 2010 Action Plan, the Income Tax Exemption was listed together with the FiT and Green Bonuses as available financial support for RES.[83]

146. In July 2010 the Nečas Government was sworn in, following elections in May 2010, and held office until July 2013.

147. There was a series of newspaper articles between July and September 2010 suggesting that the Government might resort to taxation measures to deal with the solar boom.[84]

C. The changes

148. On September 15, 2010 a bill (which became Act 330/2010) was introduced to eliminate all

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the stability of the grid and distribution network," E.ON press release, February 2010; R-229, "New solar power plants are out of luck, ČEZ and E.ON will no longer connect them to the grid" (Novinky.cz), February 17, 2010.

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

80 C-36, Act No. 137/2010 Coll.

81 C-73, National Renewable Energy Action Plan of July 2010 published by the Ministry of Industry and Trade.

82 C-73, National Renewable Energy Action Plan of July 2010 published by the Ministry of Industry and Trade, pp 58-59.

83 C-73, National Renewable Energy Action Plan of July 2010 published by the Ministry of Industry and Trade, pp 50-51.

84 R-162, "Solar boom will cost us dearly", iDes.cz, July 22, 2010; R-31, "Minister of Environment Wants to Tax Solar Power Plants," Mladá Fronta Dnes, July 23, 2010; R-185, "Solar boom is over", E15 July 30, 2010; R-186, "Nečas for HN: We will slow down the process of electricity price increases and maybe even reverse it," iHNed.cz, August 27, 2010.

support for large solar plants commissioned on or after March 1, 2011.[85] The Explanatory Report stated:

> It is a legislative change of claim for the support of production of electricity from renewable energy sources. Photovoltaic power plants already connected to the electric power system will have their right to claim support preserved under existing conditions. Facilities not yet connected to the electric power system but which started operation before January 1, 2011 will have 12 months to be connected to the electric power system. If they do so, then their right to claim support will be preserved. The extent of support will correspond to the guaranteed support for the respective facility as of the time of its connection to the electric power system.
>
> …
>
> It is proposed that this Bill comes into effect from January 1, 2011. From March 1, 2011 the only supported facilities will be photovoltaic power plants with the installed power output of less than 30 kWp that are located on roofs and constructions of buildings. To this date it is also guaranteed that photovoltaic power plants already connected to the electric power system will have their right to claim support preserved under existing conditions".[86]

149. On September 22, 2010 the Czech Government instructed the Ministers of Industry and Trade and of Environment to form a Coordination Committee to evaluate the impact of support for RES on electricity and energy prices.[87]

150. The Committee's tasks[88] included the preparation of specific analyses on the impact of RES support on prices and the preparation of a draft amendment to the Act on Promotion.

151. On October 13, 2010 a draft of legislation to amend the Act on Promotion was re-submitted.[89] The draft maintained support under existing legal regulations for sources commissioned prior to the effective date of the Act and connected to the grid by December 31, 2011 (Article II).

152. On October 13, 2010 (as the Deputy Industry and Trade Minister reported to the Coordination Committee on October 15, 2010) the Government approved proposals to reduce the impact of RES on the price of electricity by a combination of three solutions, namely: (1) "The introduction of a withholding tax on sales of electricity from photovoltaic power plants"; (2) "Change of rates for alienation of land from the agricultural land fund"; and (3) "Include the revenues from the

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85 R-172, Explanatory Report to Draft Act No. 330/2010 Coll. (Czech original and partial English translation).

86 R-172, Explanatory Report to Draft Act No. 330/2010 Coll. (Czech original and partial English translation), p. 8.

87 R-189, Resolution of the Government of the Czech Republic No. 681, September 22, 2010.

88 R-190, Minutes of the 1st Meeting of the Coordination Committee for the assessment of the impact of support of renewable energy sources on electricity prices, September 23, 2010.

89 R-299, Government Document No. 145/10, Government proposal of an act amending the Act on Promotion, October 13, 2010.

sale of emission permits, including derogative, in the financing of RES Support"[90]. The first solution eventually became the Solar Levy.

153. First Deputy Environmental Minister Bízková is recorded as having said:

> … 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.

and Mr J Fiřt was noted as declaring that the ERO fully supported "the legally strong variant, which shall ensure the reduction of the contribution to the PVPPs [photovoltaic power producers]."[91]

154. On October 20, 2010, the Government resolved to approve the introduction of "the levy on production of electricity from solar radiation from the facilities put into operation in 2009 and 2010."[92]

155. At a meeting on October 20, 2010, the Minister of Finance explained the Solar Levy as follows:

> Mechanism to reduce the surge increase of the prices of electricity consists in translation of support for RES to the prices for the final consumers only to a limited extent. The Government shall provide the operators of the transmission and distribution system (grid operators) with additional funding to cover the increase of the contribution to RES. …
>
> For the operators of the systems, the price shall be compensated from the state budget ….
>
> The necessary securing of budget resources on the part of the state budget is realised by increase of the revenues from the title of adoption of three measures:
>
> 1. Increasing the levy from removal of land from the Agricultural Land Fund …;
>
> 2. The introduction of a levy on the production of electricity from solar radiation from plants commissioned into service in 2009 and 2010 …;
>
> 3. The introduction of gift tax on emission allowances …[93]

156. On October 26, 2010 the Government introduced a draft of Act 346/2010 amending the Act on Income Tax by repealing the Income Tax Exemption and abolishing the Shortened Depreciation Period as from January 1, 2011.[94]

157. The Explanatory Report to the draft Act stated:

> The proposed changes are in response to the need to eliminate all legal means for the indirect

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90 C-198, Minutes of the third meeting of the Coordination Committee held on October 15, 2010, para 3.

91 C-198, Minutes of the third meeting of the Coordination Committee held on October 15, 2010, pp. 4-5.

92 R-307, Resolution of the Government of the Czech Republic No. 757 on the issue of solution to the increase in electric energy prices caused by the promotion of renewable energy sources, October 20, 2010.

93 Annex 5 to First [redacted] Report, Ministry of Finance presentation for government meeting, October 20, 2010, p. 3.

94 R-114, Explanatory Report to Draft Act No. 346/2010 Coll., October 26, 2010.

> support of electric power generation from renewable resources (mainly solar power plants) that is no longer justified …Taxpayers will be able to take advantage of this tax relief for the last time for the tax period that began in 2010. This means among other things that the change will also apply to taxpayers who put environmentally friendly power plants and facilities in operation before this amendment took effect.
>
> …
>
> This proposed effectiveness date [January 1, 2011] does not create a risk of true retroactivity, since it is not a revision of legal relationships that had already arisen, but is an adjustment of relationships for the future …[95]

158. At the session of October 29, 2010 the bill to amend the Act on Promotion was assigned to the Economic Committee of the Chamber of Deputies for review.

159. On November 2, 2010 a new draft was submitted to Parliament, introducing the Solar Levy (for 3 years).[96]

160. In debate before the Economic Committee on November 2, 2010 the Government was asked whether the Ministry of Industry and Trade was not afraid of losing arbitrations, and the answer was that tax regimes were a matter for each country, and changes in tax rates should not be challenged in arbitration. The Minister of Industry and Trade, Mr Kocourek, said:

> The issue of arbitrations in general is absolutely erratic. … 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 tax – it is not just a retroactive correction of support. One may argue as to whether or not this is retroactive. Nevertheless, 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.[97]

161. On November 8, 2010, the ERO issued Price Decision 2/2010, in which it set the FiTs for 2011 plants. The FiTs for plants with capacity of over 30kW commissioned in 2011 were set at lower than 50% of those for plants commissioned in 2010.[98]

162. On November 12, 2010 the Czech Parliament approved Act 346/2010, which entered into force on January 1, 2011.[99]

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95 R-114, Explanatory Report to Draft Act No. 346/2010 Coll., October 26, 2010, pp 4-5.

96 R-300, Chamber of Deputies of the Parliament of the Czech Republic, Chamber print no. 145/1 of 2010, November 2, 2010.

97 C-208, Minutes of meeting of the Economic Committee of the Chamber of Deputies of November 2, 2010, p. 5.

98 R-50, The ERO Price Decision No. 2/2010.

99 R-32, The Act 346/2010.

163. In this period, according to Mr Minčič, who was then the First Deputy Minister of Finance,investors rushed in to obtain the high FiTs, which had the effect of accelerating the boom in new solar installations, with the result that there would be electricity price increases of 12.7% for households and 18.4% for industrial consumers.[100]

164. In the debate on the amendment to the Act on Promotion on November 29, 2010 the First Deputy Minister of Finance, Mr Minčič said that the solar boom might or would trigger an increase in electricity prices for business by 17% or more, and such an abrupt increase would almost liquidate a significant proportion of Czech industry. He also discussed the legal issues, including constitutional challenges based on the "quasi-retroactivity" of the Act, issues relating to the principle of legitimate expectations under EU law, and to undertakings which result from treaties protecting and supporting foreign investments. He accepted that there was a risk of arbitrations.[101]

165. The Minister of Industry and Trade made similar points at the Senate session of December 8, 2010.[102] The Minister acknowledged the risk of investment arbitrations brought by aggrieved solar investors against the State, but referred to an opinion by a law firm, Advokátní kancelář Kříž a Bělina, which "concluded that from the general perspective, the Czech Republic should be able to defend the proposed solutions."[103]

166. In the debate Senator Jiří Čunek criticized the Government officials who failed to monitor the development of the solar market and said:

> However, what does our law say? Our law says that this is false retroactivity, that international arbitrations cannot be excluded in view of claims regarding the protection of investments, and that the taxation of emissions credits is legally contestable, since the decision of the state body is not a gift and is inconsistent with EU law. That means that we are in a very unconventional situation.

167. Senator Čunek also endorsed a proposal by the President of the Czech Republic to limit the Solar Levy to one year, so as to avoid payment of damages. As an alternative he proposed to raise funds for RES support by introducing a tax on the production of nuclear energy, as done in Germany.[104] In his opinion, that solution would have been consistent with the promotion of RES and would not have caused legal problems.

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100 Minčič Statement, paras 8, 11.

101 C-235, Transcript of the Senate session of November 29, 2010, p. 3-5.

102 C-236, Transcript of the Senate session of December 8, 2010.

103 C-236, Transcript of the Senate session of December 8, 2010, p. 2; C-237, *Advokátní kancelář Kříž a Bělina*'s Opinion of December 6, 2010.

104 C-236, Transcript of the Senate session of December 8, 2010, pp. 4-5.

168. The Chairman of the Economic Committee, Senator Jan Hajda, warned about the likelihood of arbitrations and said that the only honourable course would be to reject the bill.[105]

169. After the discussion, the Senate refused to approve the bill and none of the amendments proposed at the discussion were adopted. But Act 402/2010[106] passed on December 14, 2010, in accordance with Article 46(3) of the Czech Constitution pursuant to which a bill is considered adopted if the Senate takes no action within 30 days of its submission.

170. Sections 7(a)-(i) introduced the Solar Levy, which applied to power generated by solar radiation from January 1, 2011 to December 31, 2013 in a plant put into operation between January 1, 2009 and December 31, 2010. The levy rate was 26% on FiTs and 28% on Green Bonuses.

171. According to the Respondent, the levy rate of 26% was calculated in order to ensure that investors continued to have a guarantee of return of investment within 15 years and a return on capital of at least 7% per annum on average over the lifetime of their investment.[107]

172. Act 330/2010, which came into force on January 1, 2011 amended Section 3(5) of the Act on Promotion and abolished all incentives related to photovoltaic plants with installed output exceeding 30 kWp commissioned after March 1, 2011.

173. On January 11, 2011 the European Commissioners for Energy and Climate Action expressed "serious concerns" about the retroactive character of the amendment to the Act on Promotion.[108]

174. Act 165/2012[109] repealed the Act on Promotion as of January 1, 2013. The Act established a new funding mechanism under which, inter alia, the Czech Electricity and Gas Market Operator (OTE) paid (i) Green Bonuses directly to the RES producers; and (ii) the difference between the FiT and the market price to the "mandatory purchasers". The Act also introduced the "negative 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" when the price of electricity on the daily market had a negative value. Pursuant to the transitional provisions set out in Section 54, all of the Claimants' plants have been receiving the same amount

105 C-236, Transcript of the Senate session of December 8, 2010, p. 6. See also Senator Jan Horník, at p 9.

106 R-173 (Respondent's translation) and C-37 (Claimant's translation), 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, December 14, 2010.

107 Minčič Statement, para 17.

108 C-205, Letter of January 11, 2011 from Ms. Hedegaard and Mr. Oettinger (Commissioners of the EC) to Mr. Kocourek (Czech Minister of Trade and Industry).

109 C-39, Act No. 165/2012 Coll.

of FiTs provided for under the Act on Promotion as amended in 2010.

VIII. Jurisdictional/admissibility issues

A. Whether the Solar Levy is a tax for the purposes of Energy Charter Treaty, Art 21(1)

1. The Respondent's position

175. The Respondent contends that "[t]he Tribunal does not have jurisdiction over Claimants' [ECT] claims that pertain to taxation" by reason of Article 21 of the ECT, which excludes "Taxation Measures" from the scope of the ECT.[110]

176. Article 21 of the ECT provides, in relevant part:

> (1) 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. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.
>
> […]
>
> (2) Article 10(2) and (7) [Most favourable and national treatment] shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital.
>
> […]
>
> (5) (a) Article 13 [Expropriation] shall apply to taxes.
>
> […]
>
> (7) For the purposes of this Article: (a) The term "Taxation Measures" includes: (i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and (ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound. […][111]

177. According to the Respondent, all of the Respondent's amendments to the Incentive Regime, i.e., the installation and the extension of the Solar Levy and the repeals of the Tax Exemption and the Shortened Depreciation Period constituted taxation measures for the purpose of Article 21(1) of the ECT.[112] The Respondent notes that the Claimants do not object to the tax measure applicability as to the repeals of the Tax Exemption and the Shortened Depreciation Period.[113] Accordingly, the tax carve-out becomes at issue only in relation to the introduction and the

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110 Statement of Defense, paras 85-91.

111 Statement of Defense, paras 87-88; RLA-5, the ECT.

112 Statement of Defense, paras 92-97.

113 Rejoinder, para 339; Reply, paras 507; Memorial, paras 323-325.

prolongation of the Solar Levy.[114]

178. The Respondent asserts that the determination of whether a measure is characterized as a Tax Measure should be based on the plain text of Article 21(7) of the ECT and in accordance with the VCLT.[115] Article 31 VCLT provides, *inter alia*, that "[a] special meaning shall be given to a term if it is established that the parties so intended".[116] The Respondent then submits that under Article 21(7)(a) the contracting State Parties intended to give a special meaning to the term "Taxation Measures" by defining them as including "any provision relating to taxes of the domestic law of the Czech Republic."[117] Accordingly, any provision relating to tax measures under domestic law is carved-out pursuant to Article 21(7) of the ECT.[118]

179. According to the Respondent, such a reference to domestic law is consistent with arbitral practice where "tribunals have not hesitated to apply domestic law when expressly instructed to do so."[119] This is also supported by the drafters' intent to "preserve State autonomy over taxation matters, rather than wrest it from the State's hands".[120] The Respondent objects to the Claimants' assertion that this interpretation allows a host State to evade an ECT obligation by categorizing its measure as tax, noting that the ultimate authority to decide the tax applicability belongs to a tribunal, instead of a host State.[121] The Respondent also objects to the Claimants' allegation that the reference to domestic law is contrary to the purpose of the ECT, stating that they do not provide an adequate explanation.[122]

180. The Respondent rejects the Claimants' argument that taxes must be "imposed in good faith" in order for the Article 21 carve-out to apply.[123] The Respondent notes that the Energy Charter Secretariat's 2015 publication on "Taxation of Foreign Investments under International Law"—to which the Claimants refer—does not indicate that any such requirement applies.[124] The

114 Rejoinder, para 339.

115 Counter-Memorial, paras 487-8.

116 RLA-125, Vienna Convention on the Law of Treaties, Art. 31(1) and (4).

117 Counter-Memorial, para 488; Rejoinder, para 342.

118 Rejoinder, para 343.

119 Rejoinder, para 346.

120 Rejoinder, para 347.

121 Rejoinder, para 349.

122 Rejoinder, para 348.

123 Rejoinder, para 421; Reply, para 526.

124 Rejoinder, para 421.

passage cited by the Claimants for support discusses various merits issues relating to a State's power to tax which the Respondent deems inappropriate for the determination of whether there is jurisdiction over the dispute.[125]

181. In any event, the Respondent submits that the Claimants' allegation that the Respondent deliberately camouflaged the Solar Levy as a tax in order to evade international liability under the treaties, and thus, acted in bad faith, is without merit.[126] The Respondent contends that, as found by the tribunal in *Tza Yap Shum v. Peru*, the conduct of tax authorities ought to be examined "under an assumption of good faith".[127] According to the Respondent, the Claimants should have, but failed, to provide evidence to overcome this presumption by showing that the purpose of the introduction of the Solar Levy was one "'entirely unrelated' to taxation, 'such as the destruction of a company or the elimination of a political opponent'."[128] Furthermore, several tribunals have ruled that a State cannot be deemed to have acted in bad faith simply because it did not pursue what a tribunal (in hindsight) believes would have been a better way of accomplishing an objective.[129]

182. The Respondent maintains that the Solar Levy can meet the definition adopted in *Yukos v. Russia*, in which the tribunal defined taxation measures as "actions that are motivated by the purpose of raising general revenue for the State".[130] This is primarily based upon the Respondent's expert's analysis that "there is no obligation for the Government to use the funds that it receives pursuant to the Solar Levy to finance any specific purpose."[131] The Respondent adds that its good faith is supported by the fact that it was looking for a lawful measure under domestic law, instead of simply reducing the FiT.[132]

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125 Rejoinder, para 421.

126 Rejoinder, para 433.

127 Respondent's Rejoinder, para 423; *Tza Yap Shum v. Peru* (Kessler, Fernandez-Armesto, Otero), ICSID Case No. ARB/07/6 (Laudo, July 7, 2011), para 125.

128 Counter-Memorial, para 506; *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (Fortier, Poncet, Schwebel), UNCITRAL, Award, 18 July 2014, para 1407.

129 Rejoinder, para 427; *Invesmart B.V. v. Czech Republic* (Pryles, Thomas, Bernardini), UNCITRAL, Award (Redacted), 26 June 2009, paras 430, 484 and 501; *ECE Projektmanagement International GmbH et al v. Czech Republic* (Berman, Bucher, Thomas), PCA Case No. 2010-5, Award, 19 September 2013, para 4.764; *Saluka Investments BV v. Czech Republic* (Watts, Fortier, Behrens), UNCITRAL, Award, 17 March 2006, para 411.

130 Counter-Memorial, para 505; *Yukos Universal Limited v. Russia* (Fortier, Poncet, Schwebel), UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, para 1407.

131 Counter-Memorial, para 505; [redacted] Report, para 50. Rejoinder, para 387 citing Kotáb Report, paras 56, 57.

132 T/1/148.

183. The Respondent invokes the fact that the Solar Levy applied to all solar producers whose plants were put into operation in 2009 and 2010, irrespective of whether the solar producer could invoke an investment treaty or of whether that investment treaty contained a tax-carve out.[133] The Respondent rejects the Claimants' argument that the Tribunal read "bad faith" into the Deputy Environment Minister's contention that it was "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" noting that it is the "essence of good faith" to find a lawful way to achieve a policy objective.[134]

184. The Respondent describes that it did not choose to reduce the FiT because such a FiT reduction would have been (1) "[i]nsufficient by itself to compensate all budget support costs (unless FIT reduced by 50%); (2) "[l]ess suited to addressing temporary problem affecting only some producers of one source of RES"; (3) "[i]mpossible to implement before year-end (given need to amend multiple levels of laws/regulations)"; and (4) "[r]equire more radical revision of RES support framework".[135]

185. The Respondent contends that the Solar Levy is a tax under Czech domestic law.

186. The Respondent submits that the Tribunal must determine whether the amendment measures constituted taxes under domestic law "in accordance to evidence presented to it as to the content of the law and the manner in which the law would be understood and applied by the municipal courts"[136] and there is "overwhelming evidence" that the Czech legal system overall treats the Solar Levy as a tax, and the Solar Levy has been "understood and applied" as such by the Czech municipal courts.[137]

187. The Respondent notes that, like any tax, the Solar Levy has a rate, a base, and a taxpayer.[138] Therefore, the Czech legislator has provided for its collection by the tax authorities as revenue for the general State budget.[139]

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133 Rejoinder, para 422.

134 Rejoinder, para 423

135 T/1/142; Respondent's opening statement, Slide 63; Rejoinder, paras 122-124.

136 Rejoinder, para 352; *Emmis International Holding, B.V. et al. v. Hungary* (McLachlan, Lalonde, Thomas), ICSID Case No. ARB/12/2 (Award, 16 April 2014), para 175.

137 Rejoinder, para 353.

138 Rejoinder, para 354 citing RLA-212, A. Miller, L. Oats, Principles of International Taxation (2012), p. 4 ("Every tax has three essential elements, a base, a rate of tax and someone to pay it, a tax payer"); Kotáb Report, para 14.

139 Rejoinder, para 354 *citing* R-5, Act on Promotion (as amended by Act 402/2010), Sections 7h, 7i; Minčič

188. The Respondent asserts that "the Czech legislation specifically designates the Solar Levy as a tax".[140] The Solar Levy meets the definition of "tax" under the Tax Administration Law, a central instrument of Czech tax law, and is accounted for and reported as a tax in accordance with Czech accounting law and budgetary procedure, and listed as a tax in the reports of international organizations that use their own autonomous definitions of tax (OECD and Eurostat).[141] The Respondent submits that the Solar Levy has never been classified as anything other than a tax in accounting legislation.[142] Indeed, the Respondent emphasizes that the Claimants' own financial statements also describe the Solar Levy as a "solar tax".[143]

189. The Respondent states that nothing in the ECT suggests that Article 21 only refers to taxes in a "narrow" or "theoretical" sense; on the contrary, the Energy Charter Secretariat's publication on Article 21 indicates that the ECT "envisaged all kinds of special domestic taxes, including taxes to reduce excessive profits".[144] Furthermore, there is no provision of the ECT requiring that "domestic law" provide a "general definition" of tax.[145] It only requires that the relevant provisions be provisions "relating to taxes of domestic law".[146] In the Respondent's view, the relationship between the Solar Levy and the Czech domestic tax system is direct and unequivocal, given that (1) the Solar Levy is directly transferred to the general State budget; (2) the Solar Levy does not impact gross revenues; and (3) the accounting practice categorizes the Solar Levy as a

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Statement, para 14.

140 Rejoinder, para 359.

141 Rejoinder, para 355; Counter-Memorial, paras 495-496, 504; Reply, paras 546-547; Kotáb Report, note 7, paras 28, 29.

142 Rejoinder, para 361; Second [redacted] Report, para 18; Kotáb Report, para 26, 28; R-297, European System of Accounts ESA 2010, p. 92, para 4.14; R-284, Revenue Statistics—OECD countries: Details of Tax Revenue—Czech Republic (https://stats.oecd.org/), rows 77, 88, R-283; OECD Revenue Statistics 2014, Annex A: The Interpretative Guide, para 60; R-279, FVE Úsilné s.r.o. financial statements as of 31 December 2015, p. 6; R-280, FVE Stříbro s.r.o. financial statements as of 31 December 2015, p. 5; R-281, FVE Osečná financial statements as of 31 December 2015, p. 6; R-282, FVE Mozolov financial statements as of 31 December 2015, p. 6; Counter-Memorial, para 504, note 957; Kotáb Report, paras 24, 34, 48; Annex 3 to [redacted] Report, R. Boháč, Pojem *daň v daňových zákonech*, p. 14 of the English translation (Boháč, The Term "Tax" in Tax Laws).

143 Rejoinder, para 355 citing R-279, FVE Úsilné s.r.o. financial statements as of 31 December 2015, p. 6; R-280, FVE Stříbro s.r.o. financial statements as of 31 December 2015, p. 5; R-281, FVE Osečná financial statements as of 31 December 2015, p. 6; R-282, FVE Mozolov financial statements as of 31 December 2015, p. 6.

144 Respondent's Rejoinder, para 363 citing CLA-74, Ugur Erman Ozgur, Taxation of Foreign Investments under International Law: Article 21 of the Energy Charter Treaty in Context (2015) ["Ozgur, Taxation of Foreign Investments under International Law"], p. 56.

145 Rejoinder, para 364; ECT Article 21(7).

146 Rejoinder, para 364; ECT Article 21(7).

tax expense.[147]

190. The Respondent notes further that the Czech judiciary overwhelming refers to the Solar Levy as a tax.[148] The Czech Constitutional Court unequivocally refers to the Solar Levy as "a tax or fee" for the purposes of Article 11(5) of the Czech Republic's Charter of Fundamental Rights and Freedoms and satisfies the provision's requirement that "taxes and fees should be levied only on the basis of the law".[149] On the other hand, the Czech Supreme Administrative Court decision of July 10, 2014, on which the Claimants rely, is unpersuasive given that (1) the issue of non-equivalence had never been argued during the proceedings; (2) no other Czech court or scholar have cited this decision; and (3) no oral hearing was held and only two briefs were submitted.[150]

191. The Respondent addresses the six features of taxation proposed by the Claimants: "(a) obligatory, (b) non-refundable and (c) non-equivalent payment (d) introduced by law, (e) intended to serve as income of the state budget for the financing of society-wide needs and (f) paid for no specific purpose."[151] According to the Respondent, contrary to the Claimants' statements, the Solar Levy is "non-equivalent" and was not "paid for a specific purpose" since the proceeds are deposited into the general treasury account of the Ministry of Finance and serve to finance general government liabilities.[152]

192. The Respondent further submits that the Solar Levy can also meet the autonomous criteria most

147 Rejoinder, para 364; T/1/143-144.

148 Rejoinder, paras 393-406; [redacted] Report, paras 47-48; R-38, Constitutional Court Judgement, paras 46, 59, 60, 64; Annex 13 to First [redacted] Report, Decision of the Grand Chamber of the Czech Supreme Administrative Court (Case No. 1 Afs 76/2013-57), December 17, 2013, paras 36, 50; Annex 18 to First [redacted] Report, Decision of the Czech Supreme Administrative Court (Case No. 1 Afs 256/2014-28), March 25, 2015, para 42; R-39, Decision of the Czech Supreme Administrative Court (Case No. 1 Afs 80/2012-44), December 20, 2012, para 19; Annex 21 to Second [redacted] Report, Decision of the Czech Supreme Administrative Court (Case No. 5 Afs 126/2013-34), May 7, 2014, paras 6, 40; R-291, Decision of the Supreme Administrative Court (Case No. Afs 66/2012-38), July 24, 2013, p. 4; Annex 14 to First [redacted] Report, Decision of the Czech Constitutional Court (Case No. II. US 2216/14), January 13, 2015, paras 14, 19, 20, 29; R-286, Decision of the Regional Court of České Budějovice (Case No. 10 Af 257/2011-43), December 5, 2012, paras 14, 16; R-287, Judgement of the Supreme Administrative Court (Case No. 8 Afs 3/2014-39, April 18, 2014, para 29.

149 Rejoinder, para 356 citing Annex 14 to First [redacted] Report, Decision of the Czech Constitutional Court (case No. 2216/14), January 13, 2015, para 33 ("[The] Constitutional Court emphasizes that the option to levy taxes and fees is directly contained in Article 11(5) of the Charter and the "solar levy" can surely be considered such a tax or fee"); [redacted] Report, paras 47-48.

150 T/151-152; T/4/755-756.

151 Respondent's Rejoinder, para 373.

152 Respondent's Rejoinder, paras 374, 386.

frequently invoked by tribunals to determine whether a measure is a tax.[153] According to the Respondent, the Solar Levy meets the requirement that "there is a law, which imposes a liability on classes of persons to pay money to the State for public purposes", as expressed by several tribunals including *EnCana v. Ecuador*, *Burlington v. Ecuador*, and *Duke Energy Electroquil v. Ecuador*.[154]

193. The Respondent also contends that, considering that French and Italian versions of the ECT employ the term of "fiscal measures", instead of "taxation measures", the scope of carve-out may go beyond taxation measures and include any fiscal measures.[155] In this context, the Respondent submits that the Czech Constitutional Court decision of May 15, 2012 and the Supreme Administrative Court decision of July 9, 2015 have confirmed the Solar Levy as a fiscal measure.[156] The Respondent further submits that the Claimants also confirmed it in stating that the Solar Levy was intended to cover the additional State subsidy and avoid an increase in the State deficit.[157]

194. Lastly, pointing out that the Claimants' experts are not tax lawyers, but tax advisors, the Respondent observes that its expert Dr Kotáb has more credibility.[158]

2. The Claimants' position

195. According to the Claimants, the ECT tax carve-out should be interpreted in accordance with the rules of interpretation of international treaties, regardless of its reference to domestic law.[159] Such rules are contained in the Vienna Convention on the Law of Treaties (the "**VCLT**"), and notable in Article 31(1), which provides:

> A treaty shall be interpreted <u>in good faith</u> in accordance with the ordinary meaning to be given to the terms of the treaty <u>in their context</u> and <u>in the light of its object and purpose</u>.[160]

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153 Counter-Memorial, paras 511-4.

154 Counter-Memorial, para 511; *EnCana Corporation v. Ecuador* (Crawford, Grigera Naón, Thomas), LCIA Case No. UN3481, Award, 3 February 2006, para 142; *Burlington Resources Inc. v. Republic of Ecuador* (Kaufmann-Kohler, Stern, Orrego Vicuña), ICSID Case No. ARB/08/5 (Decision on Jurisdiction, June 2, 2010), para 165; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (Kaufmann-Kohler, Gómez Pinzón, van den Berg), ICSID Case No. ARB/04/19, Award, 18 August 2008, para 174.

155 T/1/165-167.

156 T/1/167; Respondent's opening statement, Slide 108.

157 T/1/167-168; Respondent's opening statement, Slide 109.

158 T/4/755.

159 Reply, para 512.

160 Vienna Convention on the Law of Treaties, Art. 31(1) (emphasis added by Claimants).

196. The Claimants find support for the importance of the "good faith" principle, "context" and "object and purpose" in treaty interpretation in the commentary of the International Law Commission, the writings of several authors and decisions of arbitral tribunals.[161]

197. Under these criteria, the tax carve-out in Article 21(1) ECT should not exclusively depend on a host State's domestic tax legislation, because such an interpretation enables the host State to evade international liability by arbitrary categorizing its measure as tax.[162] Rather, the good faith interpretation requires taxation measures to be legitimate or *bona fide* in order for the tax carve-out to apply.[163] The Energy Charter Secretariat's own publication on Article 21 could not be more clear about the standard for what constitutes legitimate taxation as follows:

> Whilst, States have a wide latitude of discretion in imposing and enforcing tax laws, **taxes shall be imposed in good faith.** Taxation measures shall not be confiscat[ory], prevent, or unreasonably interfere with, nor unduly delay effective enjoyment of a foreign investor's property or its removal from the State's territory.[164]

198. The Claimants note that the tribunal in *Yukos* confirmed this interpretation concluding that good faith is required in order for Article 21 to apply:

> 1430. […] the Tribunal concludes that it has jurisdiction to rule on Claimants' claims under Article 13 of the ECT due to the fact that the Article 21 carve-out does not apply to the Russian Federation's measures because they are not, as the Tribunal has concluded above, on the whole, a bona fide exercise of the Russian Federation's tax powers.
>
> 1431. This accords with Claimants' view **that Article 21 of the ECT can apply only to bona fide taxation actions, i.e., actions that are motivated for the purpose of raising general revenue for the State**. By contrast, actions that are taken only 'under the guise' of taxation, but in reality aim to achieve an entirely unrelated purpose […] cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1)".[165]

199. The Claimants thus aver that both case law and good treaty interpretation mandate that in order for the Article 21(1) ECT tax carve-out to apply, taxes must be imposed in good faith. Referring to the 2014 *Yukos* awards, the Claimants note that the ECT tax carve-out mandates that the State's

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161 Reply, paras 515-517; CLA-70, International Law Commission Draft Articles on the Law of Treaties, 1966, p. 221, para 12; CLA-71, R. K. Gardiner, *Treaty Interpretation*, 2nd ed., 2015, Oxford, pp. 197, 211; CLA-72, J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration*, Oxford, 2012, para 3.38; *Phoenix Action Ltd v. The Czech Republic* (Stern, Bucher, Fernández-Armesto), ICSID Case No. ARB/06/5 (Award, April 15, 2009), para 107.

162 Reply, para 519-524.

163 Reply, para 525.

164 Reply, para 525 citing CLA-74, Uğur Erman Özgür (for the Energy Charter Secretariat), Taxation of Foreign Investments under International Law: Article 21 of the Energy Charter Treaty in Context, p. 29 (emphasis added by Claimants).

165 Reply, para 526; *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (Fortier, Poncet, Schwebel), PCA Case No. 2005-4/AA 227, Final Award, 18 July 2014, paras 1430-1431 (emphasis added by Claimants).

power be exercised in a legitimate or *bona fide* way and it cannot be relied on when the Contracting States hides an action unfavourable to foreign investors "under the guise of taxation".[166] Nor can the exception apply where the power to tax has been exercised in an abusive manner as was pronounced by the *Quasar v. Russia* tribunal, which noted that, absent such a standard, "international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures […] as taxation".[167]

200. In the present case, the Claimants allege that the Solar Levy is not a *bona fide* taxation measure under the *Yukos* standard.[168]

201. The Claimants observe that the *Yukos* standard is not limited to "extreme circumstances such as the destruction of a company or the elimination of a political opponent" since the purpose of the standard is not to allow a host State from evading international liability by "disguising a measure as a tax".[169] Even if such an extreme circumstance is necessary for the *Yukos* standard, this criterion can be met by the fact that the Respondent introduced the Solar Levy only for the purpose of evading international liability.[170] The Claimants submit that if the Respondent truly had intended to mitigate the burden on consumers, it would have simply reduced the FiT level.[171]

202. The Claimants contend that the Solar Levy was introduced for the purpose of "offset[ing] the introduction of the support from the State budget to pay the FiT", instead of raising the State's revenue.[172] This is confirmed by the three indicators.[173] First, the Solar Levy was introduced in a retroactive manner, targeting a very narrow group, i.e., photovoltaic plants commissioned in 2009 and 2010.[174] Second, the Czech Republic introduced the Solar Levy in order to avoid

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166 Reply, para 526 citing *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (Fortier, Poncet, Schwebel), PCA Case No. 2005-4/AA 227, Final Award, 18 July 2014, para 1431; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (Fortier, Poncet, Schwebel), PCA Case No. AA 226, Final Award, July 18, 2014, para 1431; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (Fortier, Poncet, Schwebel), PCA Case No. AA 228, Final Award, July 18, 2014, para 1431.

167 Reply, para 528 citing *Quasar de Valors SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.)* v. The Russian Federation (Brower, Landau, Paulsson), SCC Case No. 24/2007, Award, July 20, 2012, para 179; *RosInvestCo UK Ltd. v. The Russian Federation* (Böckstiegel, Steyn, Berman), SCC Case No. 079/2005, Final Award, September 12, 2010, para 628; Memorial, paras 278-280.

168 Reply, para 529.

169 Reply, paras 531-533.

170 Reply, paras 534-535.

171 Reply, paras 536-542.

172 T/1/61.

173 T/1/64.

174 T/1/64.

international liability that would arise out of a simple reduction of the FiT amounts.[175] Third, the Supreme Administrative Court has decided in its decision of July 10, 2014, that the Solar Levy was not a tax.[176] The Czech Constitutional Court also has confirmed that the Solar Levy in substance reduced the FiT support level in its decisions of May 15, 2012, February 6, 2014 and January 13, 2015.[177]

203. The Claimants contend that the Solar Levy is not a tax even under Czech domestic tax law for the following reasons.[178]

204. As a threshold matter, the Tax Administration Law does not provide a general definition of tax.[179] The definition in Article 2(3) of the Tax Administration Law applies only for administration and collection of payments.[180] The Respondent's reliance on this definition is misplaced.[181]

205. The Claimants contend that whether the Solar Levy is a tax should be analysed in accordance with the common academic theory, according to which a tax generally has six features: "(a) obligatory, (b) non-refundable and (c) non-equivalent payment (d) introduced by law, (e) intended to serve as income of the state budget for the financing of society-wide needs and (f) paid for no specific purpose."[182]

206. According to the Claimants, the Solar Levy lacks at least two of these six features, namely: (c) non-equivalent payment; and (f) paid for no specific purpose.[183]

207. The Solar Levy is paid for a specific purpose, because it was introduced to "reduc[e] the burden on electricity consumers without negatively impacting on the Respondent's State deficit".[184]

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175 T/1/64-65.

176 T/1/654.

177 T/4/746-747; Claimants' closing statement, Slide 64; CLA-16, Czech Constitutional Court, Decision (case No. Pl. ÚS 17/11), May 15, 2012, para 45; Annex 16 to First [redacted] Report, Decision of the Czech Constitutional Court (case No. 3211/13), February 6, 2014, para 5; Annex 14 to First [redacted] Report, Czech Constitutional Court, Judgment 2216/14, January 13, 2015, para 25.

178 Memorial, para 343.

179 Reply, para 546.

180 Reply, paras 547-549.

181 Reply, para 550.

182 Reply, para 551-556.

183 Reply, para 556.

184 Reply, paras 567.

208. The Solar Levy does not involve the non-equivalent payment feature, which is found "when the taxpayer receives no direct consideration from the State for paying the tax."[185] Under the financing mechanism introduced by the Act No. 402/2010, the State collected the Solar Levy from the solar energy producers, and used the amount for the compensation to the grid operators, who paid the FiT to the producers.[186] Because the collected Solar Levy constituted a source of FiT, which the solar energy producers received, the Claimants allege that the producers received direct consideration by the payment of the Solar Levy.[187]

209. This conclusion is confirmed by the Czech Supreme Administrative Court decision of July 10, 2014, which concluded the Solar Levy did not meet the requirement of non-equivalence and was a *de facto* reduction of the FiT, finding that "the state use[d] the levy to lower the support it calculated and provided."[188] According to the Claimants, this is a key and the only judgement in which the Czech court analysed the nature of the Solar Levy.[189] The Court carefully examined the nature of the Solar Levy since the issue was whether the Solar Levy and the corporate income tax constituted double taxation on the same income.[190] The Claimants observe that this ruling was confirmed at least four times by the Constitutional Court and the Grand Chamber of the Supreme Administrative Court.[191]

210. The Claimants submit that all of the Czech court decisions cited by the Respondent are irrelevant to the issue of whether the Solar Levy is a tax for the purposes of Article 21(1) ECT.[192] The Supreme Administrative Court's decisions of Ref. No. 1 Afs 80/2012-40 and Ref. No. 5 Afs 126/2013-34 did not analyse the nature of the Solar Levy.[193] The Grand Chamber of the Supreme Administrative Court decision of Ref. No. 1 Afs 76/2013-57 merely confirmed that the Solar Levy was a tax for the purpose of the Tax Administration Law, which does not provide a general definition of tax, and rather found that "introducing the solar power levy *de facto* results in decreasing the level of government support".[194] The Czech Constitutional Court decision of Ref.

185 Reply, para 569.

186 Reply, para 570.

187 Reply, paras 571-572.

188 Reply, para 572.

189 Reply, para 587.

190 Reply, paras 573-574.

191 Reply, paras 575-578.

192 Reply, paras 580-581.

193 Reply, paras 582.

194 Reply, para 583; Annex 13 to First [redacted] Report, Decision of the Grand Chamber of the Czech Supreme

No. US 2216/14, which indicated that the Solar Levy was a "tax or fee", did not provide a precise characterization of the Solar Levy.[195]

211. The Claimants submit that further aspects indicate the non-taxation nature of the Solar Levy.[196] First, the legislative process of the Act No. 402/2010 was atypical for a tax. The bill was prepared by the Ministry of Industry and Trade, instead of the Ministry of Finance, which governs taxation measures.[197] Second, both the extremely limited scope of application and the unusual association with non-tax parameters in identifying the payers of the Solar Levy make it even harder to classify the Solar Levy as a tax measure.[198] Third, the temporariness of the Solar Levy was unprecedented.[199] The Solar Levy was initially introduced only for a three-year period from January 1, 2011 to December 31, 2013.[200] Fourth, the use of the term "levy", instead of "tax", indicates the Czech Parliament's awareness of not imposing a tax.[201] Finally, the Czech courts found that the Solar Levy may have had "strangling effects", which violates a proportionality test under which a tax should not lead a tax payer to liquidation.[202]

212. In the Claimants' view, the Solar Levy is a deduction of the FiT, instead of a tax.[203] This is confirmed by the statement of Mr Kocourek, then Minister of Industry and Trade, which described the Solar Levy as "a new source of income" for the Czech Republic to provide budgetary support for the RES support mechanism.[204] The Claimants submit that, as Mr Kotáb also accepts, the Czech Constitutional Court decision of May 15, 2012, and the Czech Supreme Administrative Court decisions of July 10, 2014 and December 17, 2013 have considered the Solar Levy as a *de facto* reduction of the FiT.[205] The Claimants observe that nevertheless the Respondent choose not to simply reduce the FiT in order to mitigate arbitration risks.[206]

Administrative Court, December 17, 2013 (Case No. 1 Afs 76/2013-57), para 28.

195 Reply, para 584-585.

196 Reply, para 588.

197 Reply, para 589.

198 Memorial, para 346; Reply, para 590.

199 Reply, para 591.

200 Reply, para 591.

201 Reply, para 592.

202 Reply, para 593.

203 Memorial, paras 349-351.

204 Memorial, para 350.

205 T/1/48; T/4/704.

206 Memorial, paras 356-358.

213. The Claimants allege that the wording of Article 21(7) of the ECT, "'relating to' taxes of domestic law", was not meant to widen the scope of the carve-out beyond mere domestic taxation measures.[207] The Claimants observe that the Respondent's focus on these words suggests the Respondent's admission that the amendment measures cannot be considered as tax under Czech domestic law.[208]

214. The Claimants object to the Respondent's assertion that Italian and French versions of the ECT employ the language of "fiscal measures", instead of "taxation measures".[209] The Claimants submit that the Italian and French words of "misura fiscale" and "mesure fiscale" have the same meaning of "taxation measures" in the English version.[210] Indeed, the Spanish and German versions employ "medida impositiva" and "steuerliche Maßnahme", both of which correspond to the English "taxation measures".[211]

3. The Tribunal's conclusion

215. The Parties do not agree whether the Tribunal has jurisdiction over the Claimants' claims under the ECT. As summarized above, the Respondent contends that all of the Respondent's amendments to the Incentive Regime – the introduction and extension of the Solar Levy, the repeal of both the Income Tax Exemption and the Shortened Depreciation Period – qualify as "Taxation Measures" under of Article 21 of the ECT and therefore are excluded from the scope of the ECT.[212] Article 21(1) of the ECT provides:

> (1) 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. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.

Article 21(7)(a) of the ECT describes the term "Taxation Measures" as including:

> (i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and
>
> (ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.

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207 T/1/66-67; Rejoinder, para 364; ECT Article 21(7) (emphasis by the Respondent).

208 T/1/66-67.

209 T/4/744-745.

210 T/4/745.

211 T/4/745.

212 Statement of Defense, paras 92-97.

Paragraph (7) of Article 21 further specifies:

> (b) There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
>
> (c) A "Competent Tax Authority" means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorised representatives.
>
> (d) For the avoidance of doubt, the terms "tax provisions" and "taxes" do not include customs duties.

216. As summarized above,[213] the Respondent contends that the Tribunal does not have jurisdiction to entertain any of Claimants' ECT claims because its jurisdiction under Article 26(1) of the ECT is limited to "disputes 'concern[ing] an alleged breach of an obligation' set out in Articles 10 to 17 of the ECT."[214] According to the Respondent, "'[t]he measures challenged by the Claimants in this arbitration, namely: the introduction of the Solar Levy, the repeal of the Income Tax Exemption and the prolongation of the Solar Levy' are all 'Taxation Measures' within the meaning of the ECT;"[215] accordingly, they are excluded from the scope of Article 26's dispute settlement provision.

217. The Claimants have abandoned their claim concerning the depreciation measures[216] and stated explicitly that they do not dispute that the repeal of the Income Tax Exemption constitutes a "Taxation Measure" under Article 21(7) of the ECT.[217] The Respondent emphasized this at the Hearing interpreting this as an "admission by Claimants that they do not contest that their ECT claims based on the repeal of the Income Tax exemption are barred by the Article 21 carve out," and the Claimants did not comment on it.[218] The Tribunal agrees. It cannot be disputed that the repeal of the Income Tax Exemption constitutes a "Taxation Measure" for the purposes of the ECT. The Tribunal therefore concludes that it has no jurisdiction to entertain the Claimants' claims arising out of this measure.

218. Regarding the Solar Levy, however, the Claimants contend that it cannot be characterized as a

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213 See above, para 168.

214 Counter-Memorial, para 484 citing RLA-5, ECT Art. 26; Rejoinder, para 338.

215 Rejoinder, para 338(d) citing Reply, p. 4.

216 Reply, para 67 and note 222.

217 Reply, note 577 ("As correctly noted by the Respondent (Counter Memorial, para 485), the Claimants do not deny that the Income Tax Exemption provided for by the Act on Income Tax are 'taxation measures' for the purposes of the ECT.").

218 T/1/161.

"Taxation Measure" for the purpose of Article 21(7) of the ECT. According to the Claimants, the ECT tax carve-out and its reference to domestic law should be interpreted in accordance with the rules of interpretation of international treaties contained in the VCLT.[219] According to Article 31(1)'s general rule of interpretation, the Claimants assert, "the definition of 'taxation measure' of Article 21(7) and the relevance of the reference to domestic law must be interpreted 'in good faith' and bearing in mind the 'context' of the relevant expressions and the 'object and purpose' of the ECT."[220] The ordinary meaning of a term contained in an international treaty is to be identified in the light of its object and purpose.[221] Exclusively relying on the host state's domestic legislation to define the scope of the ECT's tax carve-out, as the Respondent argues, would allow the host state "to escape its international obligations under the ECT by simply labelling a measure as a tax."[222] That however would be at odds with the purpose of the ECT which, the Claimants assert, is "to promote long-term cooperation in the energy field."[223]

219. The Claimants contend that the ECT's tax carve-out must be limited to taxes imposed in good faith.[224] Applying this principle, the Claimants follow the approach taken by the tribunals in the *Yukos* and the parallel *Hulley* and *Veteran* cases[225] and conclude that the relevant standard for determining whether a particular regulatory measure qualifies as a "Taxation Measure" under Article 21(7) of the ECT is "whether it comes within the definition of 'bona fide taxation actions, i.e., actions that are motivated by the purpose of raising general revenue for the State.'"[226] The Claimants argue that the Solar Levy does not meet this *bona fide* standard, regardless how the measure might be sought to be characterized under Czech law.[227] In any event, according to the Claimants, the Respondent's characterization of the Solar Levy as a tax under both Czech Law and the autonomous standard applied by certain non-ECT tribunals is incorrect: the Solar Levy

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219 Reply, paras 512-513.

220 Reply, para 514.

221 Reply, paras. 516-517 citing CLA-71, R. K. Gardiner, *Treaty Interpretation*, pp. 197, 211 and CLA-72, J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration*, Oxford, 2012, para 3.38.

222 Reply, para 520.

223 Reply, para 520 citing ECT, RLA-5, Article 2.

224 Reply, paras 525-526.

225 Memorial, paras. 333-335 citing *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (Fortier, Poncet, Schwebel), PCA Case No. AA 227, Final Award, July 18, 2014; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (Fortier, Poncet, Schwebel), PCA Case No. AA 226, Final Award, July 18, 2014; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (Fortier, Poncet, Schwebel), PCA Case No. AA 228, Final Award, July 18, 2014.

226 Memorial, para 341 (footnote omitted).

227 Memorial, para 342; Reply, para. 508.

neither constitutes a tax under Czech law[228] nor under the autonomous standard applied by certain tribunals operating under the US-Ecuador and Canada-Ecuador BITs.[229]

220. The Tribunal agrees that Article 21 of the ECT as a whole must be interpreted in accordance with the VCLT. The applicable provision here is the general rule of treaty interpretation in Article 31, which provides that "[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."

221. Article 21(7) of the ECT sets forth no self-standing definition of "Taxation Measures." Instead Article 21(7)(a) of the ECT provides that such measures include "any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein" as well as "any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound."

222. The Tribunal notes that, unsurprisingly, neither of the Parties has suggested that the Solar Levy qualifies as a "Taxation Measure" under the second subparagraph of Article 21(7)(a) of the ECT, (i.e. under an applicable international instrument), but that the Parties have centred all their arguments on the first subparagraph of Article 21(7)(a) referring to the domestic law of a Contracting Party

223. The Parties disagree on how this provision should be interpreted, the Claimants arguing that its explicit reference to domestic law does not reduce "the interpretation of the ECT tax carve-out to an exercise in Czech law."[230] According to the Claimants, the definition of "Taxation Measure" according to Article 21(7) and the relevance of the reference to domestic law must be interpreted in accordance with the general rule of treaty interpretation in Article 31(1) of the VCLT and "therefore be interpreted 'in good faith' and bearing in mind the 'context' of the relevant expressions and the 'object and purpose' of the ECT."[231] The Respondent contends, in turn, that the Tribunal need only consider whether the Czech legislative provisions that introduced and later extended the Solar Levy constitute provisions relating to taxes of the domestic law of the Czech Republic in order to determine whether these measures fall in the scope of the ECT's tax

228 Reply, para 595.

229 Reply, paras 597-604.

230 Reply, para 511.

231 Reply, paras 513-514.

carve-out.[232] Because, according to the Respondent, the Solar Levy constitutes a tax under Czech Law, it qualifies under the ECT's tax carve-out.[233]

224. The Tribunal takes the view that in order to ascertain whether a putative tax measure qualifies under Article 21 of the ECT a two-step analysis is required: a characterization under domestic law followed by an application of Article 21's inherent limits.

225. The starting point of such analysis must be the characterisation of the putative tax measure by the State relying on the tax carve-out. In the Respondent's words "it must look to the domestic law of the Czech Republic" to determine whether the Solar Levy qualifies as a "provision relating to taxes" under Article 21 of the ECT. [234] The Tribunal accepts that, in order for Article 21 of the ECT to apply, the domestic law of the host state must characterize the measure as a tax in nature and substance. That is clear from the text of Article 21(7)(a)(i) of the ECT, which is directed to "any provision relating to taxes of the domestic law" of the state in question. As the Respondent observes, this language focuses inquiry directly on the domestic law of the state relying on Article 21 of the ECT.

226. This interpretation is consistent with the need to interpret the ECT, including Article 21, in accordance with the VCLT and applicable rules of international law, which the Respondent explicitly recognizes.[235] Interpreting Article 21 of the ECT in accordance with the VCLT requires that effect be given to the ordinary meaning of Article 21(7)'s reference to the domestic law of the state relying on the ECT's tax carve-out.

227. In addition to requiring an interpretation of treaty-terms according to their "ordinary meaning," Article 31(1) of the VCLT also requires the Tribunal to interpret the terms of Article 21 of the ECT in the light of the ECT's object and purpose. This interpretation is also consistent with the objective of Article 21, which was to permit, within the limits of Article 21, contracting states to exclude specific measures from certain of the ECT's international protections. Put simply, the terms of Article 21, interpreted in accordance with Article 31(1) of the VCLT, require reference to the domestic law of the state adopting a particular measure, in order to determine whether that measure constitutes a tax measure under the domestic law of that state. The result, *a contrario*, is that unless a measure constitutes a tax measure as a matter of its domestic law, Article 21's purposes are not applicable. Article 21 applies only to those measures which a contracting state

232 Counter Memorial, para 487.

233 Counter Memorial, para 503.

234 Rejoinder, para 345; see also Counter Memorial, para 487.

235 Rejoinder, para 341.

to the ECT characterizes as tax measures within its domestic legal system (or within applicable international conventions).

228. If the putative taxation measure is found to constitute a taxation measure under the host state's domestic law, then, as discussed below, in a second step, an interpretation of the scope of the ECT's tax carve-out in accordance with Article 31(3) of the VCLT requires to consider the limits which Article 21 of the ECT imposes on those measures. However, before those limits become potentially relevant, a putative taxation measure must first constitute a tax measure as a matter of domestic law.

229. The Tribunal takes the view that when analyzing whether a certain measure is to be characterized as a taxation measure under domestic law, considerations of substance should prevail over a formalistic approach. In that sense although the Tribunal attaches some importance to the fact that the Solar Levy was titled just that – the Solar "Levy" – not the Solar "Tax" or some other type of tax, it is hesitant to assign decisive weight to a formal element as is the denomination of the measure. As the Respondent's expert, Mr Petr Kotáb, argues, in Czech law "the term 'levy' is very frequently used to designate payments that are more properly classified as 'taxes' or 'fees'."[236] As discussed below, however, there are other significant considerations arguing against, not only a formal but also substantial, characterization of the measure as a tax under Czech law. The Tribunal heard considerable expert and other evidence on this point. The Parties' experts mainly focused on the definition of "tax" under Czech tax theory and on the position of Czech courts, namely the Supreme Administrative Court and the Constitutional Court, on the question whether the Solar Levy qualifies as a tax under Czech law.

230. Preliminarily, the Tribunal takes the view that reliance on the fact that the Solar Levy is administered by the Tax Administration Law is not dispositive of the question whether the Solar Levy constitutes a tax in substance. The "definition" of tax contained in the Tax Administration Law extends to many payments which by their nature are not taxes; reliance on the Tax Administration Law is therefore unsuitable to give a conclusive answer as to whether or not a payment it governs is in nature a tax. This was not contradicted by Respondent's expert Mr. Petr Kotáb at the Hearing.[237]

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236 Kotáb Report, para. 35. However, the same consideration applies, *a contrario*, to the Respondent's contention that the fact that "Claimants' financial statements also describe the Solar Levy as a 'solar tax'" has decisive weight on the characterisation of the Solar Levy as a tax. See Rejoinder, para. 355 *referring to* R-279, FVE Úsilné s.r.o. financial statements as of December 31, 2015, p. 6; R-280, FVE Stříbro s.r.o. financial statements as of December 31, 2015, p. 5; R-281, FVE Osečná financial statements as of 31 December 2015, p. 6; R-282, FVE Mozolov financial statements as of December 31, 2015, p. 6.

237 T/2/415-416 ("Q. In any case, just to be clear, on any analysis, the definition of 'tax' under the TAL extends

231. Likewise, the Tribunal accepts the Respondent's argument that academic literature, in these particular circumstances, does not provide substantial guidance as to whether or not the Solar Levy is "legally a tax."[238] There is very little commentary addressing the characterization of the Solar Levy under Czech law and that commentary which does exist does not address many of the Czech judicial decisions referenced by the Parties.

232. In these circumstances, the Tribunal concludes that the decisions of the Czech Courts are of particular relevance for the characterization of the Solar Levy. In this regard, the Tribunal notes that Czech Courts have, at least prima facie, come to divergent characterization of the Solar Levy. While some court decisions refer to the Solar Levy as a tax, others come to the opposite result, finding that the Solar Levy is not a tax in substance. However, the former primarily addressed the issue of whether the Solar Levy qualified formally as a tax, in particular for purposes of the Tax Administration Law rather than addressing the issue of whether the Solar Levy constitutes a tax in substance. This applies to the decision of the Grand Chamber of the Supreme Administrative Court of December 17, 2013, cited by the Respondent as evidence that the Solar Levy was a tax for purposes of Czech law.

233. The Tribunal concludes instead that the Czech Supreme Administrative Court decision of July 10, 2014 – and the various other Czech court decisions – are authoritative on the issue of the characterisation of the Solar Levy. In that case, the Czech Court made the finding that the Solar Levy is not a tax for purposes of the prohibition against double taxation under Czech law. The Supreme Administrative Court expressly addressed the question whether, in combination with the corporate income tax, the Solar Levy would have been an improper instance of double taxation and rejected that conclusion, holding that the Solar Levy was paid for a specific consideration, "the government subsidy," and therefore not a tax, whose "common essential feature … is their non-equivalence," but a *de facto* reduction of the FiTs and Green Bonuses.

234. In its decision, the Supreme Administrative Court stated in paragraph 19:

> The Supreme Administrative Court notes with regard to the petitioner's argumentation regarding the nature of the levy as a tax that the nature of any tax in the taxation system involves the government requiring funds from tax payers without immediate compensation. *It can thus be stated that a common essential feature of all taxes is their non-equivalence.* The subject of the levy collected under the Renewable Energy Sources Act is the amount resulting from the consideration of stipulating the amount of government support for this type

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to a great many payments that are clearly not taxes. A. It extends to many payments which are not labeled as taxes, and also to payments which by their nature are not taxes. Q. In short, the TAL just cannot give us a conclusive answer as to whether or not a payment that it governs is in nature a tax? A. I would tend to agree that it cannot or it does not give us a conclusive answer, although I would say it gives us certain indication or direction.").

238 Rejoinder, paras 368-369.

> of economic activity. *Unlike collecting income tax on income resulting from the activities of the entity subject to the tax without any performance from the state at the time of taxation, the state uses the levy to lower the support it calculated and provided*. The levy was therefore correctly not included under Section 36 of the Income Taxes Act among the income subject to the withholding tax and that is not included in the tax base, for the reasons consisting of the differing natures of a levy and a tax. *Despite the fact that the levy uses the same collection mechanism as for withholding taxes on certain types of income, the levy does not have the nature of a tax*. (Emphasis added)

235. In the Court's view, the essential feature of a tax was that of non-equivalence, i.e. that taxes are paid without concrete consideration. Since the Court considered the subsidies in form of FiTs and Green Bonuses a "performance from the state" directly linked to the collection of the Solar Levy, it found that the Solar Levy lacked the characteristic of "non-equivalence" and hence "does not have the nature of a tax" and "is in nature a decrease in government subsidy and not a tax."[239] Accordingly, the Court concluded that the Solar Levy "as introduced by Act No. 402/2010 Coll. is in nature a decrease in government subsidy and not a tax, where the basic criterion is non-equivalence."[240]

236. The Tribunal accepts that, as conceded by the Claimants' expert Mr [redacted] in the hearing, there "might be differences in the definitions" of taxes in Czech academic literature.[241] However, the Tribunal notes that it is undisputed that the element of non-equivalence is an essential feature to distinguish taxes from fees under Czech law – in both case-law and academic doctrine.[242] Whether the Solar Levy lacked or not the distinguishing feature of non-equivalence was heavily disputed between the Parties' experts. In that regard, the Tribunal is also mindful of the Respondent's contention that Czech academic literature, in particular Mr Radim Boháč in a 2013 publication, has described the Solar Levy as non-equivalent. However, in his analysis, Mr Boháč concedes that with regard to the Solar Levy one could "speak of … some form of material and remote equivalence."[243] This analysis is essentially consistent with Mr [redacted] characterisation

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239 Annex 11 to First [redacted] Report, Decision of the Czech Supreme Administrative Court of July 10, 2014, paras 19-20.

240 Annex 11 to First [redacted] Report, Decision of the Czech Supreme Administrative Court of July 10, 2014, para 20.

241 T/2/377 ([redacted]

242 See, *e.g.*, T/2/404-405 (Kotáb); T/2/369 ([redacted] Annex 4 to First [redacted] Report, BAKEŠ, Milan et al. – Finanční právo. 6. aktualiz. vyd Praha: C. H. Beck, 2012, pages 92, 93 and 154 English title translation: "Section 3. Taxes, fees, customs duty", p. 1.

243 R-318, R. Boháč, "Tax Revenues of Public Budgets in the Czech Republic", p. 10. This reading was confirmed by Mr. [redacted] at the hearing: T/2/384 "My reading of [Mr. Boháč's] conclusion is that, particular for non equivalence and specific purpose, he says that there is material sort of material is not equivalent, and materially there is a specific purpose. And then he basically makes a conclusion that he would rather sort of prefer the formal side, the way it was designed, and makes a conclusion on rather on the formal grounds than the substance and the materiality, but clearly accepts that there is materially like

of the Solar Levy as being "formally non-equivalent," but materially bearing a direct causal link to the payment of the FiTs.[244]

237. The Tribunal also notes that Mr Boháč's analysis precedes the July 10, 2014 Supreme Administrative Court judgment and that the Respondent failed to submit evidence that Mr Boháč maintains his analysis in view of the Supreme Court's contrary conclusion.[245] The Tribunal does not consider that it should attach the same weight to this analysis, as to the July 10, 2014 decision of the Supreme Administrative Court. This decision is directly relevant to the question whether the Solar Levy was characterized as a tax for purposes of Czech law. The Czech Supreme Administrative Court specifically concluded that the Solar Levy could not be treated as a tax in substance, and thus could not provide the basis for a finding of double taxation. In the Tribunal's view, that conclusion directly addresses the proper characterization of the Solar Levy under Czech law.

238. The Supreme Administrative Court received argument on these questions and rendered a considered decision, in its July 10, 2014 judgment, expressly addressing the characterization of the Solar Levy. Moreover, this characterization was a significant and necessary element in the Court's holding (that the tax payers were not entitled to protection against double taxation). As Mr Kotáb conceded, that decision has neither been overturned nor otherwise criticized in later judgments by Czech Courts.[246] Importantly, other judgments of Czech courts, including the Constitutional Court, have likewise ruled that the Solar Levy is not a tax, but in substance a reduction of the FiT.[247]

239. The Tribunal is not persuaded that similar weight should be attached to the various decisions

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of non equivalence, and there is materially a specific purpose." ([redacted]

244 First [redacted] report, para 30; Second [redacted] Report, paras. 60-61; T/2/384:13-21 ([redacted]

245 T/2/446 ("Q. Just looking at the academic analyses of taxes you have accepted that a non equivalence is a mandatory feature of a tax, but let's just look at another point of academic law that you have referred to. You rely on Mr. Boháč's book and his analysis in tax revenues of public budgets; that's right, isn't it? A. That's right. Q. Now, that book was published in October 2013, wasn't it? A. That's correct. Q. And so, that was nine months before the July 2014 Judgment, and, of course, it had no opportunity to consider that judgment, did it? A. It would appear so.") (Kotáb).

246 T/2/445 ("Q. And it's fair to say also that the July 2014 Judgment has never been itself subject to a reference to the Grand Chamber or otherwise judicially criticized or overturned. A. Well, not that I know. Neither it has been cited, but in following Supreme Administrative Court decisions, including those which repeatedly referred to the Solar Levy as a tax.").

247 See, *e.g.*, Annex 15 to First [redacted] Report, Decision of the Czech Constitutional Court of May 15, 2012 (case 220/2012 Coll.), para 45; Annex 14 to First [redacted] Report, Czech Constitutional Court, Judgment 2216/14, January 13, 2015, para 25; Annex 16 to First [redacted] Report, Decision of the Czech Constitutional Court of February 6, 2014 (case No. 3211/13), para 5.

cited by the Respondent as evidence that the Solar Levy was a tax for purposes of Czech law. These decisions principally involve determinations that the Solar Levy is subject to the procedural and administrative provisions of the Tax Administration Law and is a "tax or fee" within the meaning of Article 11(5) of the Czech Republic's Charter of Fundamental Rights and Freedoms ("Charter").[248] This was reiterated by Claimant's expert Mr [redacted] at the Hearing.[249]

240. As outlined above, the Tax Administration Law applies to a wide range of fiscal payments, including fees and other charges[250] which are not generally regarded as taxes under Czech (or other) law; likewise, Article 11(5) of the Charter applies not only to taxes, but also fees. The Tribunal does not consider that these authorities establish more than that the Solar Levy was administered in accordance with general procedures and fairness requirements, applicable to both taxes and other fiscal charges, under Czech law.[251] This, however, is of no weight as the issue before the Tribunal is not whether the Solar Levy is administrated in accordance with procedures that apply to taxes (and fees) but whether the Solar Levy is a tax in substance.

241. The Tribunal therefore considers the conclusions reached by the Czech Administrative Court, *inter alia* in its December 17, 2013 and April 18, 2014 decisions, of incidental relevance to the characterization of the Solar Levy as, in its nature, a tax. Those decisions do not affect the persuasive force of the Supreme Administrative Court's July 10, 2014 decision, especially in light of the decisions of the Constitutional Court and other decisions of the Supreme Administrative Court finding that the Solar Levy was in substance a reduction of FiTs.

242. Given the foregoing decisions, the Tribunal is unwilling to adopt a different conclusion as to the proper characterization of the Solar Levy under Czech law. The Tribunal does not consider it decisive that, in the Czech legal system, judicial decisions (or decisions of the Supreme

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248 First [redacted] Report, para 61.

249 T/2/363 ([redacted] ("How does that correspond to the many other cases that referred to the levy as a tax? Actually, I find them perfectly compatible because many of them deal with the strangling effect, and are simply in the area of the tax administration law, whereas this 10th of July case is the only one dealing with the substance and addressing the substance question.").

250 First [redacted] Report, para 38.

251 This is particularly evident as regards the decision of the Grand Chamber of the Czech Supreme Administrative Court of December 17, 2013, to which Respondent attaches particular importance. When the Court states that "the solar power levy is actually a tax," it explicitly links that finding to an earlier finding in that same decision, that the Solar Levy qualified as a tax "pursuant to Section 2(3)(b) of the [Tax Administration Law]," and that it was "administered by local financial authorities, which proceed pursuant to the [Tax Administration Law]." See Annex 13 to First [redacted] Report, Decision of the Grand Chamber of the Czech Supreme Administrative Court (case No. 1 Afs 76/2013-57), December 17, 2013, paras 23-25.

Administrative Court) are arguably not regarded as sources of law.[252] That is true in many legal systems. The essential point is that, in determining how the Solar Levy is characterized in the Czech domestic legal system, the decisions of the Supreme Administrative Court (and the other decisions noted above) are the best available guidance, regardless of their formal status as a source of law. In the Tribunal's view, these decisions are entitled to substantial weight in determining the characterization of the Solar Levy as a matter of Czech law.

243. The conclusion reached by the Czech Supreme Administrative Court in its 10 July 2014 decision, i.e. that the Solar Levy does not constitute a tax in substance, finds further support in the evidentiary record. Firstly, the Respondent itself argued, through its Ministry of Finance, that the Solar Levy was materially not a tax in proceedings before the Czech Constitutional Court. In those proceedings, the Finance Ministry formally took the position that, "from the material perspective, the introduced measures [of the Solar Levy] are considered a reduction of subsidy,"[253] which is "aimed to decrease the economic feed-in tariffs."[254] Secondly, the legislative history of the Solar Levy also supports this conclusion as the Czech Government stated in connection with the measure's enactment that it was "necessary to find a formally correct mechanism for reduction of the support of RES from photovoltaic plants, such that it cannot be legally contested."[255] In the Tribunal's view, these characterizations – issued by the Czech Government itself – are precisely consistent with the holding of the Supreme Administrative Court that the Solar Levy was – rather than a tax – in substance a reduction of the FiT, a conclusion also reached by the Constitutional Court and the Grand Chamber of the Supreme Administrative Court in various decisions.

244. Moreover, and independently of the question of whether or not it qualifies as a taxation measure under Czech law, the Solar Levy cannot be considered to qualify as a "Taxation Measure" within the meaning of Article 21(7) of the ECT. The Tribunal is convinced that a measure will only be exempted from the ECT's coverage if it falls within the meaning of a "Taxation Measure" as contemplated by its Article 21. The Tribunal has no doubt that Article 21 imposes limits on those measures which may be invoked by a Contracting Party under the ECT. Article 21 is, of course,

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252 T/2/405 (Kotáb).

253 Annex 22 to Second [redacted] Report, Detailed opinion of Ministry of Finance provided Constitutional Court in 2011 the proceedings that led decision 220/2012 Coll., p. 39.

254 Annex 22 to Second [redacted] Report, Detailed opinion of Ministry of Finance provided Constitutional Court in 2011 the proceedings that led decision 220/2012 Coll., p. 17.

255 *See, e.g.*, C-198, Minutes of the third meeting of the Coordination Committee, October 15, 2010, pp. 4-5, ("1st Deputy Environmental Minister Bízková stated that it is necessary to find a formally correct mechanism for reduction of the support of RES from photovoltaic plants, such that it cannot be legally contested.").

a provision in an international treaty, subject to interpretation under the VCLT and international law more generally. It would ignore the ECT's text, and the specific reference to tax-related measures in Article 21(7)(a)(ii), to decline to give international content to these terms.

245. Moreover, a contrary result, in which the reference to "Taxation Measures" in Article 21 had no international content, would permit Contracting Parties unilaterally to define those measures which were, and were not, subject to the ECT. In the Tribunal's view, there is nothing to suggest that such a view of Article 21 of the ECT was contemplated. It would contradict the purposes of the ECT, aiming at the establishment of uniform international standards, contrary to the text of Article 21, which specifically limits the scope of the provision to tax measures. Article 21 clearly imposes limits on what constitute tax measures which are excluded from the ECT's coverage.

246. In that context, the Tribunal finds the Respondent's assertion, that the language used in the equally authentic French and Italian versions of the ECT supports a broad scope of the ECT's tax carve-out – going beyond taxation measures and including any fiscal measure – unpersuasive. Article 33(4) of the VCLT provides that "when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

247. As noted above, Article 21 of the ECT does not itself provide an express international definition of tax measures to which the provision applies. In the Tribunal's view, there is also no need, in this arbitration, to comprehensively define what are, and what are not, tax measures for purposes of Article 21's limits. Rather, it is sufficient to address one aspect of these limits, which in the Tribunal's view is applicable to the Solar Levy.

248. Similarly situated tribunals have limited the application of Article 21 of the ECT to state actions directed at raising general revenue for the state. The *Yukos* tribunal declared that "Article 21 applies only to actions that are motivated for the purpose of raising general revenue for the State."[256] The Tribunal is persuaded that Article 21 was not intended to encompass measures which had principal objectives other than the raising of revenue, but rather to exempt measures

[256] *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (Fortier, Poncet, Schwebel), UNCITRAL, PCA Case No. AA 227, Final Award, July 18, 2014, paras 1430-31 (Article 21 of the ECT 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). See also *Quasar de Valors SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. The Russian Federation* (Brower, Landau, Paulsson), SCC Case No. 24/2007, Award, July 20, 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").

which formed part of a Contracting Party's general tax regime, aimed principally at raising revenue.

249. If an ECT tribunal were to consider only the form of the measure rather than its substance, it would provide the scope for abuse of the ECT's tax carve-out, as the contracting states would be able to escape their obligations under Part III of the ECT, and thus liability from their violations thereof, simply by labelling governmental actions as "taxation" measures. There is no indication in the ECT that an ECT tribunal's jurisdiction does not encompass the determination of whether a particular measure constitutes a "Taxation Measure" for the purpose of Article 21 of the ECT. An ECT tribunal must therefore make a substantive determination of the measure in light of the relevant facts rather than simply adopting the contracting state's own, formal characterization of that measure.

250. It is true that one purpose of the Solar Levy was to raise revenue of the State budget (as one of the sources to cover the cost of subsidies to solar investors). Critically, however, the Solar Levy was structured as it was – covering only a certain class of solar energy producers and being calculated as a percentage of the FiT – in order to alter the level of the FiT rather than to raise revenue. That is confirmed, in the Tribunal's view, by the narrow class of persons subject to the Solar Levy (thereby limiting the revenue raised), the method of calculating the Solar Levy (which had the effect of reducing the FiT) and the method of collection and payment of the FiT (which involved withholding of amounts from the FiT paid to solar energy investors). In these respects, the Solar Levy's principal purpose was to reduce the FiT for certain investors.

251. As discussed above, both the Czech Supreme Administrative Court and the Czech Constitutional Court, as well as the Czech Ministry of Finance in its submissions to the Constitutional Court, concluded that the Solar Levy was in essence a reduction of the FiTs payable to certain solar energy producers. The Respondent's expert Mr Kotáb accepted that the characterization that the Solar Levy is, in substance, a reduction of the FiTs is now well established in Czech law, although in his view this did not necessary mean that the Solar Levy was not a tax.[257] At the Hearing he admitted that the characterisation of the Solar Levy as a reduction of the FiTs "has been expressed repeatedly by courts, including Constitutional Court, so we may stick to the idea expressed here, in essence or in substance, this includes the reduction of a FiT … ."[258] This was further evidenced by both government statements made during the measure's enactment and the structure of the

257 T/2/443 (Kotáb).

258 T/2/443 (Kotáb).

measure.[259] In the Tribunal's view, the evidence in the record, including expert testimony, confirms that the essence of the Solar Levy was the reduction of certain FiTs.

252. In light of this principle, the Tribunal concludes that the Solar Levy does not fall within the scope of Article 21 of the ECT. In this regard are of particular importance statements made in connection with the enactment of the Solar Levy, including the statements of the Minister of Industry and Trade on November 2, 2010 at meetings of the Economic Committee of the Chamber of Deputies.[260] These statements clearly show that the Solar Levy's principal objective was a reduction in the level of the FiTs payable to certain solar investors, and not the raising of revenue; they also show that the Solar Levy was structured, in many respects, as a tax in order to reduce the risk of claims against the Czech Republic under international law.

253. By finding that the Respondent formulated the structure of the Solar Levy – resembling, in many respects, a tax – principally for the purpose of taking the reduction in the FiTs outside the protections accorded by several international investment treaties, including the ECT, the Tribunal does not imply that the Respondent was acting in bad faith. The Respondent might very well have attempted to reduce the FiTs in a manner that would be consistent with its legal obligations, including its investment protection obligations. The Tribunal merely finds that these attempts, including making the Solar Levy subject to the procedures set out in the Tax Administration Law, cannot change the fact the Solar Levy is, in substance, a measure whose objective was a reduction in the level of the FiTs payable to certain class of solar investors, and not the raising of revenue for the State.

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259 Annex 5 to First [redacted] Report, Draft Government resolution on the problem of electricity price increases due to RES support presented by Ministry of Finance for Government session of 20 October 2010, p. 3.

260 See. e.g., Minutes of Session of the Economic Committee of the Chamber of Deputies of November 2, 2010, Annex 6 to First [redacted] Report, p. 5 (Mr. Kocourek, Minister of Industry and Trade: "The issue of arbitrations in general is absolutely erratic. … 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 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.").

B. Whether the Claimants complied with the notice requirements under the BIT and the ECT with regard to the claims arising out of the extension of the Solar Levy by Act 310/2013

1. The Respondent's position

254. In its Statement of Defense the Respondent contended that the Claimants' claim as to the Extension of the Solar Levy by the Act No. 310/2013 Coll. (the "**Solar Levy Extension Claim**") failed to satisfy the requirements of the prior written notification and the cooling-off period under Article 10(2) of the BIT and Article 26(2) of the ECT.[261] The Respondent alleged that even though the Claimants had ample opportunities to raise the Solar Levy Extension Claim after the adoption of the Act of September 13, 2013, the Claimants had not done so until the Statement of Claim of April 7, 2014.[262]

255. Article 10 of the BIT provides:

> (1) Disputes relating to investments between either Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.
>
> (2) If a dispute cannot be settled within six months of the date when it was notified by one of the parties in dispute, it shall, at the request of the investor of the other Contracting Party, be submitted to arbitration.[263]

256. Article 26 of the ECT provides:

> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution […].[264]

2. The Claimants' position

257. The Claimants took the view that the Solar Levy Extension Claim, i.e. the claim in respect of the prolongation of the Solar Levy, could not be characterized as a new dispute requiring an extra written notification and a new waiting period.[265] The notice of dispute dated June 10, 2011

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261 Statement of Defense, paras 110-114.

262 Statement of Defense, para 111

263 Statement of Defense, para 101; BIT, Article 10(2).

264 Statement of Defense, para 102; ECT, Article 26.

265 Memorial, paras 360-4.

referred to the adoption of Act No. 204/2010 concerning the introduction of the Solar Levy, and the Solar Levy Extension Claim concerns only the extension of the Solar Levy.[266] On this basis, the Claimants contended that the Solar Levy Extension Claim was the same dispute in substance as that contained in the notice of dispute and thus did not require a separate notification and cooling-off period from the original claims.[267]

3. The Tribunal's conclusion

258. The Respondent did not pursue this objection in its Rejoinder, or during the hearing, but did not formally withdraw it.

259. The notice of dispute dated June 10, 2011 referred to Act 402/2010, which introduced the Solar Levy. The Solar Levy was extended by Act 310/2013.

260. The Tribunal is satisfied that the Claimants' argument is right. The claim relating to the Solar Levy extension is the same dispute in substance as that contained in the notice of dispute and does not require a separate notification and cooling-off period from the original claims.

C. Whether the Claimants' alleged misrepresentations in obtaining the operating licence for the Mozolov plant bar their claims in relation to the plant

D. Whether the Claimants have made a prima facie showing of a violation of the BIT and ECT in relation to the Holýšov plant

261. These issues partially concern the merits of the claim, and will be disposed of below.

IX. The substantive claims: legitimate expectation and arbitrary or unreasonable behaviour

1. The Claimants' position

262. As a threshold matter, the Claimants observe that their ECT claims should be maintained even if their ECT claims are "almost identical" to their BIT claims.[268] The Claimants describe that this is because (1) the ECT is "more specific in protecting investments in the energy sector"; and (2) "[s]ince the EU is a contracting party to the ECT, there will be more grounds to oppose

266 Memorial, para 362.

267 Memorial, para 364.

268 T/4/743.

interference of the European Commission in relation to the enforcement of an eventual award."[269]

263. The Claimants contend that the Respondent violated an obligation to provide a stable and predictable legal framework by modifying the Incentive Regime.[270]

264. According to the Claimants, the obligation to provide a stable and predictable investment framework may be distinguished from the obligation to protect an investor's legitimate expectations.[271] The former concerns investors' basic expectations as to stability of an investment framework, while the latter requires an analysis of individual investors' expectations.[272] In the Claimants' view, the obligation to provide a stable and predictable investment framework arose from (1) "the Incentive Regime's intrinsic attribute of stability"; and (2) "the specific treaties invoked by the Claimants in this case".[273]

265. As for "the Incentive Regime's intrinsic attribute of stability", the Claimants submit that the Incentive Regime was established to attract investments in the photovoltaic sector by providing long-term incentives.[274] This inherent nature of the Incentive Regime created basic expectations and a promise that the Czech Republic would not modify the Incentive Regime, which are protected under the standard of "fair and equitable treatment" ("**FET**").[275]

266. The Claimants submit that the requirements of protection of the investors' basic expectations as to stability are essential elements of the FET standard.[276] This is confirmed by the tribunal in *Tecmed* and other subsequent tribunals.[277] The tribunal in *Bayindir v. Pakistan* further elaborated

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269 T/4/743-744; Claimants' closing statement, Slide 60.

270 Reply, para 643.

271 Reply, paras 637, 639.

272 Reply, para 643.

273 Reply, pars. 643, 673.

274 Reply, para 643.

275 Reply, para 643.

276 Reply, para 665.

277 Reply, paras 665-671; *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (Grigera Naón, Fernandez Rozas, Bernal Verea), ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, para 154; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (Rigo Sureda, Lalonde, Oreamuno), ICSID Case No. ARB/01/7, Award, May 25, 2004, para 114; *Occidental Exploration and Production Company v. Republic of Ecuador* (Orrego Vicuña, Brower, Barrera Sweeney), LCIA Case No.UN3467, Final Award, July 1, 2004, paras 191, 183; *CMS Gas Transmission Co. v. Argentina* (Orrego Vicuña, Lalonde, Rezek), ICSID Case No. ARB/01/8, Award, May 12, 2005, paras 275, 276, 134; *LG&E Energy Corp. LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic* (de Maekelt, Rezek, van den Berg), ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, para 124; *Enron Corp. Ponderosa Assets L.P. v. Argentine Republic* (Orrego Vicuña, van den Berg, Tschanz), ICSID Case No. ARB/01/3, Award, May 22, 2007, paras 259-260.

that a host State's policy change may lead to a violation of the FET standard.[278] This is particularly relevant to the present case, where the Czech Republic changed its policy towards the photovoltaic investors.[279]

267. The Claimants contend that the obligation to provide a stable and predictable legal framework also derives from specific treaties invoked by the Respondent, i.e., the BIT and the ECT.[280] These treaties share the purpose to promote investment between contracting States by establishing a stable investment environment.[281]

268. The Claimants allege that a promise of stability may arise in the absence of a stabilization clause.[282] The Respondent is said to have accepted this when stating that the Act on Promotion provided a promise of a 15-year simple payback and a 7% rate of return, even if the Act did not contain a stabilization clause.[283] Such a payback and a rate of return, are undeniably a form of stability, with limited scope.[284] The Claimants contend further that a contractual stabilization clause is unnecessary, considering that, in the circumstances of the RES sector, the host State does not enter a contractual relationship with individual investors.[285] In the Claimant's view, the cases that the Respondent relies on, including *Parkerings v. Lithuania*,[286] are distinguishable from the case at hand, because in those cases the tribunals found no basic or specific promise of stability by host States.[287]

269. The Claimants further contend that a stabilization clause is irrelevant to the issue of whether a host State owes an international obligation not to amend its legal framework.[288] In the Claimant's view, a stabilization clause only generates an obligation under domestic law, and accordingly it

278 Reply, para 671; *Bayindir Insaat Turizm Ticaret Ve, Sanayi AS v. Islamic Republic of Pakistan* (Kaufmann-Kohler, Berman, Böckstiegel), ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, para 240.

279 Reply, para 672.

280 Reply, para 673.

281 Reply, paras 674-677.

282 Reply, para 644.

283 Reply, paras 645-649.

284 Reply, paras 645-649.

285 Reply, para 650-664.

286 *Parkerings-Compagniet AS v. Republic of Lithuania* (Lew, Lalonde, Lévy), ICSID Case No. ARB/05/8, Award, September 11, 2007.

287 T/1/71-72.

288 T/4/710-712.

does not constrain a host State's authority to change its domestic legislation.[289] This view is supported by the tribunal in *Oxus Gold v. Uzbekistan*, which provided that "a [stabilization] clause in a law or a general regulation does not give a vested right to the investor, as the State can always modify its laws and general regulations."[290]

270. The Claimants argue that the Respondent violated the Claimants' legitimate expectations with reference to the Incentive Regime, so as to satisfy the three prongs of the test applied by most arbitral tribunals, including, in particular, the *Micula* tribunal: "(a) the Respondent made a promise, assurance or representation of regulatory stability; (b) the Claimants relied on such promise, assurance or representation; and (c) such reliance was reasonable."[291] The Claimants observe that the doctrine of legitimate expectations is irrelevant to the reasonableness of a host State's measure.[292]

271. The Claimants contend that they had legitimate expectations that "(i) the FiT level would remain stable over the lifetime of the project (i.e. 20 years), and (ii) the Income Tax Exemption would last for 6 years (i.e. the first calendar year of operation of the plant plus the following five ones)".[293]

272. According to the Claimants, because the FET standard does not expressly provide which types of investors' expectations can be considered as legitimate, and accordingly "one has to determine whether, in the specific circumstances, the State's behaviour gave rise to an expectation that its legislative framework would not change to the detriment of the investors".[294] The Claimants then submit that the specific circumstances in the present case was that the Respondent intended to attract investors by providing long and stable incentives through the Incentive Regime.[295]

273. The Claimants submit that domestic legislation can be treated as promises to foreign investors, referring to several legal authorities.[296] Based on this proposition, the Claimants take the view

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289 T/4/711.

290 T/4/711; *Oxus Gold v. Uzbekistan* (Tercier, Lalonde, Stern), UNCITRAL, Final Award, December 17, 2015, p.332.

291 Memorial, paras 439-40; *Ioan Micula, Viorel Micula and others v. Romania* (Lévy, Alexandrov Abi-Saab), ICSID Case No. ARB/05/20, Award, December 11, 2013, note 176, para 178.

292 T/1/69; T/1/79-80; CLA-121, Decision of the German Constitutional Court (1 BvR 2821/11, 1 BvR 1456/12, 1 BvR 321/12), December 6, 2016.

293 Reply, para 690.

294 T/4/712-713.

295 T/4/713-714.

296 Memorial, para 448; *Enron Corp. Ponderosa Assets L.P. v. Argentina Republic* (Orrego Vicuña, van den

that the Czech Republic made explicit promises of stability to the investors throughout its legislation including the Act on Income Tax and the Act on Promotion.[297] In this vein, the recent decision in *Charanne v. Spain*, in which the tribunal found an individual commitment was necessary for investors to enjoy legitimate expectations as to stability of investment framework, can be distinguished on the facts.[298] In that case, the claimants invoked unreasonably long period of stability, i.e., 30 to 50 years.[299]

274. The Claimants provide a more specific analysis of the promises contained in Section 6 of the Act on Promotion.[300] First, Section 6(1)(b)(2) provided a guarantee that "once it is established, the feed-in-tariffs cannot be reviewed for a given period of time, except for an increase, according to inflation."[301] Second, Section 6(4) provided a guarantee of the 5% Break-Out Rule.[302]

275. The Claimants allege that these expectations were strengthened by the purpose and context of the Incentive Regime.[303] The Explanatory Report on the bill of the Act on Promotion evidences that the Act on Promotion was enacted to meet the 8% EU target for 2010 under the EU policy of promoting RES.[304] The importance of the achievement of 8% target is evidenced by Mr Fiřt's statement that "it was not only [the] ERO that was interested but also the Ministry of Industry and Trade."[305] Dr Göde also testifies in his written statement that "the essential drive [to invest in the Czech Republic] was the Czech incentive system and its expected reliability, especially as

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Berg, Tschanz), ICSID Case No. ARB/01/3, Award, May 22, 2007, paras 264-266; *LG&E Energy Corp. et al v. The Argentina Republic* (de Maekelt, Rezek, van den Berg), ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, paras 130, 133; Reply, paras 699-706; CLA-35, R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford, 2008, pp. 134-135; *Electrabel S.A. v. Hungary* (Kaufmann-Kohler, Stern, Veeder), ICSID Case No. ARB/07/19, Award, November 25, 2015, para 155; *CMS Gas Transmission Co. v. Argentina* (Orrego Vicuña, Lalonde, Rezek), ICSID Case No. ARB/01/8, Award, May 12, 2005, para 443; *Binder v. Czech Republic* (Danelius, Creutzig, Gaillard), UNCITRAL, Ad Hoc Arbitration, Award, July 15, 2011, para 443; CLA-89, M. Téllez, Conditions and Criteria For The Protection of Legitimate Expectations Under International Investment Law, in ICSID Review, Vol. 27, No. 2, 2012, p. 436; CLA-85, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, 2012, p. 69.

297 Memorial, paras 447, 449.

298 Reply, para 697, citing *Charanne and Construction Investments v. The Kingdom of Spain*, SCC Case No. 062/2012, Final Award, January 21, 2016 (Mourre, Santiago Tawil, von Wobeser).

299 Reply, para 698.

300 T/1/26.

301 T/1/26-27.

302 T/1/27.

303 Reply, para 708.

304 Reply, para 709.

305 T/4/700-701; T/2/262-263.

to the long-term price guarantee for the electricity produced by solar operators. As known to solar producers, the energy sale price is in fact fundamental to the economics of a solar investment".[306] The Claimants emphasize that it was the guarantee of the long-term stable FiT which was integral to deciding to invest in RES.[307] The importance of the stable FiT is evidenced by the fact that the investments in photovoltaic plants were up-front.[308]

276. According to the Claimants, the Explanatory Report shows that the Income Tax Exemption and the Shortened Depreciation Period constituted essential part of the Incentive Regime, in stating that "the support system is based […] on maintaining the tax reliefs to the extent set out in the Act[s] on Income Tax". [309] In addition, the fact that the Act on Promotion did not mention the Income Tax Exemption is immaterial.[310] This was simply because the Income Tax Exemption was already established by the Act on Income Tax when the bill of the Act on Promotion was being discussed.[311]

277. The evidentiary value of the Explanatory Report is not decreased, say the Claimants, by the facts that the Report itself was not a legal source and that the Report was not specifically addressed to the Claimants.[312] The Report shows significant insight of the legislative process and the purpose of the Act on Promotion.[313] An individualized promise is not necessary in invoking the protection of legitimate expectations.[314]

278. The Claimants then contend that these general promises provided by the Act on Promotion and the Act on Income Tax were converted into specific promises by going through the licensing process and gaining required permissions to build and operate photovoltaic power plants.[315]

279. The Claimants further submit that answers shown on the Q&A tool of the ERO website as well as the 2010 Action Plan prepared by the Czech Ministry of Industry and Trade on the duration of

306 Memorial, para 450; First Göde Statement, para 23.

307 Memorial, para 450.

308 T/1/78.

309 Reply, para 711; C-120, Explanatory Report on the bill of the Act on Promotion of November 12, 2003 (extended version), p. 4.

310 Reply, para 712.

311 Reply, para 712.

312 Reply, paras 712-713.

313 Reply, para 712.

314 Reply, para 713.

315 Memorial, para 453; First Göde Statement, paras 18-20.

the stable FiT can be characterized as specific promises to photovoltaic investors.[316]

280. The Claimants contend that a promise contained in the Act on Promotion was not limited to the 15-year simple payback and the 7% WACC.[317] A promise of 15-year simple payback would contradict to the purpose of the Act on Promotion, since such a payback was insufficient to attract enough investors in order to achieve the EU targets.[318] WACC was a mere non-binding indicator for the ERO to set a FiT.[319] Indeed, the Act on Promotion did not contain reference to WACC.[320]

281. According to the Claimants, had it not been for the guarantee that the Incentive Regime should be granted and maintained, investors like the Claimants would not have invested in photovoltaic energy production in the Czech Republic.[321] This is because investors in the long-term RES business based their investment decisions on guarantees of stability derived from the purpose of the Incentive Regime.[322]

282. The Claimants make clear that in reliance on the legal framework set up by the Czech Republic and its commitments contained therein, they acquired or established SPVs, obtained the licences for energy production and invested a significant amount of money in their photovoltaic plants.[323] In particular, the Claimants point out that they based their assessment of profitability on the analysis of the investment and operating costs to set up and operate the solar plants.[324]

283. The Claimants contend that their reliance on the promises provided for by the Incentive Regime was reasonable.

284. The Claimants maintain that their reliance was reasonable as it was predicated on the guarantees contained in the Incentive Regime and its "declared purpose".[325] According to the Claimants, "[the] system was designed precisely to attract the investments that the Czech Republic needed

316 Memorial, paras 456-7; First Göde Statement, para 27; Annex II to First Göde Statement, Q&A tool available on the ERO's website in 2009.

317 T/1/15:5-6.

318 Memorial, para 450.

319 T/1/29.

320 T/1/15.

321 Memorial, para 446.

322 Memorial, paras 444-6; First Göde Statement, paras 24-27.

323 Memorial, paras 459-60.

324 Memorial, para 460; First Göde Statement, paras 21, 28.

325 Memorial, para 462.

to comply with its EU law obligations."[326]

285. The Claimants refer to both Czech and EU law to support the contention that their reliance was reasonable. With regard to Czech law, "the correctness of the Claimants' understanding of the Incentive Regime was primarily confirmed by the ERO's presentations on that matter and by the personal consultation that Dr Göde had with the Czech law firm, [redacted] in Prague."[327] As to EU law, "the compatibility of the Incentive Regime with EU state law was assessed both before the adoption of the Act on Promotion and after its implementation."[328]

286. In addition, the Claimants submit that widespread beliefs among the photovoltaic market that the Incentive Regime would not be retroactively repealed provide support for the reasonableness of the Claimants reliance.[329] As the tribunal in *CMS v. Argentina* stated, this is because "[i]t is not credible that so many companies and governments and their phalanxes of lawyers could have misunderstood the meaning of the guarantees offered in a manner that allowed for their reversal within a few years".[330] The Czech local banks financed solar projects for plants to be commissioned in 2010.[331] This is confirmed by the fact that on July 30, 2010, the head of KPMG's Transaction and Acquisition Department confirmed that banks were interested in photovoltaic plants as long as they were commissioned by the end of 2010.[332] Such a belief was also shared by energy experts licensed by the Czech Ministry of Industry and Trade, who conducted energy audits before banks approved loans for solar projects.[333]

287. The Claimants emphasize that the Respondent repeatedly reassured that the amendments to the Incentive Regime would not affect plants commissioned before 2011.[334] A Czech Republic's report of November 2009 still indicated the need of attracting investors in order to achieve the 8% EU target for 2010.[335] The abolishment of the 5% Break-Out Rule in March 2010 only affected plants commissioned from January 1, 2011 due to the political decision to keep providing

326 Memorial, para 463.

327 Memorial, para 466; First Göde Statement, paras 24, 27.

328 Memorial, para 468.

329 T/1/74.

330 T/1/74; *CMS Gas Transmission Co. v. Argentina* (Orrego Vicuña, Lalonde, Rezek), ICSID Case No. ARB/01/8, Award, May 12, 2005, para 137.

331 Memorial, paras 473, 474, 476.

332 T/1/74.

333 T/1/74.

334 Reply, para 731.

335 Reply, paras 733-734.

the same support level to plants commissioned by the end of 2010.[336] Mr Jones, the Respondent's expert, also accepted that the ERO's letter of September 8, 2009, the Government's bill of November 16, 2009, the Ministry of Industry's press release of the same date, and the Government's bill of September 15, 2010, strengthened the investors' expectations that the upcoming change would not affect plants connected in 2010.[337]

288. The Claimants allege that the Czech Republic kept providing such reassurances during 2010.[338] None of the Claimants' plants was affected by the moratorium on new applications for grid connections, because all of their plants obtained the capacity reservations before the moratorium started in February 2010.[339] The 2010 Action Plan reaffirmed that the fixed FiT would be available for 20 years.[340] Act No. 330/2010, which abolished all incentives for plants over 30kWp, only applied installations commissioned from March 1, 2011, and its Explanatory Report of September 15, 2010 provided that the existing investors would keep enjoying the incentives.[341] Both the 2010 Action Plan and the ERO's 2010 Report indicated that the future amendments to the Incentive Regime would not affect the existing investors.[342] Importantly, Dr Göde's last investment was made in the summer of 2010, when the Respondent still kept providing such reassurances.[343]

289. The Claimants submit that the 2010 Action Plan provided a strong reassurance.[344] First, the Plan confirmed that the Income Tax Exemption was integral part of the Incentive Regime, by listing it as available financial support together with FiT and Green Bonuses.[345] Second, the Plan did not suggest that the FiT level was not maintainable.[346] Third, the Plan confirmed that the FiT would be stable for 20 years in stating that "[the] tariffs are guaranteed according to the following

336 Reply, para 736; T/1/34.

337 T/3/561-568; T/2/705; C-201, Letter from Mr Fiřt (Chairman of the ERO) to Mr Vojíř (Chairman of the Economic Committee of the Chamber of Deputies), September 8, 2009; R-147, Explanatory Report to Draft Act No. 137/2010 Coll., November 16, 2009; C-197, Czech Government's press conference, November 16, 2009; R-172, Explanatory Report to Draft Act No. 330/2010 Coll., September 15, 2010.

338 T/1/34.

339 Reply, para 736.

340 Reply, paras 736, 193.

341 Reply, paras 736, 199.

342 Reply, paras 736, 737.

343 T/4/723-724.

344 T/1/36.

345 T/1/36.

346 T/1/36.

table [photovoltaic power plants 20 years]" and that no cap existed for RES support.[347]

290. The Claimants also submit that another strong reassurance was given by the Explanatory Report to Draft Act No. 330/2010 dated on September 15, 2010, which abolished all of the support for large photovoltaic plants as of March 1, 2011.[348] The Report provided that "[p]hotovoltaic power plants already connected to the electric power system will have their right to claim support preserved under existing conditions."[349]

291. In the Claimants' view, the Respondent gave these reassurances in order to (1) provide sufficient time for investors to prepare for the upcoming scheme change; and (2) achieve the EU target for 2010 by means of contribution from photovoltaic plants.[350]

292. The Claimants allege that, in 2009 and 2010, it was impossible for photovoltaic investors to expect that the amendment measures would be introduced in a retroactive manner.[351] The Claimants submit that a number of documents published in 2009 and 2010 provided repeated reassurances, instead of warnings.[352] This was also supported by the fact that even ČEZ, a company controlled by the Czech Republic, kept investing in the photovoltaic market during the period.[353] The Claimants observe that indeed the introduction of the Solar Levy had not been an option for the Czech Government until October 14, 2010, when it suddenly changed its policy.[354]

293. The Claimants observe that although the Respondent could have repealed the 5% Break-Out Rule or required grid operators to stop issuing new binding statements as soon as it had recognized the problem, it had chosen not to do so.[355] In the Claimant's view, this political decision conveyed a clear message to investors that the FiT level would remain stable for plants commissioned in 2009 and 2010.[356]

294. In this vein, the Claimants contend that the existence of the Fischer caretaker government during

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347 T/1/36-37; C-73, National Renewable Energy Action Plan of July 2010 published by the Ministry of Industry and Trade, July 2010, pp.58-60.

348 T/1/38.

349 T/1/38.

350 T/1/38-39.

351 T/1/49-50.

352 T/1/49-50.

353 T/1/49-50.

354 T/4/702.

355 T/4/728-729.

356 T/4/729.

May 2009 and July 2010 is irrelevant.[357] It did not amount to a political crisis that might have affected an investor's legitimate expectations.[358] As shown in its policy statement that it was prepared to take responsibility to manage the country, the caretaker government had authority to deal with the increase of the solar installations.[359] Indeed, the caretaker government made the important decision to repeal the 5% Break-Out Rule.[360]

295. Similarly, the Claimants object to the Respondent's assertion that the postponement of the abolishment of the 5% Break-Out Rule was the result of solar investors' lobbying and threats of arbitration.[361] No evidence shows that such an activity existed. In any event, legitimate lobbying activity does not excuse a host State from not addressing a problem in a timely manner.[362]

296. The Claimants contend that their reliance on the Income Tax Exemption was equally reasonable.[363] The repeal of the Income Tax Exemption is distinguished from an ordinary increase of income tax rate, because the Income Tax Exemption contained a promise of duration as an essential part of the Incentive Regime.[364] This position is confirmed, according to the Respondent, by an expert opinion that the Czech Republic could repeal the Income Tax Exemption only in a non-retroactive manner.[365]

297. Furthermore, the Claimants submit that Dr Göde's team was formed by experienced experts including bankers and a Czech lawyer.[366] While Dr Göde did not conduct a specific due diligence before his investment, his team provided sufficient expertise.[367] In any event, given the small size of photovoltaic investments, a sophisticated due diligence should not have been required.[368]

298. The Claimants provide that "Dr Göde made the majority of his investment in the Czech Republic only after having obtained 'a direct confirmation of the reliability of the Czech environment in

357 T/4/732-733.

358 T/4/731-732.

359 T/4/733.

360 T/4/733.

361 T/4/733-734.

362 T/4/734.

363 Reply, para 729.

364 Reply, para 729.

365 Reply, para 730; C-222, Professor JUDr Aleš Gerloch, CSc's Opinion of December 3, 2010, pp. 10-11.

366 T/1/226; T/4/724.

367 T/4/724.

368 T/4/724.

general and of the FiT regime in particular'".[369] Indeed, Dr Göde made his second investment after having confirmed that his first solar plant became operational under the FiT scheme.[370]

299. The Claimants submit that the Respondent violated its obligation to accord "full protection and security" ("**FPS**") set out in Article 10(1) of the ECT and Articles 2(3) and 4(1) of the BIT by failing to provide a stable and predictable legal framework as to the Claimants' investment. [371]

300. The Claimants submit that the scope of FPS extends beyond physical protection to legal security. To this extent, FPS and FET substantially overlap, and jointly require a host State to provide a stable and predictable legal framework.[372] In the present case, the Claimants contend that the FPS standard was violated by reason of the facts giving rise to a breach of the FET standard.[373]

301. The Claimants allege that, by dismantling the Incentive Regime, the Respondent violated the prohibition of arbitrary or discriminatory measures ("**Non-Impairment Standard**") set out in Article 10(1) of the ECT and Article 2(2) of the BIT. [374]

302. In response to the Respondent's argument that the Non-Impairment Standard requires an investor's impairment to be significant, the Claimants submit that, referring to *Saluka*, "any negative impact or effect" caused by a host State's measure satisfies the impairment requirement.[375]

303. The Claimants then submit that in any event their investments were significantly impaired, referring to Dr Göde's statement that "the Czech Republic's retroactive measures greatly impacted on the economics of [his] investment".[376] Dr Göde expected a return of EUR [redacted] (before taxation) for his investment, but, after the introduction of the Solar Levy, the Claimants' internal forecasts now point to EUR [redacted] [377]

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369 Memorial, para 479; First Göde Statement, para 29.

370 Memorial, para 479.

371 Memorial, para 379.

372 Memorial, paras 386-388, 400.

373 Memorial, para 400.

374 Memorial, paras 496-498; Memorial, paras 402-408. According to the Claimants, the Respondent's unreasonable and discriminatory measure also violated the FET standard. While the Claimants also invokes the FET standard as the basis for the prohibition of arbitrary or discriminatory measures, they provide their arguments in the context of the Non-Impairment Standard.

375 Reply, para 761; *Saluka Investments B.V. v. The Czech Republic* (Watts, Fortier, Behrens), UNCITRAL, Partial Award, March 17, 2006, para 458.

376 Memorial, para 522 citing First Göde Statement, para 37.

377 Memorial, para 523.

304. The Claimants define an unreasonable measure as referring to "a measure that imposes excessive burdens on foreign investors not commensurate to the aims pursued or to the results achieved by the measures."[378]

305. The Claimants submit that the determination of whether a measure is reasonable or not requires analysis of "whether (i) the state pursued a rational policy and (ii) acted reasonably in pursuit of such policy", relying on the *AES* and *Micula* cases.[379] A State' policy is rational if it is taken "following a logical (good sense) explanation and with the aim of addressing a public interest matter".[380] A State acts reasonably if there is "an appropriate correlation between the state's policy objective and the measure adopted to achieve it."[381] Under the proportionality test, since the Respondent's measures destroyed the Claimants' investments, the Respondent must prove that "the maintenance of the Incentive Regime, and the allegedly attendant high electricity prices, would have entailed the catastrophic consequences for the Czech economy that are invoked, in terms of layoffs, plant shut downs and dramatic drops in the tax revenues."[382]

306. The Claimants contend that "the Czech Republic's dismantling of the Incentive Regime was neither adopted in furtherance of a rational policy, nor were the Czech Republic's measures reasonable in the pursuit of such a policy, because the adverse impact on the Claimants' investment did not outweigh the policy's benefits."[383]

307. The Claimants reject the Respondent's assertion that it aimed "to counter soaring electricity prices and to address alleged 'windfall profits' of solar investors."[384]

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378 Memorial, para 499; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentina Republic* (de Maekelt, Rezek, van den Berg, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006), para 158; *Saluka Investments B.V. v. The Czech Republic* (Watts, Fortier, Behrens), UNCITRAL, Partial Award, March 17, 2006, para 307; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, September 23, 2010, para 10.3.7; *Ioan Micula, Viorel Micula and others v. Romania* (Lévy, Alexandrov, Abi-Saab), ICSID Case No. ARB/05/20, Award, December 11, 2013, para 525.

379 Memorial, para 501; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, 23 September 2010, paras 10.3.8 and 10.3.9; *Ioan Micula, Viorel Micula and others v. Romania* (Lévy, Alexandrov, Abi-Saab), ICSID Case No. ARB/05/20, Award, December 11, 2013, para 525.

380 Memorial, para 501; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, 23 September 2010, paras 10.3.8.

381 Memorial, para 501; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, 23 September 2010, paras 10.3.9.

382 Memorial, para 506.

383 Memorial, para 503.

384 Memorial, para 504; Statement of Defense, para 45.

308. With regard to the "high electricity prices" case, the Claimants assert that "there is no indication that such a risk was in any way concrete nor that the investors and the Incentive Regime would be responsible for it."[385] Rather, the extra costs of RES support, including the tariffs on consumers, and electricity prices in Czech Republic were lower than those in other EU countries.[386]

309. Moving on to "the alleged windfall profits of the investors", the Claimants deny the presence of such profits.[387] Rather, the rates of return provided for by the Incentive Regime at 10-15 % were in line with those in other EU Member States.[388] The Claimants deny that any profit over the rate of 7% should be considered a windfall, considering that a return rate at the level of 7% would not have attracted sufficient investment to achieve the 8% EU target for 2010.[389]

310. According to the Claimants, the Respondent's policy is irrational as "withdrawing benefits that [the Respondent] had used to induce investors into its solar market" dramatically reduces prospects for future investment by negatively signalling future investors and making it extremely difficult for it to attain its target of increasing electricity from solar energy by 2020.[390]

311. The Claimants contend that the Respondent's amendment measures were unreasonable.

312. The Claimants submit that a host State's measures are reasonable only if "its adverse effects on foreign investments are limited to what is strictly necessary to achieve the public interest and the public interest outweighs the negative impact on the rights of foreign investors in the specific case."[391] In the Claimants' view, proportionality is required not only between the policy objectives and the measures, but also between the benefits to the host State and the impact on investors.[392]

313. In the present case, the Claimants allege that "the Solar Levy is unreasonable because the results it achieved are completely out of proportion with respect to the harm it caused to solar

385 Memorial, para 507.

386 Reply, para 784

387 Memorial, para 509.

388 Reply, para 783.

389 Reply, para 783.

390 Memorial, para 510.

391 Memorial, para 502.

392 Reply, para 787.

investors."[393] According to the Claimants, the fact that "the end price of electricity continued to increase even after the introduction of the Solar Levy" confirms the assumption that "the effects of the Solar Levy on electricity prices were minimal and it did very little […] to shield households and industries from purportedly soaring electricity prices."[394] The Claimants assert that this lack of proportionality was exacerbated by the abrupt legislative process without appropriate reflection.[395]

314. The Claimants contend that the repeals of the Income Tax Exemption and the Shortened Depreciation Period were irrational, pointing out that "there is no explanation as to how the repeal of the tax exemption can mitigate the increase in electricity prices".[396]

315. The Claimants submit that the unreasonableness of the amendment measures was also criticized by the EU Commissioners, who expressed their concern as to the amendment measures in its letter of January 11, 2011. The EU Commission in its Communication of 2013 stated that "[a] need to make changes in regulatory conditions in response to developments in the market does not justify applying such changes retroactively to investments already made in situations where the need arises because of failures on the part of the public authorities to correctly predict or adapt to such developments in a timely manner."[397]

316. The Claimants contend that the Czech Constitutional Court decision of May 15, 2012 is not helpful because "domestic courts cannot provide absolution from violation of international law."[398] The Claimants further submit that the decision is irrelevant to the present case because the Court (1) employed domestic, instead of international, standards; (2) employed an approach which was similar to that of expropriation; and (3) was silent as to whether the Czech Republic violated its obligation towards investors.[399]

317. In the Claimants' view, the return rates above 7% WACC, which the amendment measures targeted, should be considered as reasonable, instead of excessive.[400] The Claimants find support

393 Memorial, para 517.

394 Memorial, para 517.

395 Reply, para 790.

396 Memorial, para 518.

397 T/1/53-54; C-221, EC's Communication, Delivering the internal electricity market and making the most of public intervention, November 5, 2013, p.12.

398 T/1/88.

399 T/1/88-89.

400 T/4/735.

in the EU Commission's 2016 Decision, which confirmed the return rates between 6.3% and 10.6% as reasonable.[401] The Claimants add that while the EU Commission referred the 10.6% rate regarding biogas, the 10.6% rate is also relevant to solar, given that the 7% WACC was set for the entire RES including both solar and biogas.[402] The [redacted]% return rate of Osečná plant also can be seen as reasonable, considering that the EU Commission approved up to 12 to 13% of return rates in relation to other EU Member States.[403]

318. The Claimants make four further allegations as to the unreasonableness of the Respondent's measures.[404] First, the measures were intrinsically irrational, because the Respondent repealed the essential features of the Incentive Scheme.[405] In this regard, the *Charanne* decision, in which the tribunal found that the changes to the FiT level and period did not amount to an alternation of the essential characteristics, is to be distinguished from the present case, because the alleged period, i.e., 30 to 50 years, was unrealistic for the plants' lifetime.[406] Second, the measures were by definition unreasonable, because the Respondent repealed its clear undertaking to RES investors, which it had made in exchange for their investment.[407] Third, the Respondent acted inconsistently in relation to the investors and its policy goal.[408] The Respondent repeatedly announced that the amendments to the Incentive Regime would only affect new plants commissioned after 2011, nevertheless repealed the incentives provided for plants commissioned in 2009 and 2010.[409] The amendment measures made it difficult for the Respondent to achieve its long-term policy goal of promoting RES by undermining the Respondent's reputation among investors.[410] Fourth, the Respondent cannot claim the reasonableness of its responses to the alleged solar boom, because the solar boom was caused by its own mismanagement.[411] The ERO repeatedly drew attention to the rise of solar installations at least from 2008, nevertheless the

401 T/4/735-736; R-366, European Commission's decision in State aid case SA.40171 (2015/NN) – Czech Republic (Promotion of electricity production from renewable energy sources), November 28, 2016.

402 T/4/737-738.

403 T/4/738-739; Compass Lexecon presentation, Slide 20.

404 Reply, paras 763, 765, 773, 791.

405 Reply, para 765.

406 Reply, paras 766-772; *Charanne and Construction Investments v. Spain* (Mourre, Santiago Tawil, von Wobeser), SCC, Final Award, January 21, 2016, para 529.

407 Reply, para 763.

408 Reply, para 773.

409 Reply, para 774-776.

410 Reply, para 777-779.

411 Reply, para 791.

Respondent did not address this issue until the end of 2010. As a result, the Respondent repealed the incentives in a retroactive manner, which was unprecedented among the EU Member States.[412] In the Claimants' view, Article 25.2(b) of the Draft articles on Responsibility of States for Internationally Wrongful Acts (the "**ILC Draft Articles**"), by which a State is precluded from invoking the necessity defence when the State contributed to the situation of necessity, supports this assertion.[413]

2. The Respondent's position

319. The Respondent contends that, in the absence of stabilization clause, a State may change its legislation without violating investment treaty obligations.[414] In other words, no legitimate expectations as to stability of legal framework may arise in the absence of a stabilization arrangement.[415] Such a stabilization clause can be either legislative or contractual, but a clear language of prohibiting legislative or regulatory change is required.[416] However, in the present case, no evidence shows such an explicit arrangement.[417]

320. As to the alleged stabilization of the FiT level, the Respondent alleges that a simple use of the word "stable", as found in the ERO's report of 2009, is not sufficient to grant a promise of stabilization.[418] The Respondent denies that the Claimants' assertion that the Respondent admits that an obligation of stabilization may arise in the absence of stabilization clause in stating that the Act on Promotion and the ERO regulations provided for a 15-year simple payback and a 7% rate of return.[419] Because the Respondent keeps providing the payback and the rate of return, the stabilization of these incentives is not an issue of the present case. [420]

321. Regarding the Income Tax Exemption, the Respondent calls into doubt the evidentiary value of the 2003 Explanatory Report on the Bill of the Act on Promotion on which the Claimants seem to base their argument that the Respondent promised that the Income Tax Exemption "would

412 Reply, paras 307, 795; T/1/48-49.

413 Reply, para 791-794.

414 Rejoinder, para 454.

415 Counter-Memorial, para 550.

416 Rejoinder, para 455.

417 Rejoinder, para 457.

418 Rejoinder, para 458.

419 Rejoinder, para 460.

420 Rejoinder, paras 461-462.

forever be available to [the] Claimants".[421] According to the Respondent, "the 2003 Explanatory Report does not have the force of law and is not a source of legal rights."[422] In addition, the Respondent notes that "the language in the 2003 Explanatory Report does not look anything like the type of language that States typically use when entering into a stabilization arrangement."[423]

322. The Respondent provides that the ECT does not create such a stabilization despite of its Article 10, which provides that "Each Contracting Party shall […] encourage and create stable conditions".[424] In the Respondent's view, this does not purport to stabilize a legal framework for the duration of investment.[425] The Respondent also notes that the BIT does not contain such a language.[426]

323. The Respondent further notes that Article 19(d) of the Act on Income Tax does not contain a "promise" of stabilization, but rather that there would be an exemption from corporate income tax for "income from the operation of […] solar installations […] in the calendar year in which they were first commissioned and in the immediately following five year period".[427] In the Respondent's view, the tax exemption's limitation in time to five years is not a guarantee that such exemption could not be abolished for five years or that the temporary benefit could not be subject to legislative amendment or a "grandfathering" rule for existing projects.[428]

324. The Respondent alleges that a stabilization clause generates an international obligation, despite that it is embodied in domestic legislation.[429] For instance, legislative acts adopted by Nigeria and Timor-Leste contain stabilization clauses, under which an investor may file an international arbitration if the government has violated the stabilization assurance.[430]

325. The Respondent points to the *Charanne v. Spain* award which addressed a similar issue to that

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421 Counter-Memorial, para 549-50.

422 Counter-Memorial, para 551.

423 Counter-Memorial, para 553.

424 T/4/787-788; ECT, Article 10.

425 T/4/787-788.

426 T/4/788-789.

427 Respondent's Rejoinder, para 472 citing R-61, Act 586/1992 Coll., on Income Tax (Excerpts), p. 1, Section 19(d) (as effective from January 1, 2014 to December 31, 2010).

428 Respondent's Rejoinder, paras 472-3 citing Crawford, *Treaty and Contract*, p. 369.

429 T/4/788-789.

430 T/4/788-789; Nigerian LNG (Fiscal Incentives, Guarantees and Assurances) Act of 1990 (as amended in 1993), 1993; Law No. 4/2003 on the Petroleum Development of Timor Sea (Tax Stability), 2003.

arising in this case, namely, the issue of whether governmental statements issued in connection with the regulatory framework could support a stabilization guarantee.[431] Noting that the *Charanne* tribunal "concluded that there was no evidence at all […] of any stabilization guarantee," the Respondent submits that in the present case, where the Claimants cite only an explanatory report to a preliminary draft of legislation, there is even less basis for the allegation of a "guarantee of stabilization" as to the tax exemption.[432]

326. According to the Respondent, Section 6 of the Act on Promotion was only meant to provide a 15-year simple payback, i.e., "full return of capital, but without any element of profit".[433] Nevertheless, in order to attract investors, the ERO decided in its Technical Regulation to provide them with "an adequate return on invested capital", which was later set as 7% WACC.[434] In the Respondent's view, this 7% WACC should be considered as a reasonable return rate, [435] and as Mr Fiřt testified, well known to public.[436] The Respondent points out that Dr [redacted] Claimants' expert, also accepts that profits above WACC is theoretically "supernormal".[437] Noting that the 15-year simple payback and the 7% WACC "w[ere] not legislatively guaranteed" without a stabilization arrangement, the Respondent submits that in any event the amendment measures have not affected these parameters.[438] This being the case, the Respondent submits that the Claimants' investment "has not suffered any adverse effect that is actionable under the ECT or the BIT" due to the Solar Levy.[439]

327. The Respondent points out that the Solar Levy has not changed the amounts of FiT and "affected the Claimants' after-tax profits".[440] Accordingly, what the Claimants claim in this arbitration is

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431 Counter-Memorial, para 554; *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain* (Mourre, Tawil, von Wobeser), SCC Case No 062/2012 (Final Award and Dissenting Opinion, 21 January 2016).

432 Counter-Memorial, para 554; *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain* (Mourre, Tawil, von Wobeser), SCC Case No 062/2012 (Final Award and Dissenting Opinion, January 21,2016), para 490.

433 Counter-Memorial, para 37.

434 Counter-Memorial, para 38; R-6, The Technical Regulation, Section 4(1), November 30, 2005, Section 4(1)(a).

435 T/4/756.

436 T/1/254-256; T/4/753.

437 T/3/487; T/4/757.

438 Counter-Memorial, para 535.

439 Counter-Memorial, para 535.

440 Counter-Memorial, paras 534-535.

not a promise of stable FiT but a promise of profitability.[441] However, the Incentive Regime did not contain any guarantee of such profitability.[442]

328. The Respondent contends that, referring to *Arif v. Moldova*, a legitimate expectations claim "must proceed from the exact identification of the origin of the expectation alleged, so that its scope can be formulated with precision".[443] Therefore, legitimate expectations derived from legislation must be strictly based on provisions in the legislation in question.[444] However, the original Act on Promotion did not contain any provision that FiTs would not be subject to taxation measures such as the Solar Levy.[445]

329. The Respondent contends that it had never promoted solar investments in order to achieve the 8% EU target.[446] The ERO's report of November 2009, on which the Claimants rely, merely listed solar power as one of several RES sources for the achievement.[447] Rather, the Report described the rapid increase in solar installations as "significant problem" and "disadvantaging other [] RES sources and adversely affecting consumers".[448]

330. According to the Respondent, "there is certainly no evidence that the Claimants 'relied' on the 2003 Explanatory Report or any other document, statement, or communication by the Czech Republic relating to [the tax exemption]."[449] To support this, the Respondent notes that "the Claimants effectively admit that [the Income Tax Exemption] was not a determining factor in the decision to invest [by asserting that] 'the purpose of the Incentive Regime would be frustrated if investors could rely only on the FiT support and not on the guarantees already in place and set out in the Act on Income Tax, which were evidently not sufficient by themselves to attract investments in the Czech Solar business.'"[450] The Respondent asserts that conclusive effect

441 Counter-Memorial, para 535.

442 Counter-Memorial, para 535.

443 Respondent's Rejoinder, para 476; *Franck Charles Arif v. Moldova* (Cremades, Hanotiau, Knieper), ICSID Case No. ARB/11/23 (Award, April 8, 2013), para 535.

444 Rejoinder, para 476.

445 Rejoinder, para 476.

446 T/4/763-764.

447 T/4/763-764.

448 T/4/764; C-203, "Report on the Fulfilment of the Indicative Target for Electricity Production from Renewable Energy Sources for 2008" of November 2009, prepared by the Ministry of Industry and Trade, p. 17.

449 Counter-Memorial, para 564.

450 Counter-Memorial, para 565.

should be given to the fact that "the Claimants actually were aware that Czech taxation law might change."[451]

331. The Respondent avers that the Claimants knew, or should have known, that the RES regime was based on the principle of minimum cost and reasonable (but not excessive) return, as defined by WACC and required under EU State aid law.[452] Furthermore, the Claimants were "almost certainly aware that the market they were entering was a bubble and that the FiT regime for solar installations was considered by the Czech authorities to be out of balance." [453]

332. The Respondent alleges that the Claimants' reliance on the assurances was unreasonable.

333. The Respondent contends that the Claimants knew or should have known that Czech RES support scheme was structured "based on the principle of minimum cost and reasonable (but not excessive) return, as defined by the WACC" because the Czech RES market was a regulated market.[454] Accordingly, the Claimants' reliance on the alleged promises by which investors would have received more than the WACC was not reasonable.[455] This is supported by the decisions in *AES v. Hungary* and *Electrabel v. Hungary*, in which the tribunals affirmed Hungary's measures that reduced the tariff rates to the WACC level.[456]

334. The Respondent also alleges that the Claimants should have expected that "where the government expressly warn[ed] that returns [of the photovoltaic producers were] contrary to the intent of existing law, […] some claw-back of such excessive profits [would be] possible."[457] In late 2009, the ERO already expressed that the 2010 FiT would provide excessive returns to photovoltaic producers.[458] The Respondent finds support for this in a Master's thesis at the London School of Economics, which provides that "[i]nvestors should anticipate that overgenerous FiTs at public

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451 Counter-Memorial, para 566.

452 Respondent's Rejoinder, para 477.

453 Respondent's Rejoinder, para 478.

454 Rejoinder, para 477.

455 Rejoinder, para 477.

456 Rejoinder, para 482; *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, September 23, 2010, paras 10.3.20, 10.3.31, 10.3.44; *Electrabel S.A. v. Republic of Hungary* (Kaufmann-Kohler, Stern, Veeder), ICSID Case No. ARB/07/19, Award, November 25, 2015, paras 8.33-8.34.

457 T/1/132-133; Respondent's opening statement, Slide 45.

458 T/4/765; R-156, "Legislative environment and the promotion of the electricity produced from photovoltaic power plants in 2009", ERO Presentation, October 15, 2009.

expense could well result in 'retroactive' adjustments to support regime."[459]

335. The Respondent contends that it did not provide the alleged reassurances that FiTs would not be repealed in relation to plants commissioned by the end of 2010. According to the Respondent, the fact that the abolition of the 5% Break-Out Rule was once postponed from 2009 to 2010 cannot be considered as a reassurance from the Czech Republic that the upcoming modification to the Incentive Scheme would not affect plants commissioned by the end of 2010.[460] The Respondent submits that the 1-year postponement was meant to avoid damaging ongoing projects at that time, i.e., September 2009, and that it did not purport to protect new projects starting after that moment.[461]

336. Similarly, the fact that abolishment of 5% Break-Out Rule only affected plants commissioned as of March 2011 cannot be seen as such a reassurance.[462] The Respondent provides that the adoption of less drastic measures "cannot be understood as a promise that more drastic measures would not be required if the situation deteriorated further." [463] The Solar Levy was installed in such a context that solar installations were unexpectedly increased after the mid of 2010.[464]

337. The Respondent also contends that the moratorium period cannot be considered as a reassurance.[465] Although the moratorium period had a particular scope, this did not mean that no other measures would be introduced.[466] Rather, in the Respondent's view, the moratorium conveyed a clear message that the government did not want further photovoltaic installations.[467]

338. The Respondent further contends that the 2010 Action Plan did not provide the message that the FiT level would be stable for 20 years.[468] Although the Plan simply summarized the existing framework, it did not give a promise that such a framework would remain unchanged.[469] Indeed, an article published in September 2010 stated that the 2010 Action Plan "would basically

459 T/1/133; Respondent's opening statement, Slide 46.

460 T/1/132.

461 T/1/132; Respondent's opening statement, Slide 45.

462 T/1/132; Respondent's opening statement, Slide 45.

463 T/1/132; Respondent's opening statement, Slide 45.

464 T/1/132; Respondent's opening statement, Slide 45.

465 T/4/765-766.

466 T/4/766.

467 T/4/766.

468 T/4/766-767.

469 T/4/766.

exterminate the development of solar energy".[470] In this vein, the Respondent alleges that no reassurance had been given especially after July 2010.[471] This is when the Nečas government was established and the Prime Minister stated that the government was considering to introduce a solar tax.[472]

339. The Respondent also alleges that Act No. 330/2010, which abolished all of the photovoltaic support for large plants as of March 1, 2011, was not a reassurance.[473] While the explanatory report on the Act provided that the plants commissioned before March 2011 would enjoy the existing conditions, it did not mean that other changes would not apply to these plants.[474] The Respondent describes that Act as having been originally planned to be part of single legislation to introduce State budgetary support for RES scheme and later separated and became an independent Act.[475] Accordingly, the introduction of the Act was not a sudden policy change of the Respondent.[476]

340. The Respondent reacted to the Claimants' assertion that it could have taken other less harmful measures.[477] According to the Respondent, the issue in the present arbitration should be whether the amendment measures constitute violations of the treaty standards based on the circumstances when they were introduced, instead of whether alternative methods were available.[478] The Respondent observes that in any event the Claimants failed to demonstrate the existence of such alternatives.[479] The Respondent did not abolish the 5% Break-Out Rule as of 2010, because it purported to minimize the impact on existing investors.[480] The Respondent did not tax on other sectors because they had not received excessive profits from the RES support.[481] The moratorium period could not have been introduced earlier than February 2010, because it would have been

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470 T/4/767; R-162, "Solar business will slow down, yet the price of electricity will soar," Mlada Fronta Dnes, September 16, 2010.

471 T/4/768.

472 T/4/767-768.

473 T/4/768.

474 T/4/768-769.

475 T/4/769.

476 T/4/769-770.

477 T/4/772.

478 T/4/772.

479 T/4/772.

480 T/4/773; Respondent's closing statement, Slide 15.

481 T/4/773-774.

illegal under Czech and EU law.[482]

341. The Respondent argues that the investor that completes an investment *after* a measure is announced cannot claim that at the time of the investment, it had legitimate expectations that such a measure would not be adopted.[483] In the present case, however, the power purchase agreements of Úsilné, Mozolov, and Osečná operations were signed on [redacted], and [redacted], all of which were even after the adoption of the amendment measures.[484] Furthermore, the Respondent rejects the Claimants' characterization that they had a "contractual" relationship under which the Respondent provided a promise of stability as a bargain, stating that the Claimants did not incur any legal obligation to make investment in the Czech Republic.[485] It is the Respondent's view that the FET and FPS claims fail for these reasons.[486]

342. The Respondent contends that Dr Göde made his investment decision without familiarizing himself with the Czech photovoltaic legal framework, pointing out that during the hearing he could not remember whether he had reviewed the Technical Regulation.[487]

343. The Respondent, referring to *AES v. Hungary* and *Electrabel v. Hungary*, contends that a violation of the non-impairment standard "requires the impairment caused by the discriminatory or unreasonable measure to be significant"[488] a high bar that, according to the Respondent, "cannot be met by the mere imposition of a tax, or the simple denial of a tax exemption."[489]

344. The Respondent submits that, in the present case, the Claimants have not demonstrated any effect or impact that rises to the level of "impairment" citing *Perenco* for support. The Respondent

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482 T/2/283; T/4/753; T/4/775.

483 Rejoinder, para 484; *Ulysseas, Inc. v. Ecuador* (Bernardini, Pryles, Stern), UNCITRAL, Final Award, June 12, 2012, para 252.

484 Rejoinder, para 485, note 998.

485 Rejoinder, para 486.

486 Rejoinder, para 474.

487 T/4/752.

488 Counter-Memorial, para 572; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, September 23, 2010, para 10.3.3; *Electrabel S.A. v. Hungary* (Kaufmann-Kohler, Stern, Veeder), ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, para 7.152.

489 Respondent's Rejoinder, para 495; *Occidental v. Ecuador* (Orrego Vicuña, Brower, Barrera Sweeney), LCIA Final Award, July 1, 2004, paras 2-3, 161; *Perenco v. Ecuador* (Tomka, Kaplan, Thomas), ICSID Case No. ASRB08/6, Decision on Remaining Issues of Jurisdiction and Liability, September 12, 2014, paras 596-99.

notes that, as in *Perenco*, the Claimants remain free to use, and have in fact used, the so-called "investments" to generate substantial revenues.[490] In fact, the Claimants' investment "continues to earn returns that are above the benchmark of 'adequate return' established under the Act on Promotion, and Claimants have failed to demonstrate that such returns are inadequate for a regulated investment such as theirs".[491] The fact that the Claimants may have desired greater profits than they have obtained does not in and of itself demonstrate "impairment".[492] The Respondent submits that "investment treaties do not guarantee that every business projection will be met" for "a State cannot be held liable for every single measure that might adversely affect an investment's value".[493]

345. Additionally, the Respondent argues that even if the Claimants could demonstrate "impairment", they would have to also prove that such impairment "relates to the management, maintenance, use, enjoyment, or disposal of the purported investments".[494] According to the Respondent, this follows from both the plain text of the relevant ECT and BIT provisions as well as the interpretative principles of *effet utile* and *expressio unius est exclusio alterius*.[495] The Respondent notes that the Claimants do not attempt to argue that the amendment measures impaired any of these activities.[496] The Respondent submits that the Claimants' contention that as a result of these measures, their purported investments suffered "negative effects" is not sufficient.[497] Neither does the Respondent find convincing the Claimants' argument that the measures reduced the solar plants' respective rates of return as such reduction has nothing to do with the investment's management, maintenance, use, enjoyment, or disposal.[498]

346. The Respondent submits that a host State's policy is rational "if it had been adopted 'following a logical (good sense) explanation and with the aim of addressing a public interest matter'" as

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490 Rejoinder, para 496.

491 Rejoinder, para 496.

492 Rejoinder, para 496.

493 Rejoinder, para 496.

494 Rejoinder, para 497.

495 Respondent's Rejoinder, para 497 citing *Perenco v. Ecuador* (Tomka, Kaplan, Thomas), ICSID Case No. ASRB08/6, Decision on Remaining Issues of Jurisdiction and Liability, September 12, 2014, para 596; RLA-161, K. J. Vandevelde, *Bilateral Investment Treaties* (Oxford University Press, 2010) p. 215; ECT, Art. 10(1); R-204, UNTS Translation of the BIT, Art. 2(2).

496 Respondent's Rejoinder, para 498.

497 Respondent's Rejoinder, para 498.

498 Respondent's Rejoinder, para 498.

the *AES* tribunal stated.[499]

347. The Respondent notes that "tribunals have been reluctant to question a State's 'discretionary exercise of a sovereign power' or to find a BIT violation simply because of a flaw in a given law or a shortcoming in its implementation."[500] In the Respondent's words, "tribunals have found a wide range of policy objectives to be 'rational'.[501]

348. In the present case, the Respondent maintains that its "objectives of reducing excessive profits, balancing the budget, and sheltering consumers from excessive electricity price rises are eminently rational".[502]

349. The Respondent rejects the Claimants' assertion as to the "rationality" requirement that "[i]t is […] incumbent upon [the Respondent] to prove that the maintenance of the Incentive Regime, and the allegedly attendant high electricity prices, would have entailed the catastrophic consequences for the Czech economy that are invoked, in terms of layoffs, plant shut downs and dramatic drops in the tax revenues."[503] The Claimants' position would require the Respondent to "prove that near-calamitous consequences would have occurred but for the State's intervention."[504] According to the Respondent, "tribunals have found policy objectives to be 'rational' without considering whether the circumstances meet a certain threshold of risk to the State, or of overall gravity, in the absence of measures to address such policies."[505]

350. The Respondent contends that the amendment measures were reasonable.

351. Referring to the *AES* award, the Respondent submits that "if there is 'an appropriate correlation

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499 Rejoinder, para 506; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, September 23, 2010, para 10.3.8.

500 Counter-Memorial, para 576; *S.D. Myers Inc. v. Canada* (Hunter, Schwartz, Chiasson), UNCITRAL, Partial Award, November 13, 2000, para 261; *Electrabel S.A. v. Hungary* (Kaufmann-Kohler, Stern, Veeder), ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, para 8. 35.

501 Counter-Memorial, para 576; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, September 23, 2010, para 10.3.31; *Ioan Micula, Viorel Micula and others v. Romania* (Lévy, Alexandrov, Abi-Saab), ICSID Case No. ARB/05/20, Award, December 11, 2013, para 825; *Paushok and others v. Mongolia* (Lalonde, Grigera Naón, Stern), UNCITRAL, Award on Jurisdiction and Liability, April 28, 2011, paras 319-21.

502 Respondent's Rejoinder, para 510.

503 Counter-Memorial, para 587; Memorial, para 506.

504 Counter-Memorial, para 587.

505 Counter-Memorial, para 588; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, September 23, 2010, paras 10.3.31., 10. 3. 34.

between the state's public policy objective and the measure adopted to achieve it'", "a State measure is deemed 'reasonable'".[506] The burden "is on the Claimants to prove every element of its claim that the Respondent has acted 'unreasonably' in violation of its non-impairment obligation."[507] The Respondent adds that "there is 'a presumption of validity in favour of legislative measures adopted by a State'", relying on the *El Paso* award.[508]

352. In particular, with regard to a tax or fiscal measure at issue, the Respondent takes the view that "several tribunals have held that a State's imposition of a tax or other fiscal measure for the purpose of regulating windfall profits is not 'unreasonable' under the non-impairment clause of a BIT", referring to *Paushok v. Mongolia* and *AES v. Hungary*.[509]

353. The Respondent submits that the Claimants' approach to the "reasonableness" element of the non-impairment standard distorts the "reasonableness" test and its second prong of proportionality.[510] The Respondent maintains that "tribunals are concerned not with the precise magnitude of harm to the investor vis-à-vis the magnitude of benefit to the state, but rather with whether the state measure is appropriate and justifiable in light of the public policy interest being pursued".[511]

354. In relation to the Claimants' contention that "a state measure is only reasonable if, in addition to pursuing a rational policy, its adverse effects on foreign investments are limited to what is strictly necessary to achieve the public interest […]", the Respondent states that the Claimants distorted the test as a strict scrutiny test and newly invented the phrase "strictly necessary".[512] The Respondent finds support for this in the *AES* and *Micula* decisions, which only required "'an

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506 Counter-Memorial, para 577; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, September 23, 2010, para 10.3.9.

507 Counter-Memorial, para 578.

508 Counter-Memorial, para 578; *El Paso Energy International Company v. Argentine Republic* (Caflisch, Bernardini, Stern), ICSID Case No. ARB/03/15, Award, October 31, 2011, para 290.

509 Counter-Memorial, paras 579-81; *Paushok and others v. Mongolia* (Lalonde, Grigera Naón, Stern), UNCITRAL, Award on Jurisdiction and Liability, April 28, 2011, paras 321; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, September 23, 2010, para 10.3.34.

510 Counter-Memorial, paras 582-583. Respondent's Rejoinder, para 511.

511 Counter-Memorial, paras 583-584; *Ioan Micula, Viorel Micula and others v. Romania* (Lévy, Alexandrov, Abi-Saab), ICSID Case No. ARB/05/20, Award, December 11, 2013, para 525; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, September 23, 2010, paras 10.3.9.-13.

512 Counter-Memorial, paras 585-6; Memorial, para 502.

appropriate correlation' between the state's public policy objective and the measure adopted to achieve it" for the host States' measures to be considered as reasonable.[513]

355. The Respondent asserts that it "acted reasonably at all times […] by imposing appropriate and proportional measures to correct the disequilibrium in the RES support regime" in response to "an unforeseen influx of investment in the photovoltaic industry [and] "an unforeseen drop in solar panel costs."[514] According to the Respondent, in response to the unprecedented rise in PV capacity and generation and the resulting increase in the RES subsidies and the final electricity price, "it was entirely rational for the Czech Republic to craft measures aimed at correcting the system and easing the burden on consumers."[515] In addition, the Respondent submits that "the Czech Republic also acted reasonably to rectify the good-faith mistake that had been made in the mechanism established to calibrate the RES subsidies."[516]

356. The Respondent contends that the reasonableness and proportionality of the measures in question was confirmed by the Czech courts after careful scrutiny.[517]

357. The Respondent contends that it "carefully and selectively recalibrated the RES support system by targeting only the sector that was garnering a disproportionate percentage of the RES subsidy, and, within that sector, only those producers that were enjoying the greatest amount of excessive profits."[518] The Respondent adds that "this approach was not only eminently reasonable, but also consistent with the Czech Republic's binding obligations under EU state aid law to ensure that RES subsidies do not provide the beneficiaries with more than a 'normal return on capital'".[519]

358. The Respondent emphasizes that the amendment measures only have decreased the Claimants' after-tax returns by [redacted]%, i.e., [redacted]% to [redacted]%.[520] Accordingly, the Claimants' allegation that the amendment measures have deprived the fundamental guarantee of the Incentive Regime is

513 Counter-Memorial, para 586; *Ioan Micula, Viorel Micula and others v. Romania* (Lévy, Alexandrov, Abi-Saab), ICSID Case No. ARB/05/20, Award, December 11, 2013, para 525; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (von Wobeser, Stern, Rowley), ICSID Case No. ARB/07/22, Award, September 23, 2010, paras 10.3.9.

514 Counter-Memorial, para 591.

515 Counter-Memorial, paras 592-593.

516 Counter-Memorial, para 593.

517 Counter-Memorial, para 594; R-38, Decision of the Constitutional Court of the Czech Republic, May 15, 2012, Ref. No. Pl. ÚS 17/11, para 72.

518 Counter-Memorial, para 595.

519 Counter-Memorial, para 595.

520 T/1/141.

without merit.[521]

359. The Respondent addresses the Claimants' other arguments as to the reasonableness of the amendment measures as follows.[522] First, the Respondent did not withdraw the essential features of the Incentive Regime, because it continues to provide the FiT for the lifetime of the plants.[523] The introduction of the Solar Levy was meant to restore a direct relationship between investments and expected return, which should have been embedded from the beginning as an essential feature of the regime.[524] Second, the Respondent rejects the Claimants' theory that the Czech Republic's repeal of the "consideration" to the investors provided a basis of the unreasonableness.[525] Such a theory uplifts every contractual breach of a host State to a treaty violation.[526] Third, the solar boom was not caused by the Respondent's mismanagement, but by investors' behaviour of rushing into the photovoltaic market toward the end of 2010.[527] Even if there had been a better solution, a State is not liable only because "circumstances develop in a less-than-ideal way."[528] Article 25.2(b) of the ILC Draft Articles, which the Claimants cite, is irrelevant to the present case, since the Respondent does not plead a defence of necessity.[529] Fourth, the amendment measures were not unprecedented bad practice.[530] Rather, the measures were comparable to those taken in other EU Member States.[531] In any event, whether a host State's measures are novel or whether there was a better solution is irrelevant to the unreasonableness analysis.[532] Fifth, the Respondent asserts that it addressed the solar boom in a speedy manner.[533] In any event, measures cannot be unreasonable just because they were introduced quickly.[534]

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521 T/1/141.

522 Rejoinder, para 515.

523 Rejoinder, para 516.

524 Rejoinder, para 516.

525 Rejoinder, para 517.

526 Rejoinder, para 517.

527 Rejoinder, para 520.

528 Rejoinder, para 520.

529 Rejoinder, paras 518-519.

530 Rejoinder, para 521.

531 Rejoinder, para 522.

532 Rejoinder, paras 522-525.

533 Rejoinder, para 526.

534 Rejoinder, para 527.

3. The Tribunal's analysis

A. The Principles

360. As is usual in these cases, the Parties have adduced many published awards (in this case more than 50) on the interpretation or application of the FET ("fair and equitable treatment") standard, and the FPS ("full protection and security") and non-impairment standards. Most of them are well-known, and, although formulations of the principles differ in detail, it is only necessary to summarize the present state of international law and practice in these general propositions (several of which overlap with each other):

(1) There will be a breach of the FET standard where legal and business stability or the legal framework has been altered in such a way as to frustrate legitimate and reasonable expectations or guarantees of stability.[535]

(2) A claim based on legitimate expectation must proceed from an identification of the origin of the expectation alleged, so that its scope can be formulated with precision.[536]

(3) A claimant must establish that (a) clear and explicit (or implicit)[537] representations were made by or attributable to the state in order to induce the investment, (b) such representations were reasonably relied upon by the Claimants, and (c) these representations were subsequently repudiated by the state.[538]

(4) An expectation may arise from what are construed as specific guarantees in legislation.[539]

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535 *Tecnicas Medioambientales Tecmed SA v United Mexican States* (Grigera Naón, Fernandez Rozas, Verea), May 29, 2003, para 154; *Duke Energy Electroquil Partners v Republic of Ecuador* (Kaufmann-Kohler, Gomez Pinzon, van den Berg), August 18, 2008, para 340; *Bayindir v. Pakistan* (Kaufmann-Kohler, Berman, Böckstiegel), August 27, 2009, para 179; *Electrabel SA v Hungary* (Kaufmann-Kohler, Stern, Veeder), November 30, 2012, para 7.74; *El Paso v Argentina* (Caflisch, Bernardini, Stern), October 31, 2011, para 348; *Philip Morris Brands SÀRL v Uruguay* (Bernardini, Born, Crawford), July 8, 2016, para 320. Some awards suggest that there is a free-standing and independent requirement to provide a stable and predictable legal order: see *Binder v. Czech Republic* (Danelius, Creutzig, Gaillard), July 15, 2011, para 446 (and awards cited there).

536 *Arif v Republic of Moldova* (Cremades, Hanotiau, Knieper), April 8, 2013, para 535.

537 See *Parkerings-Compagniet AS v Lithuania* (Lew, Lalone, Lévy), September 11, 2007, para 331; see Dolzer and Schreuer, *Principles of International Investment Law*, p 134.

538 *Mobil Investments Canada Inc v Canada* (van Houtte, Janow, Sands), May 22, 2012, para 154.

539 *Enron Corp v Argentina* (Orrego Vicuña, van den Berg, Tschanz), May 22, 2007, paras 264-266; *LG&E Energy Corp v Argentina* (de Maekelt, Rezek, van den Berg), October 3, 2006, paras 162-163.

(5) A specific representation may make a difference to the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectation, but is not indispensable to establish a claim based on legitimate expectation which is advanced under the FET standard.[540]

(6) Provisions of general legislation applicable to a plurality of persons or a category of persons, do not create legitimate expectations that there will be no change in the law; and given the State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.[541]

(7) An expectation may be engendered by changes to general legislation, but, at least in the absence of a stabilization clause, they are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change.[542]

(8) The requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.[543]

(9) The host State is not required to elevate the interests of the investor above all other considerations, and the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders.[544]

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540 *Electrabel SA v Hungary* (Kaufmann-Kohler, Stern, Veeder), November 30, 2012, para 7.78; *Electrabel SA v Hungary* (Kaufmann-Kohler, Stern, Veeder), November 25, 2015, para 15.

541 *Philip Morris Brands SÀRL v Uruguay* (Bernardini, Born, Crawford), July 8, 2016, paras 426-427.

542 cf. *Micula v Romania* (Levy, Alexandrov, Abi-Saab), December 11, 2013, para 529: *Philip Morris Brands SÀRL v Uruguay* (Bernardini, Born, Crawford) July 8, 2016, para 423.

543 *Philip Morris Brands SÀRL v Uruguay* (Bernardini, Born, Crawford), July 8, 2016, para 422, citing many earlier awards.

544 *Saluka Investments BV v Czech Republic* (Watts, Fortier, Behrens) March 17, 2006, paras 305-306; *Arif v Republic of Moldova* (Cremades, Hanotiau, Knieper), April 8, 2013, para 537; *Electrabel SA v Hungary*

(10) Except where specific promises or representations are made by the State to the investor, the latter may not rely on an investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.[545]

(11) Protection from arbitrary or unreasonable behaviour is subsumed under the FET standard.[546]

(12) It will also fall within the obligation not to impair investments by "unreasonable … measures" (Article 10(1), ECT) or "arbitrary ... measures (Article 2(2), Czech Republic/Germany BIT).[547]

(13) The investor is entitled to expect that the State will not act in a way which is manifestly inconsistent or unreasonable (i.e. unrelated to some rational policy).[548]

361. In *Micula v Romania* the tribunal said:

> 525. … [F]or a state's conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard to the consequences imposed on investors.
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> …
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> 669. There must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit. The crucial point is whether the state, through statements or conduct, has contributed to the creation of a

(Kaufmann-Kohler, Stern, Veeder), November 25, 2015, para 165.

545 *EDF (Services) Ltd v Romania* (Bernardini, Derains, Rovine), October 8, 2009, para 219, approved in *Philip Morris Brands SÀRL v Uruguay* (Bernardini, Born, Crawford), July 8, 2016, para 424.

546 *Oxus Gold v Uzbekistan* (Tercier, Lalonde, Stern), December 17, 2015, para 323; *Tecmed v Mexico* (Grigera Naón, Fernandez Rozas, Verea), May 29, 2003, para 154; *CMS Gas Transmission Co v Argentina* (Orrego Vicuña, Lalonde, Rezek), May 12, 2005, para 290; *cf Bayindir v. Pakistan* (Kaufmann-Kohler, Berman, Böckstiegel), August 27, 2009, para 178.

547 See *LLC AMTO v Hungary* (Cremades, Runeland, Söderlund), March 26, 2008, para 74.

548 *Saluka Investments BV v Czech Republic* (Watts, Fortier, Behrens), March 17, 2006, para 309, approved in *Philip Morris Brands SÀRL v Uruguay* (Bernardini, Born, Crawford), July 8, 2016, para 322; *Sempra Energy International v Argentina* (Orrego Vicuña, Lalonde, Rico), September 28, 2007, para 318 (not for the tribunal to decide whether measures adopted "might have been good or bad": there must be some important manifest impropriety); *Plama Consortium Ltd v Republic of Bulgaria* (Salans, van den Berg, Veeder), August 27, 2008, para 184; *AES Summit Generation Ltd v Hungary* (von Wobeser, Stern, Rowley), September 23, 2010, para 10.3.7 ("the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy"); *Binder v Czech Republic* (Danelius, Creutzig, Gaillard), July 15, 2011, para 447; *Micula v Romania* (Levy, Alexandrov, Abi-Saab), December 11, 2013, paras 520, 525 ("in the implementation of that policy, the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors"); *Electrabel SA v Hungary* (Kaufmann-Kohler, Stern, Veeder), November 25, 2015, para 155 ("a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved").

> reasonable expectation, in this case, a representation of regulatory stability. It is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance. The element of reasonableness cannot be separated from the promise, assurance or representation, in particular if the promise is not contained in a contract or is otherwise stated explicitly. Whether a state has created a legitimate expectation in an investor is thus a factual assessment which must be undertaken in consideration of all the surrounding circumstances.
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> …
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> 672. The Claimants must also have relied on that expectation when they made their investments. However, it is not necessary for the entire investment to have been predicated solely on such expectation. Businessmen do not invest on the basis of one single consideration, no matter how important. In the Tribunal's view, that expectation must be a determining factor in an investor's decision to invest, or in the manner or magnitude of its investments.

362. The FPS standard reflects the traditional obligation under international law to protect aliens from acts of non-state parties,[549] although a minority of awards treats FET and FPS as the same or similar or related concepts.[550]

363. As will be apparent from the Tribunal's factual analysis and the narrow basis of its holding, the precise ambit of, and the relationship between, the propositions set out above does not call for decision in these proceedings. It will be equally apparent that, contrary to the dissenting opinion,[551] the Tribunal's decision is not based on all of those propositions, but on the ambit of the legitimate expectation on the facts of the case.

B. Promise of stability

364. The first question is whether the Claimants made their investments in 2010 through a legitimate and reasonable expectation based on an explicit or implicit representation by the Respondent that the value of their investment would not be diminished in the way that it was.[552]

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549 *Saluka Investments BV v Czech Republic* (Watts, Fortier, Behrens), March 17, 2006, paras 483-484; *El Paso v. Argentina* (Caflisch, Bernardini, Stern), October 31, 2011, para 522; *Electrabel SA v. Hungary* (Kaufmann-Kohler, Stern, Veeder), November 30, 2012, para 7.83; *Oxus Gold v Uzbekistan* (Tercier, Lalonde, Stern), 17 December 2015, para 353; *Spyridon Roussalis v. Romania* (Giardina, Reisman, Hanotiau), December 7, 2011, para 321. See also; *Binder v. Czech Republic* (Danelius, Creutzig, Gaillard), July 15, 2011, para 477.

550 E.g. *CME Republic BV v Czech Republic* (Kühn, Schwebel, Handl), September 13, 2001, para 613; *Azurix Corp v Argentine Republic* (Sureda, Lalonde, Martins), July 14, 2006, para 408.

551 *See* paragraph 5.

552 For the sake of completeness, the Tribunal should mention, in relation to renewable energy subsidies, that the Stockholm Chamber of Commerce majority awards in *Charanne and Construction Investments v Spain*, January 21, 2016 (Mourre, Santiago Tawil, von Wobeser) and *Isolux Infrastructure Netherlands BV v Spain*, July 12, 2016 (Derains, Santiago Tawil, von Wobeser) (no legitimate expectation); the PCA Award in *Wirtgen v Czech Republic*, October 11, 2017 (Kaufman-Kohler, Born, Tomka) (no legitimate expectation); and the ICSID awards in *Blusun SA v Italy*, December 27, 2016 (Crawford, Alexandrov, Dupuy) (no legitimate expectation) and *Eiser Infrastructure Ltd v Spain*, May 4, 2017 (Crook, Alexandrov,

365. The Tribunal does not accept that it should approach this question simply on the basis of the Claimants' argument[553] that there is a free-standing obligation to provide a stable and predictable investment framework. Nor does it accept the Respondent's suggestion that no legitimate expectations as to stability can arise in the absence of a legislative or contractual stabilization arrangement.[554]

366. The Tribunal accepts that promises or representations to investors may be inferred from domestic legislation in the context of its background, including official statements. It is not essential that the official statements have legal force. There can be no doubt that both the Respondent and the ERO described the incentive regime in terms of a guarantee or promise of stability, and that the Czech Government actively promoted the new regime at home and abroad, and described its main element in terms of a guarantee.

367. The documents which establish this have already been referred to, and it is only necessary to mention that the Czech Ministry of Industry and Trade, when submitting the bill to Parliament, stated that one of the main objectives of the Act on Promotion was to establish a secure, stable and predictable regime; the 2003 Explanatory Report on the Act on Promotion stated that the support system was based "on providing a guarantee to investors";[555] the former Minister of Environment stated that the most important principle of the law was the guarantee of a stable FiT for a 15 year period;[556] the Respondent in the 2005 UN Report described the purpose of Section 6(1)(b)(2) as: "providing guarantees to the investors and owners … that … revenue …will be maintained for a period of 15 years …"[557]; and the ERO described the Act on Promotion as "bringing a guarantee of long-term and stable promotion …" including a "guarantee of revenues … for a period of 15 years."[558]

McLachlan) (legitimate expectation) depend on their facts, and not on any point of principle.

553 Reply, paras 637, 639, 674-677.

554 Counter-Memorial, para 550.

555 C-120, Explanatory Report on the bill of the Act on Promotion of November 12, 2003 (extended version), p. 4.

556 C-32, Newspaper article in "Moderní obec.cz", June 1, 2005.

557 C-72, Fourth National Communication of the Czech Republic on the UN Framework Convention on Climate Change of 2005, p. 35.

558 C-203, "Report on the Fulfilment of the Indicative Target for Electricity Production from Renewable Energy Sources for 2008" of November 2009, prepared by the Ministry of Industry and Trade, p. 22, para 5.1.

C. Knowledge of the issues arising out of the solar boom

368. Nor can there be any doubt that investors such as the Claimants would have been well aware of the political and economic issues which arose from the solar boom, and the history has been set out above.[559]

369. This phase culminated in the press release on August 24, 2009 in which the Ministry stated that it was "planning to change the maximum 5% limit by which the ERO can reduce the purchase price of electricity from renewable energy sources annually" and that it was "trying to ensure that the new act comes into force on 1 January next year,"[560] i.e. in January 2010.

370. As the Claimants accept,[561] rumours of an intention to reduce incentives began in the summer of 2009, and that many officials, including current and former ministers, issued statements about the problems of the solar boom.

371. On June 19, 2009, a major Czech newspaper reported in an article entitled "The state wants to stop solar power plants boom" that "[s]olar energy support is starting to cause problems for the state, which therefore wants to stop the ongoing solar boom. The solar electricity feed-in-tariff has gone in some instances economically beyond the limit ... ERO is therefore seeking ways to reduce the solar energy feed-in tariff dramatically. It is indeed extraordinarily attractive ...". Mr Fiřt was quoted as saying that the FiT had gone economically beyond the limit. The ERO was trying to agree an amendment to the 5% cap on decreases with the Government and members of Parliament, but the change would probably not come in 2009 because it would have to be debated in Parliament, which would not be able to make a decision before autumn, when ERO had to announce the tariffs for 2010.[562]

372. On June 24, 2009, an online article entitled "ERO is preparing purchase price reductions!" reported that: "The Energy Regulatory Office (ERO) is preparing to dramatically reduce the purchase prices of electricity produced from the sun by solar power plants. The reason for this is the exceedingly high price of the sun's energy ... Pursuant to the regulations in effect ERO cannot

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559 See especially C-200, Letter of July 1, 2009 from Mr. Fiřt (Chairman of the ERO) to Mr. Tošovský (Minister of Industry and Trade); R-306, Letter from L. Miko to J. Fiřt (Czech Original and English translation), July 22, 2009; R-135, Letter from V. Tošovský to J. Fiřt (Czech original and English translation), July 29, 2009; R-136, Letter from B. Němeček to R. Portužák (Czech original and English translation), August 10, 2009; R-145, Letter from Mr Portužák to Mr Němeček, August 28, 2009.

560 R-138, "Ministry of Industry and Trade will equalize the support of renewable energy sources," Ministry of Industry and Trade Press Release (www.mpo.cz), August 24, 2009.

561 Reply, para 175.

562 R-363, "State wants to stop solar power plants boom," Mladá fronta.

decrease the RES electricity price by more than 5 % per year. Hence, ERO is seeking a way together with the government to amend the existing regulations."[563]

373. In a presentation of June 25, 2009 the Prague office of the law firm Schönherr referred to "efforts to increase the percentage of decrease".[564]

374. In an interview published on August 13, 2009, Mr Kunz, Chairman of the Board of Energy 21, referred to the 5% limit and said: "if the legislation changes, we must be ready for that. We cannot have too many projects in which we work on the assumption that nothing will change. Nevertheless, I don't think the support will end entirely."[565]

375. On August 25, 2009, following the press release of August 24, 2009, an article under the headline "Ministry of Industry and Trade wants to reduce support of solar power plants," made reference to "Business without any risk and with a state guarantee, and said that purchase prices were guaranteed for 15 years while "thanks to current technologies, in some cases the payback period of the investment is only about five years, the [Ministry of Trade and Industry] says."[566]

376. On September 3, 2009, an article by P Gabal[567] highlighted the Ministry's statement that there were 28 solar power plants in the Czech Republic in 2007, whereas there were 2,230 as at August 1, 2009, and reported that the Ministry wanted to change the 5% limit, ideally from January 1, 2010. Mr Kunz, the Chairman of Energy 21, was again quoted as counselling against abrupt changes in the law because of investments already committed.

377. On November 2, 2009 under the heading "Additional payments for solar energy reached three billion; the state may curtail their boom",[568] it was said "… it seems now that solar power plants will not be so lucrative anymore. The amendment being prepared by the Ministry of Finance and planned to come into force early next year will likely not include the limit which allows a decrease of the purchase price by not more than 5% every year."

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563 R-364, "ERO is preparing purchase price reductions" (greensolar.webnode.cz).

564 R-30, Schönherr v.o.s., "Legal Aspects of Photovoltaic Power Plant Implementation", June 25, 2009.

565 R-143, M. Petříček, "Solar boom is slightly excessive," Hospodářské Noviny, August 13, 2009.

566 R-139, Právo, "Ministry of Industry and Trade wants to reduce support of solar power plants", August 25, 2009.

567 R-140, "Is there any danger of reduction of support for solar power plants", Rádio Praha, September 3, 2009.

568 R-181, "Additional payments for solar energy reached three billion; the state may curtail their boom" (Novinky.cz), November 2, 2009.

378. ERO made presentations dealing with the issue. In an October 2009 presentation, ERO said that "the economic return [for solar investors] at the current prices is in conflict with the guaranteed return pursuant to the law and is almost half [the 15-year period]." ERO drew attention to the technical parameters specified in the Technical Regulation and explained that an appropriate drop in the 2010 FIT to reflect cost developments would amount to 29.5%.[569]

379. As a result of the rise in the number of applications to connect new solar installations, there was a widely announced and reported national moratorium on new applications in February 2010.[570] The Respondent says that the Claimants made three of their five investments in the solar sector when the moratorium was in force.[571] The Claimants respond that they obtained the capacity reservations for their SPVs between [redacted] and [redacted] well before the moratorium came into force.[572] But the Respondent says[573] that the binding statements for the Claimants' 2010 installations had been issued to third parties and assigned to the Claimants in [redacted] and [redacted] [574]

380. It was reported that at a conference entitled Solar Energy in the Czech Republic 2010 "all conference participants agree that it is necessary to limit the speed at which the installed capacity of solar power plants has been growing but they are of fairly different opinions on how to do it." The author said: "I think that in the fall when ERO will determine new electricity purchase prices for the year 2011, a quite stormy discussion will take place around it."[575]

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569 R-156, Legislative environment and the promotion of the electricity produced from photovoltaic power plants in 2009," ERO Presentation, October 15, 2009, p. 14.

570 Press releases: R-225, "CEPS calls for the suspension of connections for new renewable energy sources," AF Power press release, February 10, 2010; R-224, "CEZ Distribuce responds to CEPS's demand," CEZ press release, February 16, 2010; R-230, "Boom development of solar power plants must be balanced with the stability of the grid and distribution network," E.ON press release, February 2010; R-229, "New solar power plants are out of luck, ČEZ and E.ON will no longer connect them to the grid" (Novinky.cz), February 17, 2010.

571 Counter-Memorial, para 103.

572 Reply, para 736, note 857.

573 Rejoinder, para 160.

574 C-81, Úsilné - Binding Statement; C-172, [redacted] C-101, [redacted] C-96, Osečná - Binding Statement; C-183, [redacted] C-184, Simplified share purchase agreement of September 1, 2010 between, *inter alia*, Ms. Denisa Rašková, as seller, and Taurus, as buyer.

575 R-155, K. Murtinger, Solar energy 2010: no solution to the crisis in sight" (nazeleno.cz), March 24, 2010.

D. Dr Göde's evidence

381. Dr Göde's evidence was that he was personally involved in the investment in the Czech Republic. In 2008 he had started contemplating entry into the energy market in the Czech Republic by constructing photovoltaic installations. He first heard from specialized periodical magazines dedicated to photovoltaic energy about the FiT incentive system implemented in the Czech Republic in 2005, which was based on the earlier German experience with FiT.

382. After having made due inquiries, including many personal consultations with the Czech law firm [redacted] in Prague, he acquired extensive knowledge of the legal framework of the incentive system, in particular of the Act on Promotion and of its implementing regulations issued by the ERO. The fundamental incentive of that system was the fixed FiT payable to renewable energy operators for the electricity produced over the expected lifetime of the plant, which, in case of solar installations, was originally fixed by the ERO in 15 years and then – by ERO Regulation 364/2007 – adjusted to 20 years. There was to be a stable FiT, subject only to yearly increase in the range 2-4% based on the inflation index for industrial producers. The Act on Promotion also provided that FiT payable to photovoltaic plants put into operation in any given year could not be more than 5% lower than those granted to photovoltaic plants put into operation in the previous year.

383. He said[576] that he was told by [redacted] that the fundamental innovation and guarantee of the system was the long-term stability of the FiT level, as compared with the previous system. He went through every piece of legislation, but does not remember receiving any written advice, although he spent days discussing the Czech legal framework. During those consultations he was assured that once put into operation a solar panel would receive the FiT set for that year by the ERO for its lifetime, and he was reassured that the plant would benefit from a tax holiday in the year in which it was put into operation and for the following five years. He was never advised of a risk that the Czech Republic could have reneged on its commitments by introducing retroactive measures affecting the guaranteed 6 year tax vacation.

384. In addition[577] he recalled an intensive promotion of the system by Czech officials, and there were many articles in local newspapers and the specialized press explaining the fundamental pillars of the promotion and showing that the new system from 2008 was capable of attracting the RES investments needed by the Czech Republic. He refers to a Report prepared by the Ministry of

576 Second Göde Statement, paras 13-17.

577 First Göde Statement, paras 18-20.

Industry and the ERO[578] which stated that the Act on Promotion provided a "guarantee of long-term and stable promotion" and referred to "the guarantee of revenues per unit of electricity produced."[579] He says that he received clear reassurances from documents produced by the ERO which he studied at the time, including a "Q&A tool" available in German on the ERO's website, which stated that the FiT had to remain stable for the expected lifetime of solar plants.[580] The Q&A has a Question 9: for what period are FiTs "guaranteed"? The table gives 20 years for photovoltaic plants.[581]

385. He was equally aware of the incentives in the Act on Income Tax and relied on them when he took the final decision to invest in the Czech Republic.

386. At the time of his investment, he did not doubt the reliability of the incentive system because he was aware that the Czech Republic needed RES investments to reach the EU targets. In addition, the State Energy Policy of the Czech Republic, prepared by the Ministry of Industry and Trade and approved by the Czech Government in March 2004, confirmed the Czech Republic's favourable attitude to attract RES investments setting a long-term goal of 15-16% of energy production from RES by 2030. The Act on Promotion purported to establish a stable and predictable investment scenario for RES producers.

387. He remembered that the Ministry of Industry and Trade and the ERO engaged in a strong promotion of the Czech RES system with the aim of attracting investments. Between 2006 and 2009, the ERO's website published several presentations on the incentive regime confirming his understanding of it.

388. Based on the estimates of the costs to set up solar plants and on the guarantees under the incentive regime, primarily the FiT one, he made the calculations to assess the profitability of the solar investment in the Czech Republic.

389. Before constructing the second plant, he had extensive practical knowledge of the incentive system. Before making further investments he wanted to obtain (and obtained) a direct confirmation of the reliability of the Czech environment in general and of the FiT regime in particular.

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578 C-203, "Report on the Fulfilment of the Indicative Target for Electricity Production from Renewable Energy Sources for 2008" of November 2009, prepared by the Ministry of Industry and Trade.

579 He does not say that he read it at the time.

580 Annex II to First Göde Statement.

581 There is a similar statement in the 2010 Action Plan relied on in the Reply, para 27: C-73, National Renewable Energy Action Plan of July 2010 published by the Ministry of Industry and Trade, pp 54, 58.

390. Dr Göde was aware of the discussions about the possibility of adjusting the RES support system, and the level of FiT. Those discussions, however, focused exclusively on prospective changes for new investors in the market and, in particular, on the possibility of removing the 5% limit on the ERO's power to set the level of FiT. The final outcome of those discussions was the change in legislation, which was adopted in May 2010 and targeted exclusively investors setting up photovoltaic plants after January 1, 2011. To the best of his knowledge, no one had ever contemplated amendments to the FiT system affecting the level of incentives granted to existing investors.

391. From an investor perspective, therefore, the legislative amendment in May 2010 did not put into question the reliability of the RES incentive system because it introduced modifications for new investors only. It was a simple evolution of the Czech law supporting RES investments.

392. From Dr Göde's point of view, it was perfectly conceivable that the Czech Republic could decide to amend the then existing level of incentive for newcomers in the market. Conversely, it was completely unpredictable to contemplate the adoption by the Czech Republic of measures impacting on investments already made. The forward-looking legislative amendment of May 2010 precisely pointed to the Czech Republic's intention not to alter the system for existing investors, as it was absolutely reasonable to expect.

393. Following the May 2010 amendment, Dr Göde was encouraged to complete the pending projects within the deadline for obtaining subsidies under the original incentive system, i.e. December 31, 2010. Had the Czech Republic spelled out clearly that the original incentives could be modified also for photovoltaic plants connected in 2009 and 2010, he would have abandoned the ongoing projects, seeking simply to recover the expenses already incurred.

394. In cross-examination Dr Göde said that at the time of his investment he read through the entire Act on Promotion, and the Q&A in German on the ERO website (which was the most important for him[582]). He could not recall whether he had read the Technical Regulation.[583]

395. He did not ask any questions of the ERO before making the investment about any aspect of the regime because once there was an Act he was not going to ask for an interpretation.[584] He did not commission any due diligence because he relied on his staff (Mr [redacted], who had been a banker and had been working in the solar industry, and Mr [redacted] who used to work for a Czech

582 T/1/216.

583 T/1/217.

584 T/1/224.

bank) and his lawyer.[585] He was aware that the Czech Republic was experiencing a boom in solar installations; he read articles about the solar boom, and continued after the initial investment was made to monitor the press for developments in the Czech solar industry.[586] He was aware of a press article in June 2009[587] stating that the State wanted to stop the solar boom and that the solar FiT was extraordinarily attractive and that amendments to the legal regime were being contemplated.[588] He had a close look at the developments.[589] They were a bit insecure about investing. But in October-November 2009 there was a declaration made by the ERO or the Czech Government and an interview with the Minister of Industry, in which the 5% reduction would only be done as of January 1, 2011. If it had changed by October 2010 they would not have continued investing.[590] In re-examination he was shown the proposal in November 2009 for amendment. He had read it and it made clear that their investment would be secure until 2011. It gave them comfort that the product line could remain the way it was.[591]

396. He knew that they could only invest in 2010 because in 2011 it was unknown how high the tariffs would be, because the 5% rule would cease to exist. He did everything to complete the 4 plants by the end of 2010.[592]

397. Counsel for the Claimants accepted that Dr Göde did not do specific due diligence.[593]

398. But they say that investors were reassured by the 2010 Action Plan issued in July 2010. In 2009 and 2010 a prudent investor would have had reason to believe that the Czech Government was able and willing to uphold the commitments.[594] They rely especially on (1) Mr Fiřt's open letter of September 8, 2009 to the Chairman of the Economic Committee of the Chamber of Deputies, in which he said: "Investors 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";[595] (2) The Explanatory Report on the November

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585 T/1/226.

586 T/1/227.

587 R-363, "State wants to stop solar power plants boom," Mladá fronta.

588 T/1/227.

589 T/1/229.

590 T/1/229-230.

591 T/1/243-244.

592 T/1/235.

593 T/4/724.

594 [redacted] and [redacted] Report, para 7.49.

595 C-201, Letter from Mr Fiřt (Chairman of the ERO) to Mr Vojíř (Chairman of the Economic Committee of

16, 2009 proposal to amend the Act on Promotion,[596] which emphasized that among the aims of the legislation were that investors might prepare sufficiently in advance for amendment of the conditions for investment; (3) statements made by the Minister for Industry and Trade at a press conference on the same day;[597] (4) the removal in March 2010 of the 5% limit only for connections to the grid from January 1, 2011; (5) the July 2010 Action Plan,[598] which referred to the guarantee of FiT for 20 years; and (6) the proposal in September 2010 to eliminate support for plants commissioned from March 1, 2011.[599] The Claimants rely on the point that the Respondent's expert witness, Mr Jones, accepted in evidence that the documents in 2009 and 2010 (especially the open letter of September 8, 2009; the draft Act of November 16, 2009, and the interview of the same day; and the draft Act of September 15, 2010) did give the impression that the incentives would remain the same for 2010 investments.[600]

E. Overall conclusions

399. As already indicated, the Tribunal accepts the Claimants' case that to establish a legitimate expectation, there is no requirement that there be an express stabilisation provision, and that it is sufficient for the Claimants to establish an express or implied promise giving rise to a legitimate and reasonable expectation of stability.

400. The essential question is whether the combination of (1) the promotion of the Incentive Regime in its early days as a guarantee and (2) the deliberate non-retroactivity of the abolition of the 5% cap by Act 137/2010 for solar plants connected to the grid from 2011 and the abolition of the support by Act 330/2010 from March 1, 2011, gave rise to a legitimate expectation by solar investors in 2010 that there would be no other changes which would affect their investment. For this purpose, for the reasons given above, the imposition of the Solar Levy is to be treated as such a change.

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the Chamber of Deputies), September 8, 2009, p. 2.

596 R-147, Explanatory Report to Draft Act No. 137/2010 Coll., November 16, 2009. See also the July 2010 Action Plan: C-73, National Renewable Energy Action Plan of July 2010 published by the Ministry of Industry and Trade.

597 C-197, Czech Government's press conference of November 16, 2009.

598 C-73, National Renewable Energy Action Plan of July 2010 published by the Ministry of Industry and Trade.

599 R-172, Explanatory Report to Draft Act No. 330/2010 Coll., September 15, 2010.

600 T/3/562-566.

(i) The investments

401. It is important to have in mind the dates when the plants were built and commissioned. The Holýšov plant was commissioned on December 18, 2008. It was not affected by the Solar Levy or the repeal of the tax incentives. But the Claimants maintain a claim in respect of the plant on the basis that the Respondent's measures increased uncertainty in the solar energy investment environment, which indirectly caused a negative impact on the Holýšov SPV's enterprise value.[601]

402. The effective dates for the EPC contracts for the other four plants were: (1) Stříbro plant: [redacted] (commissioned [redacted]); (2) Úsilné plant: [redacted] (commissioned [redacted] (3) Mozolov plant: [redacted] (commissioned [redacted]); (4) Osečná plant: [redacted] (commissioned [redacted].[602]

403. The Respondent says that the claim in respect of the Mozolov plant is not maintainable because its operating licence was obtained in bad faith after submitting falsified reports, and was annulled by the Czech administrative courts.[603]

404. The details are as follows. On October 29, 2008, Antaris AG purchased 100% shares in Holýšov for CZK 200,000. On [redacted] Holýšov executed a contract with [redacted] for the construction of a MW 1.244 solar power plant. On [redacted], Holýšov "entered into a CZK [redacted] agreement with [redacted] for the acquisition of land plots on which the solar plant would be built including, inter alia, the building permit to develop the plant and the right to connection to the grid granted by the grid operator [redacted] On [redacted], [redacted] lent EUR [redacted] to [redacted] for the construction of the solar plant and the purchase of land plots. Consequently, the investment by the Claimants in the [redacted] power plant project was (i) CZK 200,000 (acquisition of Holýšov); and EUR [redacted] (loan to [redacted] .

405. On July 29, 2009, Antaris AG purchased 100% shares in Stříbro for CZK 200,000. [redacted] bought the project rights "for the development of the Stříbro solar plant and, on [redacted] sold the project rights to [redacted] for CZK [redacted] On [redacted] [redacted] executed a contract with [redacted] for the construction of a MW 1.000 solar power plant. On [redacted] [redacted] [redacted] loaned EUR [redacted] to [redacted] for the construction of the solar plant

601 Reply, para 626.

602 Memorial, para 176.

603 Counter-Memorial, paras 521-523. Similar claims in relation to the other plants are no longer maintained: Rejoinder, paras 430-433.

and the acquisition of the project rights. Consequently, the Claimants' investment in the Stříbro power plant was (i) CZK 200,000 (acquisition of Stříbro); and (ii) EUR [redacted] (loan to [redacted] .

406. On February 25, 2010, Antaris AG set up Úsilné with CZK 200,000 in capital. Úsilné acquired the project rights for the development of the Úsilné power plant from [redacted] for EUR [redacted] On [redacted] executed a contract with [redacted] for the construction of a MW 1.242 solar power plant. The Claimants' affiliated companies paid the expenses [redacted] incurred throughout 2010. Consequently, the Claimants' investment in the Úsilné power plant was (i) CZK 200,000 (payment of the registered capital of Úsilné); (ii) EUR [redacted] (construction contract); and (iii) EUR [redacted] (acquisition of project rights and payment of various expenses).

407. On [redacted] Antaris AG set up Mozolov with CZK 200,000 in capital. Mozolov acquired the project rights for the development of the Mozolov power plant from [redacted] for CZK [redacted] On [redacted] executed a contract with [redacted] for the construction of a MW 1.658 solar power plant. On December 30, 2010, [redacted] loaned EUR [redacted] to [redacted] for the construction of the solar plant and the acquisition of the project rights. Consequently, the Claimants' investment in the Mozolov power plant was (i) CZK 200,000 (payment of the registered capital of Mozolov); and (ii) EUR [redacted] (loan to Mozolov).

408. On June 26, 2008, Dr Göde established Taurus with CZK 200,000 in capital. On September 1, 2010, Taurus purchased 100% shares in Osečná for CZK [redacted] In 2010 as a variety of expenses mainly arising out of operating and maintaining solar power plants.

409. On [redacted] executed a contract with [redacted] for the construction of a MW 3.029 solar power plant. On [redacted], [redacted] loaned EUR [redacted] to [redacted] to cover the construction contract and other expenses. Consequently, the Claimants' investment in the Osečná power plant was (i) CZK 200,000 (payment of the registered capital of Osečná); (ii) EUR [redacted] (loan to [redacted]); and (iii) EUR [redacted] (loan to [redacted]).

(ii) Non-retroactivity of the FiT changes

410. The legislation to abolish the 5% cap was originally proposed, as has been seen, in 2009 and was originally intended to apply to solar plants commissioned from 2010, but eventually adopted by Act 137/2010 and applied only to plants commissioned from 2011. The complete abolition was effected by Act 330/2010, and took effect from March 1, 2011.

411. There can be no doubt that from 2009 the Respondent was entitled to take the view that the price

of energy was seriously distorted by the solar boom, and it was clear, or should have been clear, to any informed observer that it was common currency in the trade press and elsewhere that the Respondent wished to take steps to reduce the FiT, and that the original plan announced in the press release of August 24, 2009 was to reduce it from 2010.[604]

412. Subsequently, when the proposals to amend the Act on Promotion were crystallized, the Government made it clear that it was not to be retroactive, so that investors could prepare in advance, and thus the risk of lawsuits against the Government would be minimized.

413. On September 8, 2009 in an open letter to the Chairman of the Economic Committee of the Chamber of Deputies Mr Fiřt proposed an amendment to the Act on Promotion to enable the ERO to lower the incentives, subject to "ensuring a reasonable vacatio legis period in the form of an interim provision which shall read: "The Office shall proceed for the first time in accordance with Clause 6, paragraph 4 … when setting the purchase prices for 2011." The proposed amendment pursued the following aim (among others): "Investors 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."[605]

414. On November 16, 2009 the Government put forward a proposal to amend Act 180/2005.[606] The Explanatory Report said, in line with Mr Fiřt's proposal, that the aims of the legislation were as follows:

> - The proposed wording would enable the Office to adjust the prices for solar power to bring them in line with the principles used for other types of renewable resources as of 1 January 2011, which will eliminate the current discrimination against other types of renewable sources.
> - Investors may prepare sufficiently in advance for amendment of the conditions for investment, which should entirely eliminate the risk of potential lawsuits against the Czech Republic related to protection of investments.
> - In the soonest upcoming period (2011), overpayment for solar power from end customers will be limited.
> - After the purchase prices become more realistic, the operators of distribution systems and the operator of the grid will have relevant requirements for investments into the power network. Today's exorbitant requirements are leading to investments of tens of billions of CZK, which have been reflected in regulated prices for end customers.

604 R-138, "Ministry of Industry and Trade will equalize the support of renewable energy sources," Ministry of Industry and Trade Press Release (www.mpo.cz), August 24, 2009.

605 C-201, Letter from Mr Fiřt (Chairman of the ERO) to Mr Vojíř (Chairman of the Economic Committee of the Chamber of Deputies), September 8, 2009, p. 2.

606 R-147, Explanatory Report to Draft Act No. 137/2010 Coll., November 16, 2009.

415. During a press conference on the same day,[607] the Minister of Industry and Trade, Mr Vladimír Tošovský, said that: "The change consists of the ERO having an option to adjust the feed-in tariff so that it would reflect the costs and the required return from 2011, which is important" and "the promotion stays as it is for 2010." He was asked by Czech Television: "You mentioned reduction of the promotion from 2011. Why 2011?", to which he replied:

> It is because some projects are currently under way and the investors or bank have already invested in them. If we did this, it would mean changing the terms and conditions under which they invested in the course of the development, which could pose a threat to their investment. That is why it is 2011.

416. The point that investment in 2010 would not be affected was taken up by specialists. In a German language article of December 16, 2009 entitled "An 'all-clear' for Investors" by members of the Renewable Energy team at the Czech law firm Ueltzhöffer Balada, it was said:

> Investors in the photovoltaic industry can thus largely be given the "all-clear". The proposed new provision changes nothing for facilities that connect to the network before the end of 2010. For those facilities, the prices of 23 November 2009, set by the regulator, will still apply. In subsequent years of operation, the reduction in feed-in tariffs will remain limited to 5 percent as before. There is thus about a year left to complete and connect a project in order to benefit from the already fixed prices.
>
> …
>
> From the point of view of both investors and lawyers, the proposed law sends a positive signal in terms of investment and protection of legitimate expectations. The current tariffs, which are still very high, will not bring investors much in the long term if they are highly controversial and so create a permanent risk of a change in the law. With this bill, the government has finally made a clear statement regarding the future development possibilities for photovoltaics in the Czech Republic.[608]

417. The Respondent now says that the main reason for postponing abolition of the 5% limit until 2011 was to avoid harming projects that were already in progress (but could not be completed in 2009) — not to give licence for even more investors (like the Claimants) to pile in.

418. The Respondent says that solar investors, including the Claimants, took advantage of the non-retroactivity of the change in the Act on Promotion, and used the delay to commission an unexpectedly massive number of new solar installations, with the result that more than half of the solar generation capacity in the Czech Republic today was brought online in the last three months of 2010.[609]

419. Mr Jones' evidence was that "approximately 1,200 MW of capacity was commissioned in the

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607 C-197, Czech Government's press conference of November 16, 2009, p. 2.

608 R-234, L. Klett, P. Chmelíček, "An "all-clear" for investors," Prager Zeitung, December 16, 2009.

609 Second Jones Report, para 7.11.

last three months of 2010 alone."[610] He says that this development could not have been predicted with accuracy before mid-2010: "[T]he fact that most of the installed capacity was commissioned at the very end of 2010 suggests that the ERO did not receive the relevant license applications until relatively late in 2010 and so the Government could not have been certain, even in mid-2010, as to the amount of installed capacity that would be commissioned in 2010. I therefore completely disagree with Claimant's suggestion that it would have been straightforward to calculate the financial impact of the solar boom prior to the end of the year."[611]

(iii) The Solar Levy

420. There is no doubt that the mechanism of a tax was introduced to avoid claims by investors, especially foreign investors. Thus the minutes of the meeting of October 15, 2010 of the Coordination Committee promoted by the Czech Ministry of Industry and Trade sate: "1st Deputy Environmental Minister Ms Bízková stated that 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. … Chairman of ERO Mr J Fiřt declared that the ERO fully supports the legally strong variant, which shall ensure the reduction of the contribution to the PVPPs [photovoltaic power producers]."[612]

421. As already indicated, the point that investment in 2010 would not be affected was taken up by specialists, with the result that in a German language article of December 16, 2009 entitled "An 'all-clear' for Investors"[613] by members of the Renewable Energy team at the Czech law firm Ueltzhöffer Balada, it was said that "there is thus about a year left to complete and connect a project in order to benefit from the already fixed prices."

422. The Government was obviously concerned about the prospect of lawsuits, including claims by foreign investors under investment treaties, as was the Coordination Committee.[614]

423. In his September 8, 2009 open letter to the Chairman of the Economic Committee of the Chamber of Deputies Mr Fiřt said: "Investors 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

610 Second Jones Report, para 7.11.

611 *Ibid.*

612 C-198, Minutes of the third meeting of the Coordination Committee held on October 15, 2010, p. 4-5.

613 R-234, L. Klett, P. Chmelíček, "An "all-clear" for investors," Prager Zeitung, December 16, 2009.

614 R-190, Minutes of the 1st Meeting of the Coordination Committee for the assessment of the impact of support of renewable energy sources on electricity prices, September 23, 2010.

Czech Republic regarding protection of investments."[615] The Government's proposal of November 16, 2009[616] to amend the Act on Promotion said that one of its aims was to eliminate the risk of investor protection litigation.

424. It does not follow that any such claims would have succeeded, but it is clear that fear of them did lead the Government to adopt the device of the Solar Levy.

425. It was clear from mid-2010 that the Government might resort to taxation measures to deal with the solar boom, and statements to that effect by the Prime Minister, Minister of Industry and Trade, and the Minister of Environment were widely reported.

426. On July 23, 2010, the Minister of Environment was quoted in article entitled "The Minister of Environment wants to tax solar power plants" as saying: "The only instrument we have for the existing contracts is the fiscal instrument. I can imagine in these circumstances that some form of taxation could help to make the purchasing prices realistic … This issue must be solved as a matter of urgency, because it is over economic means of this country and its citizens."[617]

427. On July 30, 2010, a newspaper reported under the headline "Solar boom is over" that the speculative sale of solar power plant projects was over, and that there was speculation in the market concerning a 30% reduction in the support and a special tax.[618]

428. On August 27, 2010 the Prime Minister was quoted in an article as saying that "We must suppress the solar business. Also with the help of taxes …" The State would intervene effectively but "primarily has to avoid arbitrations and litigations" but the government would try to reduce the attractiveness of the photovoltaic business: "The range of steps includes also tax considerations. I deem it fundamental to say that we do not want to neglect it." [619]

429. On September 16, 2010, the Minister of Industry and Trade was quoted in an article which began "The government is still obscure on how to restrict solar power plants this year. The fairest idea is to tax them" and saying, after a reference to the option to tax the producers: "If we [were] to tax the contribution, the support represented in the price of electricity will remain the same for

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615 C-201, Letter from Mr Fiřt (Chairman of the ERO) to Mr Vojíř (Chairman of the Economic Committee of the Chamber of Deputies), September 8, 2009, p. 2.

616 R-147, Explanatory Report to Draft Act No. 137/2010 Coll., November 16, 2009.

617 R-147, Explanatory Report to Draft Act No. 137/2010 Coll., November 16, 2009.

618 R-185, T. Zavadilová, "Solar boom is over," E15, July 30, 2010.

619 R-186, "Nečas for HN: We will slow down the process of electricity price increases and maybe even reverse it", iHNed.cz, August 27, 2010.

the consumer."[620]

430. The Tribunal accepts that the Solar Levy was a transparent device to avoid what the Respondent had been advised might cause investor claims. That is clear from the minutes the Coordination Committee.[621] But, in common with the Czech Constitutional Court,[622] and the European Commission's Decision on state aid,[623] the Tribunal does not consider that the modifications to the support scheme and the tax measures were retroactive, and considers that they did not violate the principle of legitimate expectation.

431. The Tribunal's view is that Dr Göde was essentially an opportunistic investor who saw a window of opportunity and who was aware, or should have been aware, that dealing with the solar boom was a fast-moving and controversial political issue.

432. The Tribunal accepts the Respondent's case that there is no evidence of any real due diligence by Dr Göde. The only documentary evidence of advice from [redacted] are some invoices (totalling approximately EUR [redacted] , none of which specifies the nature of legal services provided, and originate from the law firm and lawyer (Ms [redacted] responsible for the Claimants' commercial transactions during the relevant period.

433. He of course knew of, and endeavoured to take advantage of, the fact that the 5% limit had been removed only from 2011. But he was also aware that the Czech Government had been deeply concerned about the effect of the solar boom from 2009 and should have been aware that other legislative changes, especially with regard to tax, were in the air. The Claimants had avoided the February 2010 moratorium by taking assignments of the binding statements in relation to three of their largest projects.

434. The Tribunal accepts the Respondent's case that the market which the Claimants were entering was a bubble and that the Czech Government considered that the FiT regime was out of balance and that would have been obvious to anyone who participated in industry discussions, or paid attention to warnings by specialist professionals, or read the local press.

435. The Tribunal considers that Dr Göde's actions were essentially opportunistic, and that the investment protection regime was never intended to promote and safeguard those who, in the

620 R-162, "Solar boom will cost us dearly", iDes.cz, July 22, 2010.

621 C-198, Minutes of the third meeting of the Coordination Committee held on October 15, 2010, p. 4-5.

622 May 15, 2015.

623 R-366, European Commission's decision in State aid case SA.40171 (2015/NN) – Czech Republic (Promotion of electricity production from renewable energy sources), November 28, 2016, para 135.

words of the Respondent, "pile in" to take advantage of laws which they must know may be in a state of flux caused essentially by investors of that type. In the words of the Respondent, the Claimants had "a speculative hope – as opposed to an internationally-protected expectation."[624]

436. The abolition of the tax exemption is not at the forefront of the Claimants' case, since the material on which the claim of legitimate expectation is based is very thin, and consists of little more than a statement in the Explanatory Report in November 2003 of an early draft of the Act on Promotion that the promotion system was based on maintaining (inter alia) "the tax reliefs to the extent set out in the Acts on Income Tax …".[625] It is true that an expert appointed by the Czech Government, Professor Dr Gerloch gave an opinion[626] that under Czech law the removal of the exemption would be regarded as retrospective and unlawful, but the Czech Constitutional Court subsequently upheld the withdrawal of the tax exemption.[627] In the view of the Tribunal, the Respondent is right to argue that investors did not have a legitimate expectation that the 5-year tax exemption was a guarantee that it could not be subject to legislative amendment within that period.

437. Investors know that the legislative framework may change and evolve in the light of circumstances and of political developments. It is not every change which gives rise to a claim based on breach of legitimate expectation.

438. It is also necessary to mention the Respondent's argument that in any event the Claimants had no expectation of a WACC in excess of 7%. There is a dispute as to the significance of the 7% figure. According to the Respondent, until the end of 2010, the WACC level used by the ERO in calculating the FiTs for the purpose of section 4 of the Technical Regulation was 7% per annum, [628] and it shows that the Claimants could only have expected to achieve a 15-year payback period for capital expenditures and a 7% rate of return.[629]

439. The Claimants accept that the Respondent did respect the 15-year simple payback and the 7% return, but say that this is irrelevant because the fact that the ERO used 7% as an internal method

624 Counter-Memorial, para 5(k).

625 C-120, Explanatory Report on the bill of the Act on Promotion of November 12, 2003 (extended version), p 4.

626 C-222, Professor JUDr. Aleš Gerloch, CSc's Opinion of December 3, 2010.

627 R-38, Decision of the Constitutional Court of the Czech Republic, May 15, 2012, Ref. No. Pl. ÚS 17/11, paras 83–84.

628 Counter-Memorial, para 44; Reply, para 103.

629 Counter-Memorial, para 574.

(or benchmark) for calculating the FiTs cannot be invoked to assess what profits investors were promised and were entitled to receive, and the crucial figures are the levels of FiT set each year.[630] The Respondent accepts that the return level did not operate as a cap on profits, but functioned as the baseline assumption applicable to setting the FiT.[631]

440. The Tribunal is of the view that an informed investor who had undertaken proper diligence would have been aware of the use by the ERO of the 7% benchmark. A presentation by the Prague office of the regional law firm Schönherr entitled "Legal Aspects of Photovoltaic Power Plant Implementation" was aimed at solar investors and explained that the tariffs "reflect typical investment and operating costs of the projects and lifetime of the installations so that the revenues cover the expenditures + bring 7% profit . . ."[632] Press reports in 2009 discussed excessive rates of return for solar installations and cited 7% as the ERO benchmark.[633] But in the light of the Tribunal's main conclusion, it is not necessary to come to a final conclusion on the effect of the Claimants' knowledge that the ERO's policy was to use a 7% WACC.

441. In the view of the Tribunal, the Claimants' complaint of impairment by arbitrary and unreasonable conduct also fails.

442. The Claimants accept that there was an undesired expansion of RES plants in many countries, but they say[634] that the Czech measures were unreasonable and arbitrary and that some EU Member States were able to limit the undesired expansion of RES investments by means of sound regulatory and non-retroactive practices which did not betray the legitimate expectations of RES investors, especially Germany, Portugal, France, Austria, Denmark, The Netherlands, and Slovenia. They argue that the retrospective changes were "regulatory opportunism", consisting in reducing regulated payments after the initial investments are already made. The burden of the incentive regime was not higher than that of similar regimes in other EU Member States. In any event, even if hypothetically the increase in the cost of electricity were viewed as excessive, that increase was easily predictable and was simply the price that the Respondent committed to pay

630 Reply, paras 20, 104.

631 Rejoinder, para 16(c).

632 R-30, Legal Aspects of Photovoltaic Power Plant Implementation, Schönherr v.o.s., The Czech Association of Scientific and Technical Societies, June 25, 2009.

633 R-362, "What is the adequate decrease of photovoltaic electricity purchase prices?" (oze.tzb-info.cz), October 19, 2009, p. 3, 5 ("ERO calculations set the return to 7% with a 15-year payback for all renewable sources (RES)"); R-156, "Legislative environment and the promotion of the electricity produced from photovoltaic power plants in 2009," ERO Presentation, October 15, 2009, p. 15 ("Purchasing prices are calculated with the income of 7% (WACC) for all RES categories, nevertheless, for PVPP the income is more than twofold").

634 Memorial, paras 496 et seq; Reply, paras 259 et seq.

to reach the 8% target fixed by the EU.

443. The Tribunal accepts that the Solar Levy was designed (unnecessarily, in the view of the Tribunal) to disguise abolition of the 5% limit. But it was adopted as part of a package of measures which (1) introduced a State budget subsidy to limit the rise in consumer electricity prices caused, in large part, by the solar boom, and (2) sought to offset this new budget expenditure with new tax revenues. The Solar Levy was specifically targeted at those solar installations that received a FiT which was excessive. The Tribunal accepts the Respondent's case that for purposes of the reasonableness analysis, it does not matter whether a tribunal believes that a particular course of action is "good" or "bad," that a different solution might have been "better," or that a State could have done "more," or that other States took different measures.

444. The Tribunal accepts that the Respondent had the rational objective of reducing excessive profits and sheltering consumers from excessive electricity price rises, and that its actions were not arbitrary or irrational. There was an appropriate correlation between the Respondent's objectives and the measures it took. There is nothing irrational or unreasonable about the imposition of a charge to regulate what the Respondent reasonably regarded as windfall profits and to reduce the impact on consumers, and the measures, which applied only to the most recent installations and therefore the ones able to earn the profits as a result of the decline in PV costs, were not disproportionate.

445. The measures dealt with a pressing problem caused by the late entry of many investors (mainly domestic) seeking to take advantage of an incentive regime which was bound to change. All that the measures did was to reduce the rate of return to a level which the State had originally intended. It is true in this context also that the Respondent resorted to the device of the Solar Levy instead of a change to the 5% limit in the FiT, but in the view of the Tribunal that does not alter the essential fact that the measures were rational and proportionate. The effect on the Claimants was that they would have an investment payback in [redacted] years and a rate of return of between [redacted]% and [redacted]%.[635] On Dr Göde's original calculations, the effect was a reduction in profits from [redacted] euros to [redacted] euros over the life of the investment.[636]

446. Consequently, in the view of the Tribunal, there was neither an impairment of the investment, nor the use of unreasonable or irrational or arbitrary measures.

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635 First Peer Report, para 2.2.2; Second Peer Report, paras 2.2.4, 2.2.8. Mr [redacted] said that he had no basis to dispute the mathematics of Mr Peer's payback period and rate of return assessment: T/3/621. The Respondent described the effect as an average decrease from [redacted]% to [redacted]%: T/1/141-142; T/4/798.

636 First Göde Statement, para 39.

X. Other issues

447. In the light of the Tribunal's conclusions on the merits, it follows that these issues do not arise: (1) whether compliance by the Respondent with an award of the Tribunal would be a state aid; (2) whether illegality barred the claim in relation to the Mozolov plant; (3) whether there was a prima facie case in relation to the Holýšov plant; and (4) the quantum of damages.

448. The claims are therefore dismissed.

XI. Costs

449. The effect of Articles 10(2) and 9(5) of the BIT and Article 40 of the UNCITRAL 1976 Rules is that the costs of arbitration are in principle to be borne by the unsuccessful party, but the Tribunal may apportion costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

450. The Claimants have prevailed on one important issue, namely the ECT tax carve-out objection, but have failed on the merits.

451. The Claimants claimed their costs in the amount of € [redacted] including their share of the fees and expenses of the Tribunal and the PCA.[637]

452. The Respondent claimed its costs of $ [redacted] and in addition its share of the fees and expenses of the Tribunal and the PCA.[638]

453. Accordingly, in very broad terms the Claimants claim $ [redacted] million and the Respondent claims $ [redacted] million.

454. In the light of the Tribunal's conclusion that the Claimants succeeded on the issue of the tax carve-out but failed on the merits, the Claimants' primary submission is that they should be awarded the costs of this arbitration, relating to the Respondent's objections to the jurisdiction, but should not bear any of the Respondent's costs relating to the merits because the Claimants brought *bona fide* claims, while the Respondent, among others, raised the unnecessary EU State aid issue.

455. As regards quantum, the Claimants say that they ran the case with a small legal team (much smaller than the Respondent's team), relied upon expert evidence only where strictly necessary,

637 Claimants' Schedule of Costs, Annexed to the Claimants' Submission on Costs.

638 Respondent's Submission on Costs, para 1.

and, divided essentially all costs with the other eight Claimants with which it sought to bring a single multi-party arbitration. The Claimants say that if the Respondent's legal costs exceed those of the Claimants, such an amount would not be "reasonable", given that the Claimants bore the burden of proof as to most of the issues.

456. The Respondent submits that the costs should be allocated in accordance with the principle that the costs follow the event, and that its costs were reasonable. It should be entitled to its costs even if the Claimants were to prevail on some of the issues, because the Claimants caused an unnecessary aggravation of costs.

457. The Claimants have requested that the Tribunal order the Respondent to bear the costs occasioned by the postponement of the hearing [redacted] [639] The Respondent says that no special order is required because it was an unforeseen event outside the Respondent's control.[640]

458. The Parties deposited with the PCA a total of GBP [redacted] (GBP [redacted] by the Claimant; GBP [redacted] by the Respondent) to cover the costs of arbitration.

459. The fees of Mr Gary Born, the arbitrator appointed by the Claimants, amount to GBP [redacted] His expenses amount to GBP [redacted]. The fees of Judge Peter Tomka, the arbitrator appointed by the Respondent, amount to GBP [redacted] The fees of Lord Collins, the presiding arbitrator, amount to GBP [redacted] His expenses amount to GBP [redacted].

460. Pursuant to the Terms of Appointment and the agreement of the Parties, the International Bureau of the PCA was designated to act as Registry in this arbitration. The PCA's fees for registry services amount to GBP [redacted] Other Tribunal costs, including court reporters, interpreters, travel, bank charges, and all other expenses relating to the arbitration proceedings, amount to GBP [redacted]

461. Based on the above figures, the combined Tribunal costs, comprising the items covered in Article 38 (a), (b) and (c) of the UNCITRAL Arbitration Rules, as enumerated above, are fixed at a total of GBP [redacted]

462. Finally, under Article 38(e), the Tribunal finds the costs claimed by the successful Party, the Respondent, to be reasonable in amount and proportionate to the nature and complexity of the

639 E-mail from the Claimants dated November 11, 2016: "the Claimants would like to receive confirmation from the Tribunal and the Respondent that all non-refundable costs arising from the cancellation of the November hearing will be charged exclusively and entirely to the Respondent."

640 E-mail from the Respondent dated November 14, 2016.

matter.

463. In the exercise of its discretion in the light of Article 40 of the UNCITRAL Rules, the Tribunal takes these matters into account: (1) the Respondent prevailed on the merits; (2) the Claimants succeeded on the issue of the tax carve-out; (3) it is reasonable to make some allowance for the Claimants' costs in relation to the adjournment.

464. In the light of all these considerations, the Tribunal's conclusion on legal and arbitration costs is that the Respondent should be awarded US$ [redacted] in legal costs, and that the Claimants should bear three-quarters of the arbitration costs.

XII. Operative part

465. The Claimants' claims are dismissed.

466. The Claimants shall pay to the Respondent within 28 days of delivery of this award the sum of US$1.75 million and GBP 178,125.50.

467. The arbitration costs are assessed at GBP [redacted], and any balance held by the PCA shall be remitted in equal shares to the Parties in accordance with Article 41(5) of the UNCITRAL Rules.

Place of Arbitration: Geneva, Switzerland

Signed, this 2nd day of May 2018,

Mr Gary Born
Subject to the attached dissenting opinion

Judge Peter Tomka
Subject to the attached declaration

Lord Collins of Mapesbury PCA, FBA
Presiding Arbitrator