AD HOC ARBITRATION UNDER THE 1976 UNCITRAL RULES

PCA CASE NO. 2013-35

- between -

NATLAND INVESTMENT GROUP N.V., CAPAMERA LIMITED (PREVIOUSLY NATLAND GROUP LIMITED), G.I.H.G. LIMITED AND RADIANCE ENERGY HOLDING S.A.R.L

(the "Claimants")

- and -

THE CZECH REPUBLIC

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

FINAL AWARD

The Arbitral Tribunal

Mr John Beechey C.B.E.
Mr J. Christopher Thomas, K.C.
Professor Alfredo Bullard (Presiding Arbitrator)

15 December 2023

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GLOSSARY OF DEFINED TERMS

***Achmea* Judgment**	Decision of the Court of Justice of the European Union dated 6 March 2018 in the case of *Slovak Republic v. Achmea BV*
***Achmea* Objection**	The Respondent's jurisdictional objection based on the *Achmea* Judgment dated 4 March 2021
Act 137/2010	Act amending the Act on RES Promotion to allow a greater than 5% year-on-year drop in the FiT for the most profitable RES sources, effective 1 January 2011
Act 310/2013	Act amending Act 165/2012 and certain other acts, by amending, *inter alia*, the rules on the Solar Levy
Act 402/2010	Act amending the Act on RES Promotion, by introducing the Solar Levy and Government subsidies for partial financing of the RES Regime
Act on Income Tax	Act No. 586/1992 on Income Tax, introduced by the Respondent in 1992 to incentivize investment in its RES sector
Act on RES Promotion	Act No. 180/2005, introduced by the Respondent to stimulate investment in its RES sector
Actual Scenario	The scenario that considers the situation of the Claimants' investments in Energy 21 as it actually was on each valuation date taking into account the effects of the Solar Levy
All Measures Scenario	The scenario in which all of the Measures were implemented, which the experts were asked to consider for the purposes of compiling their Joint Expert Report
Amended RES Regime	The package of amendments made to the legal, regulatory, and tax regime for RES established by the Respondent, including the Solar Levy, which were brought into effect on 1 January 2011
Binding Statements	Statements issued by grid operators upon application by PV investors (if all regulatory requirements are met) for the purpose of reserving PV capacity on the grid
Blando	Blando Investments S.A.
BITs	The three bilateral investment treaties invoked by the Claimants, namely, the Cyprus-Czech Republic BIT, the Luxembourg-Czech Republic BIT, and the Netherlands-Czech Republic BIT
Capamera	Capamera Limited
ČEPS	The Czech transmission operator
CITA	Corporate Income Tax Act of the Netherlands
Claimants	Natland Investment, Natland Group, GIHG, and Radiance
CMS	CMS Cameron McKenna
Commission	European Commission
Counterfactual Scenario	The scenario that considers the situation in which the Claimants' investments in Energy 21 would have been on each valuation date, had the Solar Levy not been introduced

Cyprus-Czech Republic BIT	Agreement between the Czech Republic and the Republic of Cyprus for the Promotion and Reciprocal Protection of Investments, signed on 15 June 2001, entered into force on 25 September 2002
DCF	Discounted cash flow
DCEMF Mezzanine	DCEMF Mezzanine Holdings B.V., a minority shareholder of Energy 21 (not a claimant in this arbitration)
Earn-Out Letters	Two earn-out letters mentioned in an exhibit attached to Mr Edwards' First Expert Report, which were subsequently submitted by the Claimants and placed on the record as factual exhibits C-494 and C-495
EC Decision	European Commission Decision in Case SA.40171 Czech Republic – Promotion of electricity production from renewable energy sources, 28 November 2016
ECJ	European Court of Justice
ECT	The 1994 Energy Charter Treaty, 2080 UNTS 95, signed by Cyprus, Luxembourg, and the Netherlands on 17 December 1994, and by the Czech Republic on 8 June 1995, entered into force on 16 April 1998
Energy 21	Energy 21 a.s.
Energy Act	Act No. 458/2000 on Business Conditions and Public Administration in the Energy Sectors
ERO	The Czech Energy Regulatory Office, responsible for setting the Feed-in-Tariff's level each year
EU	European Union
EU Target	The percentage targets that were set by the EU regarding the proportion of RES-generated energy that the Respondent consumed
E21 Business Model	A Microsoft Excel spreadsheet containing the cash flow forecasts of Energy 21's PV plants from September 2015 onwards
E21 Holding	E21 Holding B.V., a company incorporated in the Netherlands and Radiance's wholly-owned subsidiary
Feraton	Feraton Financial Services B.V.
FiT	The Feed-in Tariff, one of the two Subsidies introduced through the Act on RES Promotion
FMV	Fair market value
FTI	FTI Consulting
Fund	Mid Europa Fund III LP, a company incorporated in the Channel Islands, and the fund holding 100% of Radiance
Funding Agreement	A funding agreement entered into by the members of IPVIC; formally titled "Agreement relating to the arbitration between the members of the IPVIC Consortium and the Czech Republic" of 21 May 2013, with an "Amendment No. 1" to the Agreement of 21 March 2021
General Court	EU General Court

GIHG	G.I.H.G. Limited, a company incorporated in Cyprus, and one of the four Claimants in this arbitration
Green Bonus	The Green Bonus, one of the two Subsidies introduced through the Act on RES Promotion
Income Tax Holiday	One of the two incentives brought about by the Act on Income Tax, which afforded solar plant operators a temporary tax exemption on income gained through the operation of their plants
Investment and Subscription Agreement	An investment and subscription agreement entered into between Radiance, GIHG, Natland Investment, Mr Daniel Kunz, Mr Pavel Maleček, DCEMF Mezzanine and Blando on 11 May 2010
IPVIC	International Photovoltaic Investors Club
IRR	Internal rate of return
LIBOR	London Interbank Offered Rate
Luxembourg-Czech Republic BIT	Agreement between the Belgo-Luxembourg Economic Union and the Czechoslovak Socialist Republic concerning the Reciprocal Promotion and Protection of Investments, signed on 24 April 1989, entered into force on 13 February 1992
Joint Expert Report	A report on various outstanding issues, prepared jointly by the Claimants' expert, Mr Richard Edwards, and the Respondent's expert, Mr Michael Peer, requested by the Tribunal on 31 May 2022 and filed on 15 July 2022
Measures	The measures challenged by the Claimants in this arbitration, primarily the repeal of the Income Tax Holiday, changes to the Original Depreciation Provisions and the introduction of the Solar Levy
MEP	Mid Europa Partners LLP, a buyout investor headquartered in the United Kingdom, and an investment adviser to the Fund
***Micula* Decision**	Decision of the European Commission of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral Award in *Micula v. Romania* of 11 December 2013
MIT	Ministry of Industry and Trade
Moratorium	A moratorium placed on the issuance of new grid connection approvals, devised in response to the solar boom
MW	Megawatt
Natland	A Czech investment group, the investments of which include Claimants Natland Group and Natland Investment, and a number of other companies
Natland B.V.	Natland Investment Group B.V.
Natland Group	Natland Group Limited, a company incorporated in Cyprus, and one of the four Claimants in this arbitration
Natland Investment	Natland Investment Group N.V., a company incorporated in the Netherlands, and one of the four Claimants in this arbitration

Netherlands-Czech Republic BIT	Agreement between the Kingdom of the Netherlands and the Czech and Slovak Federal Socialist Republic concerning the Encouragement and Reciprocal Protection of Investments, signed on 29 April 1991, entered into force on 1 October 1992
New RES Act	Act No. 165/2012 Coll., on promotion of sources of energy and amending certain acts, replacing the Act on RES Promotion
NGL	NGL Business Group Ltd, the name Natland Group assumed on 12 April 2015
No Measures Scenario	The scenario in which none of the Measures was implemented, which the experts were asked to consider for the purposes of compiling their Joint Expert Report
November Bill	A bill drawn up by the Czech Republic's Emergency Coordination Committee on 2 November 2010 in response to the solar boom, featuring the introduction of a solar levy
Original Depreciation Provisions	One of the two incentives brought about by the Act on Income Tax, which gave solar plant operators the right to depreciate for tax purposes particular components of PV plants
OST Due Diligence Report	Due diligence report prepared by OST Energy for Energy 21 in May 2014, containing *inter alia* the electricity generation forecast of Energy 21's PV plants
Other Measures Scenario	The scenario in which the Income Tax Holiday was repealed and the Original Depreciation Provisions modified, but the Solar Levy was not imposed, which the experts were asked to consider for the purposes of compiling their Joint Expert Report
Parties	The Claimants and the Respondent
PCA	Permanent Court of Arbitration
PRIBOR	Prague Interbank Offered Rate
Proposed Application	An outline of the application that the Respondent would make to seek the disclosure of the Funding Agreement, requested by the Tribunal to assist it in its determination of whether to authorize such a disclosure
PV	Photovoltaic
Radiance	Radiance Energy Holding S.à.r.l., a company incorporated in Luxembourg, and one of the four Claimants in this arbitration
RES	Renewable energy sources
RES Regime	The legal, regulatory, and tax regime for RES established by the Respondent, including the Act on RES Promotion and implementing ERO regulations, providing for specified Subsidies for production of electricity from RES
Response	The Respondent's Response Submission on Remaining Issues dated 24 November 2021
Rejoinder	The Respondent's Rejoinder Submission on Remaining Issues dated 20 April 2022

Reply	The Claimants' Reply Submission dated 9 February 2022
SCC	Stockholm Chamber of Commerce
Solar Levy	A levy imposed on the revenue of solar installations, introduced by Act No. 402/2010 Coll. for a period of three years for installations commissioned in 2009 and 2010, and extended, in reduced form, for installations commissioned in 2010 by Act No. 310/2013
SPVs	Special purpose vehicles
Submission	The Claimants' Submission dated 1 September 2021
Subsidies	The two incentive schemes introduced through the Act on RES Promotion, namely the Feed-in-Tariff and the Green Bonus.
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules (1976)
VCLT	Vienna Convention on the Law of Treaties
WACC	Weighted average cost of capital
11 May 2010 Facility Agreement	A facility agreement entered into between Radiance and Energy 21 under which Radiance agreed to provide a loan facility of up to EUR 27,000,000 to Energy 21
11 May 2010 SPA	A sale and purchase agreement entered into between Radiance, GIHG and Natland under which Radiance acquired 59.26% of Energy 21
2010 Transaction	Radiance's first entry into Energy 21, by way of three agreements, the 11 May 2010 Facility Agreement, the 11 May 2010 SPA, and the Investment and Subscription Agreement, dated 11 May 2010
2011 Forecasts	A Microsoft Excel spreadsheet containing the expectations that the management of Energy 21 had, as at 1 January 2011, regarding the performance of its PV plants
2011 Transaction	The transaction of 4 August 2011 by which E21 Holding, a wholly-owned subsidiary of Radiance, purchased a 42.58% share in Energy 21, giving Radiance a 95% interest in Energy 21 overall
2015 Transaction	Radiance's exit from Energy 21, by way of a sale of its shareholding to Uniastra Holding Limited on 22 December 2015
2016 Rejoinder	The Respondent's Rejoinder dated 6 September 2016
5% Limit	A limit built into the Subsidies which prevented the ERO from reducing the amount payable that year by more than 5% of the previous year's figure

I. INTRODUCTION

A. THE PARTIES

1. The Claimants in this arbitration are Natland Investment Group N.V. ("**Natland Investment**"), a company incorporated and having its seat in the Netherlands; Natland Group Limited ("**Natland Group**"), a company incorporated and having its seat in Cyprus; G.I.H.G. Limited ("**GIHG**"), a company incorporated and having its seat in Cyprus; and Radiance Energy Holding S.à.r.l. ("**Radiance**"), a company incorporated and having its seat in Luxembourg (and together with Natland Investment, Natland Group and GIHG, the "**Claimants**"). The Claimants are represented in these proceedings by:

Professor Luca G. Radicati di Brozolo
Mr Michele Sabatini
Dr Flavio Ponzano
Dr Emilio Bettoni
Ms Lucia Pontremoli
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Via Alberto da Giussano, 15
20145 Milan
Italy

Mr Nico Leslie
Fountain Court Chambers
Fountain Court
Temple
London EC4Y 9DH
United Kingdom

2. The Respondent in this arbitration is the Czech Republic. It is represented by:

Ms Martina Matejová
Mr Jaroslav Kudrna
Ministry of Finance of the Czech Republic
Letenská 15
118 10 Praha 1
Czech Republic

Mr Paolo Di Rosa
Mr Dmitri Evseev*
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Czech Republic

3. At an earlier stage of the proceedings, the Respondent was represented by the following counsel: (i) Professor Zachary Douglas, then of Matrix Chambers, up until 1 July 2015; (ii) Mr David Alexander, Mr Stephen P. Anway, and Mr Rostislav Pekař of Squire Patton Boggs up until 17 July 2015; and (iii) Mr Petr Plášil, Ms Markéta Filipová, Ms Marie Talašová, Ms Anna Bilanová, Mr Tomáš Munzar, and Mr Martin Nováček of the Ministry of Finance of the Czech Republic, in addition to the representatives of the Ministry of Finance listed above.

B. THE DISPUTE

4. The Claimants' claims in this arbitration are based on, and these proceedings are commenced pursuant to:

   (a) Article 26 of the 1994 Energy Charter Treaty, which was signed by Cyprus, Luxembourg and the Netherlands on 17 December 1994, and by the Czech Republic on 8 June 1995, and entered into force on 16 April 1998 (the "**ECT**");

   (b) Article 8 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, which was signed on 29 April 1991 and entered into force on 1 October 1992 (the "**Netherlands-Czech Republic BIT**");

   (c) Article 8 of the Agreement between the Czech Republic and the Republic of Cyprus for the Promotion and Reciprocal Protection of Investments, which was signed on 15 June 2001 and entered into force on 25 September 2002 (the "**Cyprus-Czech Republic BIT**"); and

(d) Article 8 of the Agreement between the Belgo-Luxembourg Economic Union and the Czechoslovak Socialist Republic concerning the Reciprocal Promotion and Protection of Investments, which was signed on 24 April 1989 and entered into force on 13 February 1992 (the "**Luxembourg-Czech Republic BIT**", and together with the Netherlands-Czech Republic BIT and the Cyprus-Czech Republic BIT, the "**BITs**").

5. The dispute concerns the Claimants' investments in the photovoltaic (or "**PV**") sector in the Czech Republic. The Claimants' investments were effected through their purchase of shareholdings in, and/or the financing of, Energy 21 a.s. ("**Energy 21**"), a Czech joint stock company, beginning in 2008. As a result of the Claimants' investments in Energy 21, the Claimants indirectly owned eleven special purpose vehicles ("**SPVs**"), each of which has operated at least one solar power plant in the Czech Republic. The Claimants' investments were made subsequent to the establishment by the Czech Republic, beginning in 1992, of a legal, regulatory, and tax regime for renewable energy sources ("**RES**" and the "**RES Regime**"). In the earlier phase of the proceedings, the Claimants argued that the "dismantling" of the RES Regime breached several obligations incumbent on the Czech Republic under the ECT and the BITs and therefore entitled them to compensation in the amount of not less than CZK 2,212 million. The Respondent denied all of the Claimants' allegations, arguing that the Claimants were not entitled to any damages.

6. In light of the Tribunal's findings in the Partial Award dated 20 December 2017, the Claimants, in the current phase of the proceedings, seek compensation for loss suffered as a result of the Respondent's breaches in the amount of not less than CZK 1,769.8 million. The Respondent argues that the Claimants have failed to meet the burden of proving their damages and rejects the Claimants' calculation of damages.

C. THE PARTIAL AWARD

7. On 20 December 2017, the Tribunal issued its Partial Award on issues of jurisdiction and liability, the dispositive part of which provides:

> 508. For the reasons set out above, the Tribunal decides as follows:
>
> (a) The Claimants' claim that the Respondent breached the Energy Charter Treaty by repealing the Income Tax Holiday and by modifying the Original Depreciation Provisions of the Act on Income Tax (Act No. 586/1992) is dismissed for lack of jurisdiction;
>
> (b) GIHG's claim that the Respondent has breached the Cyprus-Czech Republic Bilateral Investment Treaty is dismissed for lack of jurisdiction;

(c) Radiance Energy Holding's claim that the Respondent has breached the Luxembourg-Czech Republic Bilateral Investment Treaty is dismissed for lack of jurisdiction;

(d) The Claimants' claim that the Respondent has breached the fair and equitable treatment standard in Article 10 of the Energy Charter Treaty is granted;

(e) Natland Group's claim that the Respondent has breached the fair and equitable treatment standard in Article 2(2) of the Cyprus-Czech Republic Bilateral Investment Treaty is granted;

(f) Natland Investment's claim that the Respondent has breached the fair and equitable treatment standard in Article 3(1) of the Netherlands-Czech Republic Bilateral Investment Treaty is granted;

(g) The Claimants' claim that the Respondent has breached the full protection and security standard in Article 10 of the Energy Charter Treaty is dismissed;

(h) Natland Group's claim that the Respondent has breached the full protection and security standard in Article 2(2) of the Cyprus-Czech Republic Bilateral Investment Treaty is dismissed;

(i) The Claimants' claim that the Respondent has breached the non-impairment standard in Article 10 of the Energy Charter Treaty is dismissed;

(j) Natland Group's claim that the Respondent has breached the most-favored-nation clause in Article 3 of the Cyprus-Czech Republic Bilateral Investment Treaty is dismissed; and

(k) All other claims, defenses and requests for relief, including claims for compensation and costs, are deferred to a subsequent phase of the arbitration.

8. In the Partial Award, the Tribunal decided to postpone its decision on certain remaining issues to a subsequent phase of the proceedings as follows:

> 503. As set out above in Section VI, the Tribunal has found that, while the Solar Levy does not fall under the Tax Exemption in Article 21(7) of the ECT, the Income Tax Holiday and the Original Depreciation Provisions do. Accordingly, although the Tribunal has jurisdiction under the ECT over claims arising out of the Solar Levy (and indeed has found that the imposition of the Solar Levy constitutes a breach of the Respondent's obligations under the ECT, the Cyprus-Czech Republic BIT and the Netherlands-Czech Republic BIT), it has no jurisdiction under the ECT over any claims arising out of the repeal of the Income Tax Holiday and the modification of the Original Depreciation Provisions. The Tribunal has further found in Section VIII above that the Claimants' claims based on the alleged breach of the fair and equitable treatment standard, insofar as they are based on the Income Tax Holiday and the Original Depreciation Provisions, stand to be dismissed for lack of merit.
>
> 504. However, the Tribunal notes that the Claimants' valuation approach does not attempt to segregate the impact of the Solar Levy from the impact of the repeal of the Income Tax Holiday and the modification of the Original Depreciation Provisions. The Tribunal is therefore not in a position to quantify the Claimants' losses based on the findings it has reached. However, given the factual and legal complexity of this case, involving a variety of jurisdictional and legal issues arising under four different investment treaties, it would be inappropriate for the Tribunal to simply dismiss the Claimants' case for compensation for failure to meet the burden of proving their losses. Anticipating the Tribunal's findings on the many jurisdictional and legal issues arising in this case, and then developing alternative calculations for each scenario, cannot reasonably be expected from either Party.

> 505. Moreover, as set out in Section VIII above, the Tribunal has deferred its decision on whether the fact that a great bulk of the Claimants' total installed photovoltaic electricity generation capacity was installed in 2009 and 2010, when the "solar boom" was already emerging as a legitimate policy issue in the Czech Republic, has any impact on the Claimants' claims, in relation to quantum. The Tribunal is not in a position to make this determination in the absence of a valuation approach which takes into account the Tribunal's determinations on its jurisdiction and on the scope of the Respondent's liability under the applicable investment treaties. As noted above, the relevance of the EU State aid rules and of the Commission's decisions, to the extent not already addressed above, will also be addressed in that context.
>
> 506. In the circumstances, the Tribunal finds it appropriate, in accordance with Article 32(1) of the UNCITRAL Rules, to issue a Partial Award which deals with issues of jurisdiction and liability only, and to postpone its decision on the issues of quantum to a subsequent phase of the proceedings. The Tribunal will revert to the Parties after the issuance of this Partial Award, in order to establish, in consultation with the Parties, a procedural calendar for the second phase of this arbitration.

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

9. The following constitutes an abridged summary of the course of the proceedings. A more detailed account of the procedural history preceding the issuance of the Partial Award may be found within that Award.

10. By Notice of Arbitration dated 8 May 2013, the Claimants commenced arbitration proceedings against the Respondent pursuant to Article 26 of the ECT, Articles 8 of the Netherlands-Czech Republic BIT, the Cyprus-Czech Republic BIT, and the Luxembourg-Czech Republic BIT, and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law Arbitration Rules as revised in 2010.

11. By the Respondent's letter of 9 July 2013 and the Claimants' letter of 22 July 2013, the Parties agreed that the present arbitration shall be governed by the United Nations Commission on International Trade Law Arbitration Rules (1976) (the "**UNCITRAL Rules**"). Pursuant to Article 3(2) of the UNCITRAL Rules, the arbitration proceedings were deemed to have commenced on 15 May 2013, the date on which the Respondent received the Notice of Arbitration.

12. The Claimants appointed Mr Doak Bishop as the first arbitrator. The Respondent appointed Mr J. Christopher Thomas K.C. as the second arbitrator.

13. Pursuant to Article 7(1) of the UNCITRAL Rules, the two co-arbitrators appointed Dr Veijo Heiskanen as the presiding arbitrator of the Tribunal. Dr Heiskanen accepted this appointment on 19 November 2013 and the Tribunal was duly constituted.

14. On 1 August 2014, Mr Bishop advised the Parties that his firm had been engaged in "matters that may involve issues similar to those in this arbitration". Mr Bishop, while noting that he had not been involved in those matters and that they did not involve the Parties, nonetheless resigned as arbitrator in the proceedings "in order to avoid any perception of bias".

15. On 24 September 2014, at the Tribunal's invitation, the Claimants appointed Mr Gary Born as co-arbitrator in these proceedings pursuant to Articles 7(1) and 13(1) of the UNCITRAL Rules to replace Mr Bishop.

B. WRITTEN SUBMISSIONS, DOCUMENT PRODUCTION, HEARING, AND PARTIAL AWARD

16. On 23 January 2014, at the invitation of the Tribunal, the Parties submitted a common draft of Procedural Order No. 1 and a proposed procedural calendar, identifying areas of agreement and disagreement.

17. On 24 January 2014, the Tribunal convened the first procedural meeting with the Parties by telephone conference.

18. By 3 March 2014, the Parties and the Tribunal signed the Terms of Appointment, which recorded, inter alia, that the Permanent Court of Arbitration (the "**PCA**") would act as the Registry and administer the arbitral proceedings.

19. On 14 February 2014, the Tribunal issued Procedural Order No. 1, recording the agreement of the Parties on procedural matters, and where no agreement was reached, setting forth the Tribunal's directions, having heard the Parties and deliberated. Specifically, the Tribunal, *inter alia*, (i) determined Geneva as the place of arbitration; (ii) directed the Claimants to file a Statement of Claim; (iii) directed the Respondent to file its Request for Bifurcation in light of the Respondent's intention to object to the Tribunal's jurisdiction; and (iv) directed the Parties to attempt to reach an agreement with regard to a procedural timetable.

20. Following receipt of further proposals by the Parties, on 7 March 2014, the Tribunal issued Procedural Order No. 2 concerning the timing of the document production.

21. On 24 March 2014, the Claimants submitted a procedural timetable agreed by both Parties, which was confirmed by the Tribunal the following day.

22. On 16 June 2014, the Tribunal issued Procedural Order No. 3, setting out its decision regarding the Parties' outstanding disputed document production requests.

23. On 24 November 2014, the Tribunal issued Procedural Order No. 4 and the Concurring Opinion of Mr Born, in which the Tribunal, *inter alia*, granted the European Commission's (the "**Commission**") request "to file a written *amicus curiae* submission on the three points of law mentioned in its Application […] subject to an undertaking by the Commission to pay reasonable additional costs incurred by the Parties as a result of its intervention, if so ordered by the Tribunal".

24. On 7 January 2015, the Tribunal approved a revised procedural calendar agreed by the Parties.

25. On 20 January 2015, the Tribunal confirmed its general consent to a Disclosure Agreement entered into by all parties in PCA Cases No. 2014-19 to 2014-22,[1] 2014-01,[2] and the present arbitration, under which the parties agreed to disclose the rulings rendered in each of these cases.

26. On 2 February 2015, the Commission filed its written submission and requested the Tribunal to reconsider its decision that the Commission should undertake to pay reasonable costs incurred by the Parties as a result of its intervention.

27. On 16 February 2015, in light of the Commission's refusal to provide that undertaking (which had been one of the conditions subject to which the Tribunal had granted the Commission's request to file an *amicus* submission), the Tribunal advised the Commission that its submission would not be considered by the Tribunal.

28. On 19 March 2015, the Claimants submitted their Statement of Claim, together with witness statements and expert reports.

29. On 20 April 2015, the Respondent submitted its request for bifurcation of proceedings, requesting that the Tribunal "hear its objections to the Tribunal's jurisdiction as a preliminary question".

30. On 15 May 2015, the Tribunal issued Procedural Order No. 5, rejecting the Respondent's request for bifurcation of the proceedings, and confirming the procedural calendar as agreed by the Parties.

31. On 15 July 2015, the Tribunal issued Procedural Order No. 6, setting out its decision regarding the Respondent's further document production requests.

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1 *WA Investments – Europa Nova Ltd. (Cyprus) v. The Czech Republic*, PCA Case No. 2014-19; *Voltaic Network GmbH v. The Czech Republic*, PCA Case No. 2014-20; *Photovoltaik Knopf Betriebs GmbH v. The Czech Republic*, PCA Case No. 2014-21; *I.C.W. Europe Investments Ltd. v. The Czech Republic*, PCA Case No. 2014-22.

2 *(1) Antaris Solar GmbH (2) Dr. Michael Göde v. The Czech Republic*, PCA Case No. 2014-01.

32. On 31 October 2015, the Respondent submitted its Statement of Defense, together with an annex, witness statement, and expert reports.

33. On 23 December 2015, the Tribunal issued Procedural Order No. 7, setting out its decision regarding the Claimants' further document production requests.

34. On 4 May 2016, the Claimants submitted their Reply on the Merits and Quantum and Answer to Objections to Jurisdiction, together with an annex, witness statements, and expert reports.

35. On 6 September 2016, the Respondent submitted its Rejoinder, together with an annex, witness statement, and expert reports (the "**2016 Rejoinder**").

36. On 28 October 2016, the Claimants submitted their Rejoinder on Jurisdiction, together with an updated annex, and expert reports.

37. On 31 January 2017, the Tribunal granted the Parties' requests for the admission into the record of a decision of the Commission on the "Czech Republic Promotion of electricity production from renewable energy sources" issued on 28 November 2016 and made public on 23 January 2017, and for the submission of written comments on that decision.

38. On 6 February 2017, in accordance with leave granted by the Tribunal, the Claimants submitted the Supplemental Report by their quantum expert, Mr Geoffrey Senogles.

39. On 15 February 2017, both Parties submitted their comments on the Commission's decision dated 28 November 2016.

40. On 27 February 2017, the Respondent submitted its comments on the Supplemental Report of Mr Senogles, together with the Third Expert Report of Mr Michael Peer.

41. From 13 to 17 March 2017, a hearing was held at the Peace Palace in The Hague, the Netherlands.

42. On 16 June 2017, the Parties filed simultaneous costs submissions.

43. On 20 December 2017, the Tribunal issued the Partial Award in which it dealt with issues of jurisdiction and liability.

44. On 18 January 2018, in accordance with Article 36(1) of the UNCITRAL Rules, the Claimants submitted a request to the Tribunal to correct a few "clerical or typographical errors" in the Partial Award.

45. On 24 January 2018, the Respondent confirmed that it did not wish to make any comments on the Claimants' request for corrections.

46. On 20 February 2020, pursuant to Article 36 of the UNCITRAL Rules, as requested by the Claimants, the Tribunal made three sets of corrections to the Partial Award of 20 December 2017.

C. SUSPENSION OF THE PROCEEDINGS AND THE RECONSTITUTION OF THE TRIBUNAL

47. On 20 December 2017, the Tribunal requested that the Parties confer on the schedule of the next phase of the proceedings and report the outcome of their discussion by 2 February 2018.

48. On 29 January 2018, the Parties jointly requested that the Tribunal grant a one-week extension until 9 February 2018 to inform the Tribunal of the outcome of their discussions regarding the schedule of the next phase of the proceedings. The Parties' joint request for extension was granted on the same day.

49. By correspondence dated 9 February 2018, the Parties informed the Tribunal that the Respondent had submitted a set-aside application against the Partial Award in Switzerland and that they had agreed to stay the arbitration until the Swiss Federal Tribunal had decided on the set-aside application. The Tribunal took note of the Parties' agreement to stay the arbitration on the same day.

50. By letter dated 15 February 2018, the Respondent expressed its formal reservation of rights, asking the Tribunal to take note of "[t]he Czech Republic's objections regarding violations of its procedural rights aris[ing] from the Partial Award of 20 December 2017", which are "separate from and additional to the objections raised in the Czech Republic's set-aside application to the Swiss Federal Tribunal against the Tribunal's rulings on jurisdiction".

51. On 24 June 2018, Mr Born tendered his resignation as co-arbitrator due to "unforeseen developments in another proceeding".

52. On 9 and 26 July 2018, the Claimants and the Respondent respectively took note of Mr Born's resignation and raised no objection in this regard.

53. On 9 August 2018, Dr Heiskanen disclosed that he was acting as counsel in three investment arbitration proceedings in which the implications of the decision of the Court of Justice of the European Union of 6 March 2018 in the case of *Slovak Republic v. Achmea BV* (the "***Achmea* Judgment**") on the tribunal's powers to entertain the case had arisen as an issue. Dr Heiskanen indicated that his involvement in the three matters did not affect his independence and

impartiality in the present arbitration but, nevertheless, he was prepared to tender his resignation as the presiding arbitrator in this case should either Party take a different view.

54. On 15 August 2018, the Respondent accepted Dr Heiskanen's offer to resign from the Tribunal. Additionally, considering the *Achmea* Judgment to have "a direct bearing on this arbitration", the Respondent indicated that it intended to bring up this issue once the suspension of the proceedings was lifted.

55. In light of the Respondent's letter of 15 August 2018, Dr Heiskanen tendered his resignation as the presiding arbitrator in this arbitration on 20 August 2018.

56. By letter dated 20 August 2018, the Claimants appointed Mr John Beechey C.B.E. as arbitrator pursuant to Articles 13(1) and 7(1) of the UNCITRAL Rules.

57. Following Dr Heiskanen's resignation, the Claimants also requested that Mr Beechey and Mr Thomas appoint a new presiding arbitrator pursuant to Article 7(1) of the UNCITRAL Rules.

58. On 28 August 2018, the Respondent challenged Mr Beechey's appointment as arbitrator and requested him to resign. The Respondent's request for Mr Beechey's resignation was based on (i) his appointment as an arbitrator in four pending cases, which Respondent contended raised matters of fact and law "extremely similar" to those already determined in the Partial Award; and (ii) Mr Beechey's service as the President of the ICSID tribunal in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, an investment arbitration case which, amongst other things, dealt with the impact of the *Achmea* Judgment.

59. On 2 September 2018, the Respondent stated its intention to submit a formal notice of Mr Beechey's challenge by 4 September 2018 pursuant to Article 11(1) the UNCITRAL Rules.

60. On 3 September 2018, Mr Beechey informed the Parties that he had reviewed the concerns of the Respondent and decided that the appointing authority in this matter should consider the challenge on its merits.

61. On 4 September 2018, the Respondent filed its Notice of Challenge of Mr Beechey pursuant to Articles 11(1) and 11(2) of the UNCITRAL Rules based on the reasons mentioned above. The Respondent invited the Claimants and Mr Beechey to comment on the Notice of Challenge by 19 September 2018.

62. On 19 September 2018, objecting to the Respondent's challenge of Mr Beechey, the Claimants advised Mr Thomas that the Parties would approach the Arbitration Institute of the Stockholm Chamber of Commerce (the "**SCC**") and request it to decide the Respondent's challenge of Mr

Beechey in accordance with the SCC Procedures as Appointing Authority under the UNCITRAL Rules.

63. In October 2018, the Board of the SCC dismissed the Respondent's challenge of Mr Beechey.

64. On 23 October 2020, the Claimants, on behalf of both Parties, informed the Tribunal and the PCA that the Respondent's request to set aside the Tribunal's Partial Award had been rejected by the Swiss Federal Supreme Court and that the suspension agreed by the Parties in this arbitration had therefore been lifted.

65. On that same date, in order to fill the vacancy left by the former presiding arbitrator's resignation in August 2018 and to reconstitute the Tribunal, the Parties submitted an agreed protocol for the appointment of a replacement presiding arbitrator. They requested the co-arbitrators and the PCA to confirm whether they would agree to the proposed procedure. On 27 October 2020, the co-arbitrators and the PCA confirmed that they would adopt the Parties' agreed protocol.

66. On 26 January 2021, in accordance with the agreed protocol, Professor Alfredo Bullard was appointed as the presiding arbitrator in this arbitration.

D. THE DECISION ON THE RESPONDENT'S *ACHMEA* OBJECTION AND THE DETERMINATION OF THE PROCEDURAL CALENDAR

67. On 4 February 2021, the Tribunal directed the Parties to confer and seek agreement on the procedural calendar for the next phase of the proceedings.

68. By correspondence dated 4 March 2021, the Parties, noting the Respondent's intention to raise a jurisdictional objection based on the *Achmea* Judgment (the "***Achmea* Objection**"), advised the Tribunal that they had agreed on the timetable and format for submissions on the admissibility of the Respondent's *Achmea* Objection. Additionally, the Parties (i) informed the Tribunal that they would submit their respective positions on the issues of disagreement relating to the procedural calendar of the next phase of the proceedings; and (ii) proposed to schedule a procedural session by videoconference following the completion of the Parties' submissions on the *Achmea* Objection.

69. On 5 March 2021, the Parties submitted their respective positions on outstanding issues of disagreement relating to the procedural calendar for the next phase of the proceedings, including the title of the written pleadings therein.

70. On 9 March 2021, the Tribunal issued Procedural Order No 8, (i) establishing the timetable for the Parties' submissions on the admissibility of the *Achmea* Objection; (ii) reserving the

determination of all other issues raised in the Parties' correspondence of 5 March 2021 to a subsequent procedural order; and (iii) agreeing to a procedural session by videoconference following the completion of the Parties' written submissions on the *Achmea* Objection.

71. Between 24 March and 10 May 2021, in accordance with Procedural Order No. 8, the Parties respectively submitted two rounds of submissions on the admissibility of the *Achmea* Objection.

72. On 19 May 2021, at the Tribunal's invitation, the Parties, *inter alia*, confirmed that the procedural calendar for the next phase of the proceedings remained an issue of disagreement between the Parties to be discussed during the procedural meeting scheduled on 25 May 2021.

73. On 25 May 2021, a procedural meeting was held by videoconference in which counsel and representatives for the Parties, the Tribunal, and the PCA participated. At the procedural meeting, the Parties addressed the Tribunal on the admissibility of the *Achmea* Objection and discussed the outstanding issues of procedure-related disagreements between the Parties. At the end of the procedural meeting, the Tribunal requested the Parties to confer and revert with a joint proposal regarding the procedural calendar for the next phase of this arbitration by 4 June 2021, taking into account the Tribunal's request that the Parties submit updated quantum reports, which took into consideration the Tribunal's determination on its jurisdiction and on the scope of the Respondent's liability under the applicable investment treaties as set out in the Partial Award.

74. On 4 and 5 June 2021, the Parties respectively submitted their positions on the procedural calendar.

75. On 6 June 2021, the Tribunal informed the Parties of its decision to declare the Respondent's *Achmea* Objection inadmissible in these proceedings and that its reasoning would be provided in writing in due course. In light of its decision, the Tribunal invited the Parties to seek an intermediate solution between their current positions regarding the procedural calendar and to revert by 9 June 2021.

76. On 9 June 2021, the Parties informed the Tribunal of their agreement on the procedural calendar for the next phase of the arbitration, but not on the meaning of "accompanied by expert report(s) on quantum" included in the proposed calendar. Accordingly, the Parties submitted their respective positions on the expression in separate communications on the same day.

77. On 16 June 2021, the Tribunal issued Procedural Order No. 9, *inter alia*, (i) establishing the procedural calendar as agreed by the Parties; and (ii) deciding that "[e]ither Party may adduce without limitations the evidence with its written submissions that it considers relevant to the issues left open by the Partial Award".

78. On 22 July 2021, as foreseen in the Tribunal's letter of 6 June 2021, the Tribunal issued its Decision on the Admissibility of the *Achmea* Objection, declaring the Respondent's objection to the Tribunal's jurisdiction based on the *Achmea* Judgment inadmissible.

E. THE CLAIMANTS' REQUEST TO AMEND THE CASE CAPTION

79. On 10 May 2021, the Claimants notified the Tribunal that (i) Natland Investment had been renamed NIG N.V. ("**NIG**") on 20 October 2015; and (ii) Natland Group had been renamed NGL Business Europe ("**NGL**") on 12 April 2015 and subsequently merged into the Cypriot company Capamera Limited ("**Capamera**") on 3 February 2017. Accordingly, the Claimants requested that the case caption of this arbitration be modified to reflect the changes of names of the Claimants.

80. On 14 May 2021, the Respondent confirmed that it did not object to amending the case caption to reflect Natland Investment's new name. However, it objected to the amendment of the case caption in respect of the addition of Capamera. It requested the Tribunal to order the Claimants to explain (i) the delay in the making of the disclosures; (ii) whether the Claimants believed that the dissolution of Natland Group in 2017 carried any implications for the Partial Award; and (iii) the factual, legal, and procedural bases on which the Claimants based their request for the addition of Capamera as a claimant in this arbitration.

81. On 19 May 2021, at the Tribunal's invitation, the Claimants responded to the Respondent's objection relating to the case caption, clarifying that, as a result of the merger, Capamera had become the universal successor of Natland Group by operation of law. As such, the Claimants requested that the Tribunal reject the Respondent's objection, because, in their view, the merger was irrelevant for jurisdictional purposes.

82. During the procedural meeting of 25 May 2021, the Tribunal invited the Claimants to submit evidence from Mr Tomáš Raška regarding the corporate events concerning Natland Group as the basis of the Claimants' request to modify the case caption.

83. On 4 June 2021, the Claimants indicated that they would be in a position to file Mr Raška's statement by 18 June 2021.

84. On 18 June 2021, the Claimants filed the statement of Mr Raška dated 16 June 2021 relating to the change of names of Claimants Natland Investment and Natland Group.

85. On 28 June 2021, at the Tribunal's invitation, the Respondent provided its comments on Mr Raška's statement and reiterated its request that the Tribunal decline to amend the case caption.

86. By letters dated 8 and 15 July 2021, the Claimants and the Respondent respectively maintained their positions with respect to the Claimants' request to amend the case caption.

87. On 24 July 2021, the Tribunal requested the Claimants by 3 August 2021 (i) to disclose the legal advice provided to Mr Raška in connection with the reorganization of the Natland Group companies in Cyprus; (ii) to submit a report by an independent expert on Cypriot law addressing the legal bases of that reorganization; and (iii) to explain the reasons for the delay in disclosing Natland Group's merger into Capamera. As to the procedure by which the Claimants' request would be considered and resolved, the Tribunal proposed the following two options: (i) a separate procedure on an expedited timetable in which each Party would adduce expert evidence of Cypriot law and make further submissions as to the effect of the merger of Natland Group into Capamera, followed by a short virtual hearing; or (ii) incorporation of these issues into the pleadings already scheduled for the quantum phase of the proceedings. The Tribunal invited the Parties to confer and present their agreed position on the procedure by 6 August 2021.

88. By letter dated 3 August 2021, the Claimants informed the Tribunal that no written legal advice was provided in relation to the potential implications of the merger for the arbitration and that they would be in a position to file an expert report on Cypriot law with the submission due on 1 September 2021. The Claimants further explained that they had not disclosed Natland Group's merger into Capamera in the earlier phase of the proceedings, because they had been advised that they were "irrelevant corporate events, having no implication for the arbitration".

89. On 6 August 2021, the Parties informed the Tribunal of their agreement to proceed under the second option proposed by the Tribunal to resolve the Claimants' request to amend the case caption, i.e., that the Parties would file any expert reports regarding Cypriot law, together with the submissions that had already been scheduled, and that they would incorporate into such submissions any further arguments that they might have on this matter.

F. WRITTEN SUBMISSIONS IN THE CURRENT PHASE OF THE PROCEEDINGS AND ORGANIZATION OF THE HEARING

90. On 1 September 2021, the Claimants filed their Submission, together with (i) an expert report by Mr Richard Edwards of FTI Consulting[3] ("**FTI**"); (ii) an expert report by Mr Bas Opmeer of FSV Belastingadviseurs; and (iii) a Legal Memorandum on Cypriot Law by Dr Marcos Gregorios Dracos (the "**Submission**").

91. On 3 November 2021, the Claimants, on behalf of both Parties, requested that the Tribunal approve the Parties' agreement to amend certain deadlines in the procedural calendar.

92. On 4 November 2021, the Tribunal issued Procedural Order No. 10, endorsing the Parties' agreement to postpone certain deadlines for their remaining submissions and the notification of witnesses and experts to be cross-examined.

93. On 24 November 2021, the Respondent submitted its Response Submission on Remaining Issues (the "**Response**"), together with (i) the Fourth Expert Report of Mr Peer; and (ii) the First Expert Report of Mr Kypros Ioannides.

94. On 21 January 2021, the Tribunal issued Procedural Order No. 11, endorsing the Parties' agreement further to postpone certain deadlines for their remaining submissions and the notification of witnesses and experts to be cross-examined.

95. On 9 February 2022, in accordance with Procedural Order No. 11, the Claimants submitted their Reply (the "**Reply**"), together with (i) the Second Report of Mr Edwards and (ii) the Second Legal Memorandum on Cypriot Law by Dr Dracos.

96. On 20 April 2022, the Respondent submitted its Rejoinder Submission on Remaining Issues (the "**Rejoinder**"), together with (i) the Fifth Expert Report of Mr Peer; (ii) the Second Expert Report of Mr Ioannides; and (iii) the Expert Report of Professor Stef van Weeghel.

97. On 19 May 2022, the Claimants informed the Tribunal and the Respondent that they had inadvertently failed to submit two earn-out letters (the "**Earn-Out Letters**") that they had intended to produce together with their Reply. They sought leave from the Tribunal to submit these documents, as well as a corrected version of Appendix 5 to the Second Expert Report of

[3] This was the first such report prepared by Mr Edwards in this arbitration. During the prior phase of the arbitration, the Claimants' damages analyses were conducted by Mr Senogles, then of Charles River Associates.

Mr Edwards. With the consent of the Respondent, the Earn-Out Letters were admitted into the record on 20 May 2022 as factual exhibits C-494 and C-495.

G. HEARING

98. On 7 March 2022, at the Tribunal's invitation, the Parties agreed to hold the hearing at the Winter Palace of Prince Eugene of Savoy in Vienna, Austria (the "**Winter Palace**").

99. On 8 April 2022, the Tribunal invited the Parties to submit comments on certain issues concerning the administrative and logistical arrangements for the hearing by 9 May 2022.

100. On 10 May 2022, the Tribunal granted a one-day extension for the Parties to respond to the issues raised in the Tribunal's letter of 8 April 2022.

101. On 10 May 2022, following a one-day extension granted by the Tribunal, the Parties submitted a joint letter concerning the administrative and logistical arrangements for the hearing, advising the Tribunal that they had reached agreement on most of the outstanding hearing-related issues. The Parties requested that the Tribunal resolve any remaining areas of disagreement on the basis of written submissions that they were to file simultaneously.

102. On the same date, upon the Parties' request, the Tribunal confirmed, *inter alia*, that (i) the hearing would take place in-person; and (ii) it did not envisage the need to summon for cross-examination any witness or expert in addition to those notified by the Parties.

103. On 12 May 2022, the Tribunal provided its observations on the Parties' agreed positions set out in their joint letter of 10 May 2022 and, where the Parties had been unable to reach agreement, set out its directions. The Tribunal therefore vacated the pre-hearing conference scheduled for 17 May 2022.

104. From 23 to 25 May 2022, a hearing was held at the Winter Palace. The following individuals attended:

Tribunal:

Professor Alfredo Bullard (Presiding Arbitrator)
Mr John Beechey C.B.E.
Mr J. Christopher Thomas, K.C.

The Claimants:	**The Respondent:**
Mr Frank Schulte Mr Petr Bartoň (*Claimants' representatives*)	JUDr Jaroslav Kudrna, LL.M, Ph.D JUDr Martina Matejová, Ph.D (*Ministry of Finance of the Czech Republic*)
Professor Luca G. Radicati di Brozolo	Mr Dmitri Evseev

Mr Michele Sabatini
Mr Emilio Bettoni
Mr Flavio Ponzano
Ms Lucia Pontremoli
Ms Caterina Coroneo
(*ArbLit - Radicati di Brozolo Sabatini Benedettelli Torsello*)

Mr Nico Leslie
(*Fountain Court Chambers*)

Mr Miloš Olík
(*Rowan Legal*)

Fact Witnesses
Mr Tomáš Raška

Expert Witnesses
Mr Richard Edwards
Mr Sean Horan [not testifying]
(FTI Consulting)

Ms Mallory Silberman
Mr Bart Wasiak
Mr John Muse-Fisher
Ms Naomi Biden
Mr Eugenio Araujo
Mr Michael McDonagh
(*Arnold & Porter*)

Ms Karolina Horáková
(*Skils s.r.o. advokátní kancelář*)

Expert Witnesses
Mr Michael Peer
Mr Jiří Urban [not testifying]
Ms Šarlota Schutznerova [not testifying]
(*KPMG Česká republika, s.r.o.*)

Prof Stef van Weeghel
(*PwC*)

Permanent Court of Arbitration:

Dr Levent Sabanogullari
Ms Iris Koberg

Court Reporter:

Ms Anne-Marie Stallard

Interpreters:

Ms Simona Sternová
Ms Dominika Winterová

105. During the housekeeping session at the start of the second hearing day, 24 May 2022, the Claimants informed the Tribunal that they had received a number of *inter partes* requests from the Respondent, which stemmed from the cross-examination of Mr Raška. In the course of his cross-examination, Mr Raška had stated that the members of the International Photovoltaic Investors Club (the "**IPVIC**") had shared certain expenses relating to solar arbitrations through a "funding arrangement" (the "**Funding Agreement**"), a fact which, according to the Respondent, had previously been unknown to it.[4]

106. Following the Respondent's request that the Claimants disclose the Funding Agreement and having heard the Claimants' objections thereto, the Tribunal directed the Parties to set out their positions in writing on the same day.[5] In subsequent correspondence between the Parties, the

4 2022 Hearing Transcript, Day 1, p. 201:7-25; Day 2, pp. 4:6-7:11. *See also* 2022 Hearing Transcript, Day 2, pp. 247:25-249:2; Day 3, pp. 126:22-131:14, 151:3-20, 152:22-153:9.

5 2022 Hearing Transcript, Day 2, p. 4:16-25, 5:22-6:10, 6:20-7:11.

Respondent sought additional information from the Claimants, including the disclosure of a copy of the Funding Agreement. Based on its exchanges with the Claimants, at the end of the second day of the hearing, the Respondent informed the Tribunal of its intention to file an application for the disclosure of the Funding Agreement.

107. Also on 24 May 2024, the Tribunal requested that the Parties' experts—Mr Edwards and Mr Peer—submit a joint report by 30 June 2022, setting out (i) their agreed views on the specific questions posed to them by the Tribunal during the hearing; and (ii) their separate views on points that were not agreed in appendices A and B to the joint report, with a maximum total of ten pages per appendix.[6] It was also agreed that the Parties would submit simultaneous comments on the joint report by 21 July 2022.

108. At the close of the 25 May 2022 hearing day, after receiving written submissions on the Respondent's disclosure request and hearing oral clarifications from the Parties, the Tribunal ordered, *inter alia*, that after the close of the hearing, two of the Respondent's counsel be permitted to review a copy of the Funding Agreement on a confidential basis in order to assess its relevance for this Arbitration.[7]

H. THE RESPONDENT'S REQUEST FOR THE DISCLOSURE OF THE FUNDING AGREEMENT

109. On 26 May 2022, the Respondent informed the Tribunal that two of its counsel, Mr Evseev and Ms Silberman, had reviewed the Funding Agreement as instructed, and within the limits set by the Tribunal. Since the review of the Funding Agreement "confirmed and exacerbated [its] concerns", the Respondent requested that the Funding Agreement be made available for review by all of the Respondent's internal and external counsel, so that it could present an application to the Tribunal (the "**Proposed Application**").

110. On 28 May 2022, having received the Claimants' submission that the Respondent's proposed application concerning the Funding Agreement should be prepared only by the two counsel for the Respondent who had reviewed the Funding Agreement, the Tribunal requested the Claimants to provide it with copies of the Funding Agreement and its Amendment by no later than 30 May 2022. The copies of the Funding Agreement and the Amendment were provided to the Tribunal on the same day.

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6 2022 Hearing Transcript, Day 3, pp. 163:16-164:22.

7 2022 Hearing Transcript, Day 3, p. 151:3-14, 152:22-153:9, 173:20-177:12.

111. On 8 and 13 June 2022, at the Tribunal's invitation, Mr Evseev and Ms Silberman and the Claimants respectively submitted their comments on the relevance and materiality of the Respondent's proposed application, taking account of the current stage of the proceedings.

112. On 30 June 2022, the Tribunal issued Procedural Order No. 12, in which it denied the Respondent's application for the production of the Funding Agreement and for the filing of further submissions in relation to it.

113. On 22 July 2022, the Respondent notified the Tribunal of its objections to Procedural Order No. 12. It requested that the Tribunal: (i) take note of its objections; (ii) reconsider its decision to deny the Respondent's application for the production of the Funding Agreement; (iii) permit Ms Silberman to share with the Respondent's party representatives and its entire counsel team the two letters that preceded the issuance of Procedural Order No. 12; and (iv) clarify that Procedural Order No. 12 should not be read as preventing the Respondent from using the descriptions of the Funding Agreement already on the record for its submissions on costs. Furthermore, the Respondent requested that the Tribunal direct the PCA to ask the two former members of the Tribunal, who had resigned following the issuance of the Partial Award, to conduct conflicts check for the period in which they had served as arbitrators in this matter.

114. On 8 August 2022, at the Tribunal's invitation, the Claimants submitted their comments on the Respondent's requests of 22 July 2022. Leaving aside the request that the Tribunal take note of the Respondent's objections to Procedural Order No. 12, the Claimants opposed the Respondent's other requests which, in their view, "essentially [sought] to reverse the Tribunal's directions and determinations". The Claimants deferred to the Tribunal's discretion to decide whether to instruct the PCA to contact the former members of the Tribunal for conflict check purposes.

115. On 31 August 2022, the Tribunal informed the Parties that it had taken careful note of the objections and reservations expressed by the Respondent with regard to Procedural Order No. 12.

116. On 6 September 2022, the Tribunal informed the Parties that the PCA, acting under instructions of the Tribunal, had confirmed that the two former members of the Tribunal had carried out further conflict checks. Each had declared that he had no conflict of interest to disclose.

117. On 25 October 2022, the Tribunal issued Procedural Order No. 13, (i) dismissing the Respondent's request for reconsideration of the Tribunal's decision to deny the Respondent's application for the production of the Funding Agreement; (ii) dismissing the Respondent's request to release to the Czech Republic the submissions made by the Parties' counsel prior to the issuance of Procedural Order No. 12; and (iii) clarifying that the description of the Funding

Agreement already on the record and those contained in Procedural Order No. 12 may be used by the Parties in their costs submissions.

118. On 5 April 2023, Ms Silberman informed the Tribunal that she would retire from Arnold & Porter on 12 April 2023. She requested the Tribunal's authorization to convey the relevant documents "directly, exclusively and confidentially" to Mr Craig Steward, Arnold & Porter's General Counsel, assuring the Tribunal that the firm would take the necessary measures to prevent access to the Funding Agreement by other attorneys, employees or third parties.

119. On the same day, the Tribunal confirmed receipt of Ms Silberman's communication and invited the Claimants to provide their comments by 11 April 2023.

120. On 11 April 2023, the Claimants confirmed that they had no objections to Ms Silberman's request. Accordingly, the Tribunal granted Ms Silberman's request on 12 April 2023.

I. JOINT EXPERT REPORT AND SUBMISSIONS ON COSTS

121. On 9 June 2022, the Claimants informed the Tribunal that the Parties had not reached an agreement in relation to the preparation of the experts' joint report, which the Tribunal had directed Mr Edwards and Mr Peer to submit by 30 June 2022. They requested the Tribunal to instruct "each expert (i) to coordinate with the other expert in the preparation of the joint report, without any consultation with, or intervention by, counsel, except in case the experts need to approach the Tribunal for clarifications; and (ii) not to discuss or share with counsel any correspondence, documents or material exchanged with, or received from, the other expert, or the experts' joint work".

122. On 14 June 2022, at the Tribunal's invitation, the Respondent requested that the Tribunal reject the Claimants' application of 9 June 2022 on the basis that "it would create a risk of infringing upon the [P]arties' due-process rights".

123. On 20 June 2022, the Tribunal, having considered the Parties' views on whether their respective experts should be able to consult with counsel in the preparation of their joint report, instructed each side to submit, together with the joint expert report, a short explanation as to what the extent of its involvement in the preparation of the joint report had been.

124. On 15 July 2022, following a 15-day extension granted by the Tribunal, Mr Edwards and Mr Peer filed their Joint Expert Report (the "**Joint Expert Report**"), together with Appendices A and B, which outlined each expert's separate views on points that were not agreed.

125. On 15 and 16 July 2022, the Claimants and the Respondent respectively outlined the extent to which they had been involved in the preparation of the Joint Expert Report.

126. On 5 August 2022, following an extension granted by the Tribunal, the Parties filed their comments on the Joint Expert Report.

127. On 16 December 2022, the Claimants and the Respondent filed their respective submissions on costs (the "**Claimants' Submission on Costs**" and the "**Respondent's Submission on Costs**", respectively).

128. On 19 December 2022, the Respondent submitted an updated version of its Submission on Costs correcting a few minor errors.

129. On 5 January 2023, the Respondent noted that the Claimants' Submission on Costs included information on the contents of the Funding Agreement that had previously been held to be confidential and not part of the record. In light of Procedural Order No. 13, the Respondent requested that the Tribunal (i) disregard such information; and (ii) declare such information excluded from the record.

130. On 13 January 2023, at the Tribunal's invitation, the Claimants provided their response to the Respondent's request of 5 January 2023, requesting that the Tribunal (i) dismiss the Respondent's request; or (ii), if it ordered the Claimants to remove references to the Funding Agreement, to require the Respondent to withdraw its argument in its Submission on Costs that "there is no evidence in the record as to what percentage of [the Claimants'] costs were borne by Claimants themselves".

131. On 18 January 2023, the Tribunal issued Procedural Order No. 14 (i) granting the Respondent's request that references to the Funding Agreement be excluded from the Claimants' Submission on Costs, and (ii) dismissing the Claimants' request that the Tribunal exclude the above-cited sentence from the Respondent's Submission on Costs.

J. THE TRIBUNAL'S REQUEST FOR DOCUMENTATION

132. On 25 January 2023, the Tribunal requested *inter alia* that the Claimants produce, or explain the reasons why it could not produce, (i) an inventory of the assets transferred to Capamera, which was marked as Annex 1 to Appendix B-5 to Dr Dracos' First Expert Report (the "**Inventory**"); and (ii) copies of the Earn-Out Letters.

133. On 1 February 2023, the Claimants provided their response to the Tribunal's letter of 25 January 2023. The Claimants stated *inter alia* that, despite their best efforts, they were not able to locate

a copy of the Inventory. With regard to the Earn-Out Letters, the Claimants noted that these documents had been produced before the hearing on 20 May 2022, and were on the record as exhibits C-494 and C-495.

134. On 3 February 2023, the Respondent indicated that it would be prepared to provide brief comments on the Claimants' communication of 1 February 2023.

135. On 4 February 2023, the Tribunal invited the Respondent to provide comments on the Claimants' communication of 1 February 2023. The Claimants were given leave subsequently to reply to the Respondent's comments.

136. On 8 February 2023, the Respondent provided its comments on the Claimants' communication of 1 February 2023. The Respondent noted that the Claimants' communication of 1 February 2023 marked the first time that the Claimants had (i) acknowledged that they had performed a search for the Inventory, and (ii) expressed the view that the Inventory's existence was doubtful. In regard to the latter claim, the Respondent contended that, on the contrary, it seemed highly likely that the Inventory had existed at one point in time, since it had been mentioned in a "Merger Scheme" annexed to a Cypriot court order of 3 February 2017, and that, had Natland Group's treaty claims carried the value alleged in the Claimants' quantum assessment, they surely would have been included in such Inventory. For these reasons, the Respondent submitted that the conclusion to be drawn must be that no treaty claims were ever transferred to Capamera.

137. On 13 February 2023, the Claimants provided their reply to the Respondent's comments of 8 February 2023. The Claimants reiterated that they had carried out multiple extensive searches for the Inventory in the course of the present proceedings. The Claimants further reiterated that they continue to regard the existence of the Inventory as doubtful, for the following reasons: (i) the description of the Inventory in the "Merger Scheme" suggests that, if anything, it was conceived as a collection of financial statements from the companies involved in the merger rather than a stand alone document specifically prepared for the merger; (ii) since the merger was a group restructuring, there had been no compelling need to record and value what had been transferred to Capamera; and (iii) the merger approval by the 3 February 2017 court order was not limited to items listed in the Inventory, but rather it related to the transfer of all "properties, assets and liabilities" to Capamera, thereby making the hypothetical content of the Inventory less significant, including with respect to the question of whether Natland Group's treaty claims had been properly transferred to Capamera.

III. FACTUAL BACKGROUND

138. This section recalls the facts relevant to this phase of the proceedings and the questions left open by the Partial Award. This overview, however, is not exhaustive of all the events and circumstances laid out by the Parties in their submissions, nor of their diverging views thereon. For a more comprehensive factual background, regard should be had to paragraphs 84 to 145 of the Partial Award.

A. THE RES SYSTEM ESTABLISHED BY THE RESPONDENT, THE SOLAR LEVY, AND THE "SOLAR BOOM"

139. The Claimants' investments through Energy 21 took place in the context of what has been described repeatedly throughout these proceedings as a "solar boom". This refers to a period of rapidly expanding investment in the Czech Republic's solar energy sector, precipitated by the reduction of the costs of entry originally associated with the country's solar market. Those costs had been reduced substantially as a result of the very significant and unanticipated reduction in the costs of importing photovoltaic panels from China and Taiwan, which had taken the Respondent and industry participants by surprise. Here, relevant details surrounding the 'solar boom' are restated, including the legislative and policy framework that enabled it, the "legitimate policy issue" that arose for the Respondent, and the measures that it took to address that issue.[8]

1. The Respondent's RES Regime

140. The Respondent established its RES Regime over the course of a number of years.[9] In 1992, the Czech Republic introduced Act No. 586/1992 on Income Tax (the "**Act on Income Tax**").[10] Pursuant to this Act, a tax exemption applying to income gained from the operation of solar facilities (the "**Income Tax Holiday**") was established, as were rules for the depreciation for tax purposes of certain PV plant components (the "**Original Depreciation Provisions**").[11]

141. On 31 March 2005, in connection with its newly assumed European Union ("**EU**") law obligations,[12] the Respondent enacted Act No. 180/2005 on Promotion of Electricity Production

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8 *See* Partial Award, para. 428.

9 *See* Partial Award, paras. 84-104. *See also* Submission, paras. 17-31; Response, paras. 6-22.

10 Partial Award, para. 84; Act on Income Tax (**Ex. C-18/R-61**).

11 Partial Award, para. 84; Act on Income Tax, s. 19 (**Ex. C-18/R-61**).

12 *See* European Commission, Energy for the Future: Renewable Sources of Energy, 26 November 1997 (**Ex. C-345**); EU Parliament Resolution on Electricity from renewable energy sources and the internal electricity market, 30 March 2000 (**Ex. C-347**); Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market, 27 September 2001 (**Ex. C-20**); European

from Renewable Energy Sources (the "**Act on RES Promotion**").[13] At a time of global recognition of the need to address climate change,[14] the Czech Republic was set a target (the "**EU Target**") of 8% for contribution of electricity produced from RES as a proportion of total electricity consumption by 2010.[15] Later, in 2009, this target was increased to 13%.[16]

142. The Act on RES Promotion was designed to help the Czech Republic meet the EU Target by providing two tariff incentives to stimulate investment in RES: (a) the Feed-in Tariff (the "**FiT**"), a fixed purchase price for units of electricity delivered to the grid by RES producers, and (b) the Green Bonus, a payment made by the grid operator to RES producers for electricity they sold on the free market or consumed themselves (the "**Green Bonus**" and, together with the FiT, the "**Subsidies**").[17]

143. The FiT scheme obliged Czech electricity consumers to purchase RES-generated electricity energy at the price set by the Czech Government's Energy Regulatory Office ("**ERO**").[18] The ERO's role in relation to the Subsidies formed part of its broader mandate to "support economic competition, to support the use of renewable and secondary energy sources, and to protect consumers' interests in those areas of the energy sector where competition is impossible".[19]

144. Built into the Act on RES Promotion was a guaranteed 15-year return on investments for RES producers,[20] which, it will be recalled, was held by this Tribunal to be an intrinsic "stability guarantee" for investors.[21] In essence, this required that the Subsidies in respect of a RES

Commission, Communication from the Commission: The Support of Electricity from Renewable Energy Sources, 7 December 2005 (**Ex. C-349**).

13 Act No. 180/2005 on Promotion of Electricity Production from Renewable Energy Sources, 31 March 2005 (**Ex. C-26/R-5**) (hereinafter "**Act on RES Promotion**").

14 Reply, para. 14: "The Czech Republic's adoption of an incentive regime to encourage the use of RES– including the Act on Promotion – is linked to, and was triggered by, the global initiatives against climate change dating back to the 1992 United Nations Convention on Climate Change and the 1997 Kyoto Protocol to that Convention".

15 Annex II to the Act concerning the conditions of accession of the Czech Republic et al. and the adjustments to the Treaties on which the European Union is founded, 12. Energy, Part A., 23 September 2003, p. 588 (**Ex. C-22**). *See* Partial Award, para. 88.

16 Directive 2009/28/EC on the promotion of the use of energy from renewable sources, 23 April 2009 (**Ex. C-23**).

17 Act on RES Promotion, ss. 4, 6 (**Ex. C-26/R-5**).

18 Partial Award, para. 94.

19 Act No. 458/2000 on Business Conditions and Public Administration in the Energy Sectors, 28 February 2005, s. 17(3) (hereinafter "**Energy Act**") (**Ex. C-152**).

20 Act on RES Promotion, s. 6(1)(b)(2) (**Ex. C-26/R-5**).

21 Partial Award, paras. 427-428. *See also* 2022 Hearing Transcript, Day 1, p. 135:7-21.

investment be maintained by the ERO at a consistent level for 15 years from the point at which that investment was commissioned. That 15-year period was subsequently lengthened to 20 years.[22]

145. In addition to this stability guarantee, the Act on RES Promotion prevented the ERO from reducing the Subsidies by more than 5% of the level that had been set in the prior year (the "**5% Limit**").[23] This was characterized as a mechanism "to provide comfort to prospective investors".[24] Overall, these restrictions meant that the Subsidies could only be adjusted to account for yearly inflation, by somewhere between 2% and 4% per annum.[25]

2. The Emergence of a Solar Boom as a "Legitimate Policy Issue"

146. Initially, it was not expected that the Act on RES Promotion would have a substantial impact on the growth of solar energy.[26] Indeed, the Parties agree that when the Act on RES Promotion was drafted in late 2003, expectations of such growth in this segment of the renewable energy sector were low, due to the then prohibitively high costs of solar panels (which account for a significant proportion of the total cost of solar plants).[27]

147. By 2009, however, the cost of solar panels had reduced significantly as a result of markedly cheaper imports from Asia.[28] In this respect, the Parties disagree as to whether such cost reductions were foreseeable in the period between 2003 and late 2008, when they are said to have begun.[29] The Claimants suggest that the Respondent's policymakers "had evidence of the large potential for PV cost reductions as early as 2005".[30] By contrast, the Respondent points to, *inter*

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22 ERO Regulation No. 364/2007 Coll. Amending Decree No. 475/2005 Coll. Implementing certain provisions of the law on support for the use of renewable sources, p. 15 (**Ex. C-29**).

23 Partial Award, para. 96; Act on RES Promotion, s. 6(4) (**Ex. C-26/R-5**).

24 Expert Report of Wynne Jones, 23 October 2015, para. 6.6.

25 ERO Regulation No. 140/2009 Coll., 25 May 2009, s. 2(9) (**Ex. C-31**). *See* Statement of Claim, para. 79; Submission, para. 24.

26 For instance, the Claimants' Reply notes that "[t]he Act on [RES] Promotion proved incapable of meaningfully promoting PV energy from 2006 to 2008". *See* Reply, para. 27.

27 *See* Partial Award, para. 90; Response, para. 20; Reply, paras. 22-23.

28 *See* Partial Award, paras. 101, 121, 426. This spawned an anti-dumping duty investigation by the European Commission.

29 Partial Award, para. 121, *referring to* 2016 Rejoinder, para. 109; Second Expert Report of Wynne Jones, 3 September 2016 (hereinafter "**RER-Jones-2**"), para. 7.11; Hearing Transcript, Day 4, p. 91:3-20, *referring to* Presentation by Wynne Jones, slide 6.

30 Direct Examination of Dr Pablo T. Spiller and Dr. Anton Garcia, 15 March 2017, slide 9. *See also* Reply, paras. 23-24. *See* Reply, section II.A.2.

alia, a Governmental report of September 2005 which found it "unlikely" that there would be "any significant increase in installed capacity or electricity production in the immediate future".[31]

148. Nevertheless, as was held in the Partial Award, reductions in the costs of constructing PV plants stimulated increased investment into such plants and thereby created a legitimate policy issue for the Czech Government, of which the Claimants were aware.[32] Specifically, the FiT rate for 1 January 2009 to 31 December 2009 had been set by the ERO on 18 November 2008,[33] prior to a "sharp decrease" in the cost of solar panels that began towards the end of 2008.[34] The result was a mismatch between the costs upon which the level of investment support offered by the Respondent in the form of the Subsidies had been calculated, and the actual, lower costs of the solar panels experienced in the market, which had the effect of increasing the investors' rate of return, incentivizing a large increase in grid interconnection requests. The Partial Award noted the Respondent's observation that "the total installed PV capacity in the Czech Republic increased from 754 Megawatts ("**MW**") in September 2010 to 1,959 MW by the end of 2010".[35]

149. The ERO financed the FiT by calculating a surcharge that would then be invoiced to all households and businesses in the Czech Republic.[36] As such, a misalignment between the FiT and the costs of PV plants, the commissioning of which entitled investors in the PV plants to the FiT, would have a direct impact upon the consumers that funded them.[37] In addition, the situation would have seen solar investors profit from the Subsidies to a far greater extent than other RES

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31 Report on meeting the indicative target for the production of electricity from renewable sources in 2004, September 2005, para. 3.7.3 (**Ex. R-165**).

32 *See* Partial Award, paras. 426-428.

33 Energy Regulatory Office, Price Decision No. 8/2008 which sets the support of electricity production from renewable energy sources, from the combined production of electricity and heat, and from secondary energy sources, 18 November 2008 (**Ex. R-37**).

34 Partial Award, para. 121.

35 Partial Award, para. 120.

36 *See* Statement of Defense, para. 315, *referring to* ERO Price Decision No. 9/2008, 18 November 2008 (**Ex. R-16**); ERO Price Decision No. 10/2008, 18 November 2008 (**Ex. R-17**); ERO Price Decision No. 7/2009, 25 November 2009 (**Ex. R-18**); ERO Price Decision No. 8/2009, 25 November 2009 (**Ex. R-19**); ERO Price Decision No. 4/2010, 30 November 2010 (**Ex. R-20**); ERO Price Decision No. 9/2006, 27 November 2006 (**Ex. R-24**); ERO Price Decision No. 9/2007, 26 November 2007 (**Ex. R-25**); ERO Price Decision No. 6/2010, 29 December 2010 (**Ex. R-26**). *See also* para. 142 above.

37 Witness Statement of Joseph Fiřt, 22 October 2015 (hereinafter "**RWS-Fiřt-1**"), para. 13; *see also* Letter from Josef Fiřt to the Minister of Industry and Trade, 1 July 2009 (**Ex. C-332**). *See* Statement of Defense, para. 315, *referring to* ERO Price Decision No. 9/2008, 18 November 2008 (**Ex. R-16**); ERO Price Decision No. 10/2008, 18 November 2008 (**Ex. R-17**); ERO Price Decision No. 7/2009, 25 November 2009 (**Ex. R-18**); ERO Price Decision No. 8/2009, 25 November 2009 (**Ex. R-19**); ERO Price Decision No. 4/2010, 30 November 2010 (**Ex. R-20**); ERO Price Decision No. 9/2006, 27 November 2006 (**Ex. R-24**); ERO Price Decision No. 9/2007, 26 November 2007 (**Ex. R-25**); ERO Price Decision No. 6/2010, 29 December 2010 (**Ex. R-26**). *See also* Response, paras. 8, 10.

producers.[38] Consequently, this prompted the ERO to begin recommending changes to avert what was deemed an "extremely serious" situation.[39]

3. ERO's concerns in 2009

150. The ERO expressed alarm at the rising number of connection requests for PV plants in mid-2009.[40] At the time, the 5% Limit operated to impede the ERO from reducing the FiT to a level commensurate with the costs of PV panels.[41]

151. In June 2009, an article was published that recorded the statements of the ERO's chairman that the ERO was planning to reduce the FiT through dealings with the Czech Government, but that such changes would be unlikely in 2009.[42] It was also noted that "solar energy [was] starting to cause some problems for the [S]tate", which was looking to "stop [the] power plants boom".[43]

152. By way of a letter dated 1 July 2009, the ERO then specifically recommended that the Government abolish the 5% Limit as of 2010.[44]

153. In parallel to the ERO's statements, however, the Czech Ministry of Environment took a different position, stating that it "like[d] the current boom of solar power plants".[45] Initially, that sentiment was shared by the Ministry of Industry and Trade (the "**MIT**").[46]

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38 **RWS-Fiřt-1**, para. 13; *see also* Letter from Josef Fiřt to the Minister of Industry and Trade, 1 July 2009 (**Ex. C-332**). *See also* Partial Award, para. 119.

39 Letter from Josef Fiřt to the Minister of Industry and Trade, 1 July 2009 (English translation) (**Ex. C-332**). *See also* Partial Award, para. 101; Response, para. 31.

40 **RWS-Fiřt-1**, paras. 12-13; *see also* Letter from Josef Fiřt to the Minister of Industry and Trade, 1 July 2009 (**Ex. C-332**). *See also* Letter from B. Němeček to R. Portužak, 10 August 2009 (**Ex. R-136**).

41 Partial Award, paras. 101-102; Response, para. 32. *See also* 2022 Hearing Transcript, Day 1, p. 88:10-20: "Now, unfortunately, in 2009 and 2010 ERO could not set an economically appropriate [FiT], due to something called the '5% [L]imit', which was a provision in the Act on [RES] Promotion that did not allow for the [FiT] for new installations to be set at a level more than 5% lower than the [FiT] for installations that were commissioned in the previous year. Now, with a dramatic drop in the price of solar panels, the solar [FiT] suddenly became far more generous than it was ever intended to be, which caused the unsustainable boom".

42 R. Zelenka, "The state wants to stop solar power plans boom", Mladá Fronta E15, 19 June 2009 (**Ex. R-317**).

43 R. Zelenka, "The state wants to stop solar power plans boom", Mladá Fronta E15, 19 June 2009 (**Ex. R-317**).

44 Letter from Josef Fiřt to the Minister of Industry and Trade, 1 July 2009 (**Ex. C-332**).

45 R. Zelenka, "Wind plants fight for grid connection, owners of solar plants are worried that the state will reduce development of photovoltaic", Mladá Fronta E15, 19 June 2009 (English translation) (**Ex. R-200**).

46 R. Zelenka, "Wind plants fight for grid connection, owners of solar plants are worried that the state will reduce development of photovoltaic", Mladá Fronta E15, 19 June 2009 (**Ex. R-200**).

154. In a letter dated 22 July 2009, the Ministry of Environment expressed its hesitancy with regard to any potential removal of the 5% Limit, stating that the safeguard was "necessary for preserving the trust of the investors in the market".[47] It recommended an alternative, such as shortening the period for which a grid operator would be entitled to the "purchase of electricity from solar energy".[48]

155. In a letter dated 29 July 2009, the Minister of Industry and Trade then wrote to the ERO Chairman, echoing the concern about the "enormous growth in the number of photovoltaic power plant installations".[49] The Minister promised to "make efforts to amend [the Act on RES Promotion] as soon as possible".[50]

156. Later, on 24 August 2009, the MIT announced that it was preparing an amendment to the Act on RES Promotion, which would abolish the 5% Limit as of 1 January 2010.[51] The press release expressly stated that those PV plants operationalized in 2009 would not be affected by the change.[52] The MIT also reserved its final decision as to the proposed abolition of the 5% Limit would apply to 2010 PV plants.[53] This proposal encountered heavy protest on the part of solar investors and banks on the basis that it would sharply reduce the FiTs the following year.[54]

157. On 28 August 2009, the MIT abandoned its proposals and chose not to abolish the 5% Limit from 1 January 2010, opting instead for a more gradual approach.[55] A letter was sent to the ERO explaining that this choice was needed to "ensure the investors in renewable sources certainty of payback of their investment, transparency and predictability" and that "[a] simple cancellation could thus entail a risk of suits filed by investors against the Czech Republic on grounds of lost

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47 Letter from the Minister of Environment to Josef Fiřt, 22 July 2009 (English translation) (**Ex. R-306**).

48 Letter from the Minister of Environment to Josef Fiřt, 22 July 2009 (English translation) (**Ex. R-306**).

49 Letter from Minister of Industry and Trade to Josef Fiřt, 29 July 2009 (English translation) (**Ex. R-135**).

50 Letter from Minister of Industry and Trade to Josef Fiřt, 29 July 2009 (English translation) (**Ex. R-135**).

51 Partial Award, para. 423; Tomáš Bartovský, "Ministry of Industry and Trade will Equalize the Support of Renewable Energy Sources", <www.mpo.cz>, 24 August 2009 (**Ex. R-138**).

52 Tomáš Bartovský, "Ministry of Industry and Trade will Equalize the Support of Renewable Energy Sources", <www.mpo.cz>, 24 August 2009 (**Ex. R-138**). *See also* Response, para. 255; Reply, paras. 140-145.

53 Tomáš Bartovský, "Ministry of Industry and Trade will Equalize the Support of Renewable Energy Sources", <www.mpo.cz>, 24 August 2009 (**Ex. R-138**). *See also* Response, para. 255; Reply, paras. 140-145.

54 E15.cz, "Companies want to retain aid for photovoltaics", 24 August 2009 (**Ex. R-359**).

55 *See* Partial Award, para. 423.

investments".[56] The Tribunal noted in the Partial Award that during the period March 2009 to May 2010, a caretaker government, with no parliamentary majority, had been installed, following the resignation of the Topolánek government. No action to address the solar boom was taken by that government.[57]

158. The ERO's concerns did not abate during this time of political difficulty. In a letter dated 8 September 2009, Mr Josef Fiřt wrote of the "critical need" for an amendment of the Act on RES Promotion, based on the "dramatic situation" of a rising number of grid connection requests.[58] Specifically, Mr Fiřt suggested that approval for connections to the grid had been granted for more than 2000 MW of capacity, a figure that he described as "particularly alarming".[59]

159. Mr Fiřt proposed and endorsed an amendment to the Act on RES Promotion that would "enable the [ERO] with effect from 1st January 2011 to adjust the prices for photovoltaics in harmony with the principles used for other types of renewable resources […]"[60] He also noted that this solution would allow:

> Investors […] to prepare sufficiently in advance for the change in conditions for investing which should eliminate entirely the risk of possible lawsuits in the Czech Republic regarding protection of investments.[61]

160. On 16 November 2009, the MIT confirmed at a press conference that the ERO would be able to adjust the FiT, uninhibited by the 5% Limit, for PV investments made starting in 2011.[62] It stated that this would allow the Czech Republic to "avoid the threat to the projects which are already under way or are sufficiently prepared".[63] Accordingly, the Czech Government submitted draft legislation that would amend Section 6(4) to allow the reduction of the FiT by more than 5% for

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56 Partial Award, para. 102; Letter from Roman Portužák to Blahoslav Němeček, 28 August 2009 (English translation) (**Ex. R-145**).

57 Partial Award, para. 122.

58 Letter from Josef Fiřt to Oldřich Vojiř, 8 September 2009, p. 1 (English translation) (**Ex. R-161**).

59 Letter from Josef Fiřt to Oldřich Vojiř, 8 September 2009, p. 1 (English translation) (**Ex. R-161**).

60 Letter from Josef Fiřt to Oldřich Vojiř, 8 September 2009, p. 2 (English translation) (**Ex. R-161**).

61 Letter from Josef Fiřt to Oldřich Vojiř, 8 September 2009, p. 2 (English translation) (**Ex. R-161**).

62 Partial Award, para. 103; Press Conference Following the Government Session, 16 November 2009 (**Ex. C-324**).

63 Press Conference Following the Government Session, 16 November 2009 (English translation) (**Ex. C-324**). *See also* Reply, para. 36; 2022 Hearing Transcript, Day 1, p. 22:21-25.

RES producers that had reached "less than an 11-year term investment recovery" and that this provision would only apply to plants connected as of 1 January 2011.[64]

161. The Respondent maintains that it was forced to retain the 5% Limit for the 2010 year, given that it was threatened with "lawsuits and international arbitrations" if it did not.[65] By contrast, the Claimants suggest that the Respondent chose not to make amendments to its RES Regime because, *inter alia*, it would not otherwise be able to meet the EU Target.[66]

162. On 23 November 2009, the ERO fixed the 2010 FiT in a manner consistent with the 5% Limit.[67]

163. In December 2009, a Czech newspaper published an article on the topic of RES regulatory reform, stating:

> 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 […] 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 […] With this bill, the government has finally made a clear statement regarding the future development possibilities for photovoltaics in the Czech Republic.[68]

4. Action to repeal the 5% Limit

164. In February 2010, the Czech grid operator requested that electricity companies suspend the commissioning of new solar plants by placing a moratorium on the issuance of new grid connection approvals (the "**Moratorium**").[69] This Moratorium did not apply to those plants which had already been approved, i.e., those who had received binding statements in 2010

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64 Partial Award, para. 425; Explanatory Report on Draft Act No 137/2010, p. 5 (English translation) (**Ex. R-147**).

65 Response, para. 33, *referring to* **RWS-Fiřt-1**, para. 19.

66 In support of this point, the Claimants points to a November 2009 ERO Report which called for more RES energy production, more RES plants, including PV plants, and "the retention of the current levels of purchase prices". *See* 2022 Hearing, Claimants' Opening Presentation, slides 25-26, *referring to* ERO, "Report on the Fulfilment of the Indicative Target for Electricity Production from Renewable Energy Sources for 2008", November 2009, pp. 26-27 (**Ex. C-335**).

67 ERO Price Decision No. 5/2009 (**Ex. R-38**).

68 L. Klett, P. Chmelíček, "An 'all-clear' for investors", Prager Zeitung, 16 December 2009 (English translation) (**Ex. R-279**). *See* Reply, fn. 237.

69 Soňa Holingerová, "ČEZ Distribuce responds to ČEPS's demand", 16 February 2010, (**Ex. C-319**); Response, paras. 34, 261; Reply, para. 154; 2022 Hearing Transcript, Day 1, pp. 91:11-14, 143:18-24.

("**Binding Statements**").[70] Receipt of these Binding Statements was a key part of the process which essentially allowed RES producers to reserve capacity on the Czech Republic's grid.[71]

165. On 17 March 2010, the Czech Government passed Act No. 137/2010. The Act, which entered into force on 20 May 2010 ("**Act 137/2010**"), paved the way to the 2011 abolition of the 5% Limit.[72]

166. In July 2010, the National Renewable Energy Action Plan was filed with the Commission by the Respondent, which (i) restated that the 2010 FiT for PV installations was the figure set in November 2009;[73] (ii) confirmed that the FiT would apply for 20 years;[74] (iii) outlined that there were no caps on the volume of any RES energy;[75] and (iv) predicted that 1650 MW of PV-generated energy would be installed in 2010, to meet the EU target.[76]

167. According to the Respondent, solar investors bypassed the Moratorium over the course of 2010 by: (i) purchasing grid connection approvals from speculators; (ii) cutting corners to reduce plant construction time from nine to twelve months to three months; and (iii) backdating materials used in the plant's licensing process.[77] As a result, the Respondent submits that its efforts to curb the solar boom were unsuccessful.[78]

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70 Soňa Holingerová, "ČEZ Distribuce responds to ČEPS's demand", 16 February 2010 (**Ex. R-319**); V. Vácha, "Boom development of solar power plants must be balanced with the stability of the grid and distribution network", 16 February 2010 (**Ex. R-320**); Response, para. 261; Reply, para. 40, *referring to* AF Power Press Release, "ČEPS calls for the suspension of connections for new renewable energy sources", <allforpower.cz>, 10 February 2010 (**Ex. R-316**). *See also* Statement of Defense, para. 85.

71 The Claimants characterize Binding Statements as follows: "[a] Binding Statement is a preliminary contract setting out a unilateral and legally binding statement by the grid operator confirming *inter alia*: (i) that the grid could sustain a given electricity input from the PV plant to be built under the specified technical conditions; and (ii) the grid operator's commitment to reserve the specified electricity input from the plant to be connected to the grid and to execute a grid connection agreement within 180 days". *See* Reply, para. 29, fn. 37; Submission, para. 214, fn. 271.

72 Act No. 137/2010 (**Ex. C-36**). *See also* Partial Award, para. 125; 2022 Hearing Transcript, Day 1, p. 23:1-4.

73 Ministry of Industry and Trade, National Renewable Energy Action Plan, July 2010, p. 58 (**Ex. C-80**). *See also* 2022 Hearing, Claimants' Opening Presentation, slide 31.

74 Ministry of Industry and Trade, National Renewable Energy Action Plan, July 2010, p. 59 (**Ex. C-80**). *See also* 2022 Hearing, Claimants' Opening Presentation, slide 32.

75 Ministry of Industry and Trade, National Renewable Energy Action Plan, July 2010, p. 59 (**Ex. C-80**). *See also* 2022 Hearing, Claimants' Opening Presentation, slide 33.

76 Ministry of Industry and Trade, National Renewable Energy Action Plan, July 2010, p. 77 (**Ex. C-80**). *See also* 2022 Hearing, Claimants' Opening Presentation, slide 33.

77 Response, para. 36, *referring to* **RER-Jones-2**, para. 7.58; Partial Award, para. 428.

78 Response, paras. 35-36.

168. In light of the significant "socio-economic, budgetary, and technical consequences" threatened by the solar boom,[79] the Respondent was required to devise an alternative solution.[80] Indeed, on 27 August 2010, the Czech Prime Minister went on record stating that "[w]e must suppress the solar business".[81]

169. On 15 September 2010, the Respondent released an explanatory report on Act No. 330/2010, which would enter into force and make amendments to the Act on RES Promotion in 2011. The Explanatory Report stated that "[p]hotovoltaic power plants already connected to the electric power system will have their right to claim support preserved under existing conditions".[82]

170. Signaling that legislative change was coming had the effect of accelerating additional investment into the PV sector. As noted above at paragraph 148, the overwhelming majority of the Czech Republic's total solar capacity was installed in the last few months of 2010, with a more than doubling of capacity from 754 MW in September to 1,959 MW at the years' end.[83]

171. The Partial Award found that "until the fall of 2010, there was no indication [of] impending regulatory changes" which would affect PV plants commissioned in the Czech Republic during 2009 and 2010.[84]

5. Formation of the Emergency Coordination Committee

172. On 22 September 2010, the Emergency Coordination Committee was convened, headed by the Minister of the Environment and the Minister of Industry and Trade.[85] The Emergency Coordination Committee's most pressing task was to find a way to finance the Subsidies, which

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79 *See* Response, paras. 76, 259.

80 For a discussion of the threat posed by the solar boom to the Czech Republic, *see* Response, paras. 29-31, 36, *referring to* Letter from Josef Fiřt to the Minister of Industry and Trade, 1 July 2009 (**Ex. C-332**) and "Updated Scenarios of Impacts of the Support of Renewable Sources on Electricity Prices", ERO Presentation, 24 October 2010, p. 20 (**Ex. R-191**). *See also* Partial Award, para. 101.

81 "Nečas for HN: We will slow down the process of electricity price increases and maybe even reverse it" 27 August 2010 (English translation) (**Ex. R-186**).

82 Explanatory Report on Act No. 330/2010, 15 September 2010, p. 8 (English translation) (**Ex. R-172**).

83 *See* Partial Award, para. 428, *referring to* Hearing Transcript, Day 1, p. 152:13-18. *See also* 2022 Hearing, Respondent's Opening Presentation, slide 40, *referring to* Updated Scenarios on Impacts of the Support of Renewable Sources on Electricity Prices, 24 October 2011, slide 2 (**Ex. R-191**); ERO Yearly Report on the Operation of the Czech Electricity Grid for 2014, 2015 (**Ex. R-101**), section III.

84 Partial Award, para. 426.

85 Resolution No. 681 of the Government of the Czech Republic, 22 September 2010 (**Ex. R-189**). *See also* Reply, para. 45; Response, para. 37.

were rapidly rising in cost to such an extent that it would no longer be feasible for electricity consumers to continue to fund them.[86]

173. The Emergency Coordination Committee considered a number of options, taking into account the prevailing socio-economic conditions in the Czech Republic.[87] On 13 October 2010, it transmitted to the Czech Parliament draft legislation that would see the State budget contribute to RES financing.[88]

174. In addition, at its 15 October 2010 meeting, the Emergency Coordination Committee raised the possibility of "withholding tax on sales of electricity from photovoltaic power plants".[89] Subsequently, on 2 November 2010, a second draft of this legislation was produced (the "**November Bill**"), which involved RES financing from the State budget but also introduced a levy on PV producers.[90]

175. This levy had been discussed in the media in September 2010.[91] However, its place in a legislative instrument was not made public until the November Bill was approved by the Chamber of Deputies on 9 November 2010.[92] At this point, the media reported that a levy had been included in the then-approved November Bill.[93]

6. Amendments to the RES Regime

176. In late 2010 and in 2011, a series of amendments to the Respondent's RES Regime occurred. The Respondent introduced Act No. 346/2010, repealing the Income Tax Holiday and modifying the

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86 Government of the Czech Republic, "Government against rapid price hikes on electricity", <vlada.cz>, 9 November 2010, p. 1 (**Ex. R-295**).

87 *See* Transcript of Senate Committee Session, 29 November 2010, p. 2 (**Ex. C-370**).

88 Draft Act amending the Act on RES Promotion, 13 October 2010 (**Ex. R-268**).

89 Minutes of the third meeting of the Coordination Committee, 15 October 2010 (English translation), p. 3. (**Ex. C-325**).

90 *See* Resolution of the Economic Committee of the Chamber of Deputies from the 5th Meeting, 2 November 2010 (**Ex. R-269**).

91 *See* Peter Vasek, "We made concessions, but it will not put the budget at risk", 24 September 2010 (**Ex. R-187**).

92 Czech Constitutional Court, Case No. Pl. ÚS 17/11, Decision, 15 May 2012, para. 15 (**Ex. CLA-22**).

93 Government of the Czech Republic, "Government against rapid price hikes on electricity", <vlada.cz>, 9 November 2010 (**Ex. R-295**).

Original Depreciation Provisions.[94] Through a separate act, it introduced the "solar levy" (collectively the "**Measures**", which together formed the "**Amended RES Regime**").[95]

177. The solar levy was introduced through Act No. 402/2010 ("**Act 402/2010**"), adopted by the Czech Parliament on 14 December 2010 and brought into effect on 1 January 2011 (the "**Solar Levy**").[96] Applying from 1 January 2011 to 31 December 2013 to revenues generated by PV plants that had been into operation between 1 January 2009 and 31 December 2010, the Solar Levy had the effect of reducing the payments made to electricity producers on a per MW basis.[97] It was set at 26% for payments to solar energy producers under the FiT system and 28% for payments to solar energy producers under the Green Bonuses system.[98] Act 402/2010's other effect was, as had been envisioned in earlier draft legislation, to source contributions to RES funding from the Czech State budget.[99] This changed the RES Regime from one financed entirely by consumer subsidies (in the form of higher electricity bills) to a hybrid system that combined consumer subsidies with subsidies supplied from the State's budget. It is evident from the Commission's later decision, of 28 November 2016, that this arrangement raised issues of State aid under EU law.[100]

178. According to the Claimants, the Solar Levy came "completely out of the blue" and was attached to their investments, which were originally guaranteed to the Subsidies, unencumbered, and for a 15- and then 20-year period.[101] As such, the introduction of the Solar Levy, the Claimants assert, was criticized by the Commission in light of its "retroactive character".[102]

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94 Act No. 346/2010 (**Ex. C-38**/**R-28**); Partial Award, para. 128.

95 Act No. 402/2010 (**Ex. C-37**/**R-173**). *See* Explanatory Report on Act No. 330/2010, 15 September 2010 (**Ex. R-172**); Act No. 346/2010 (**Ex. C-38/R-28**); Partial Award, paras. 126-128.

96 Act No. 402/2010, Art. VI (**Ex. C-37**/**R-173**).

97 Act No. 402/2010, s. 7(a) (**Ex. C-37**/**R-173**). *See* Partial Award, para. 126.

98 Partial Award, para. 126.

99 Act No. 402/2010, s. 6(a)-(b) (**Ex. C-37/R-173**).

100 European Commission, "State Aid SA.40171 (2015/NN) – Czech Republic: Promotion of electricity production from renewable energy sources", C(2016) 7827, 28 November 2016 (**Ex. R-367**) (hereinafter the "**Decision**").

101 Submission, para. 24; Reply, para. 123. *See also* Partial Award, para. 96.

102 Reply, para. 124, *citing* Letter from Ms Hedegaard and Mr Oettinger (European Commissioners) to Mr Kocourek (Czech Minister of Trade and Industry), 1 January 2011 (**Ex. C-337**).

179. On 1 January 2011, Act No. 330/2010 also entered into force. It amended Section 3(5) of the Act on RES Promotion and abolished any incentives related to photovoltaic plants with installed output exceeding 30 kilowatt peak ("**kWp**") commissioned after 1 March 2011.[103]

180. Partly entering into force upon its publication on 30 May 2012 and partly on 1 January 2013, Act No. 165/2012 repealed further provisions of the Act on RES Promotion (the "**New RES Act**"). One such result of the New RES Act was the termination of all contracts between RES producers and grid operators that had provided the former with either the FiT or Green Bonus, taking effect from 31 December 2012.[104]

181. The Solar Levy was extended so as to apply beyond 31 December 2013 through the introduction of Act No. 310/2013 ("**Act 310/2013**"),[105] which entered into force on 13 September 2013. From 1 January 2014 onwards, however, the Levy itself was reduced to 10% from 26%, and was only applicable to those plants which were commissioned in 2010.[106]

B. THE CLAIMANTS AND THEIR INVESTMENTS

182. The Claimants in this arbitration are Natland Investment, Natland Group, GIHG, and Radiance. Each Claimant made investments in the RES sector in the Czech Republic through Energy 21.[107] In turn, Energy 21 created or purchased shareholdings in SPVs which themselves commissioned and built PV plants in the Czech Republic.[108]

1. The Claimants and their corporate reorganizations

183. Natland Investment, an entity incorporated in the Netherlands, was, at the relevant times, a wholly-owned subsidiary of Natland Group.[109]

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103 Explanatory Report on Act No. 330/2010, 15 September 2010 (**Ex. R-172**). *See* Partial Award, para. 127.

104 *See* Partial Award, para. 129.

105 *See* Partial Award, para. 130.

106 *See* Partial Award, paras. 128, 130.

107 *See* Partial Award, paras. 105, 107.

108 Overview of the solar plants operated by the SPVs (**Ex. C-153**). *See also* Partial Award, paras. 107-108.

109 *See* Energy 21's Structure Diagram, 30 June 2011 (**Ex. C-45**); Claimants' Submission, para. 237.

184. On 20 October 2015, Natland Investment was renamed NIG.[110] According to Mr Raška, the renaming was a "mere formality [to] reflec[t] a company policy that 'Natland' explicitly appears only in the name of companies that actively seek new investment opportunities".[111]

185. Natland Group, an entity incorporated in Cyprus in 2009, was itself part of the broader Czech-owned investment group Natland ("**Natland**"), whose purpose was to seek out investment opportunities in medium-sized companies.[112] Natland's majority shareholder at the relevant times was Mr Raška.[113]

186. On 12 April 2016, Natland Group was renamed NGL.[114] Thereafter, various steps were taken to dissolve Natland Group, including preparing a draft plan relating to its dissolution on 15 October 2016,[115] and issuing a formal resolution approving the restructuring plan on 15 November 2016.[116] In early December 2016, Mr Raška approved the plan to reorganize Natland Group, specifically to merge into Capamera, after, it was said, having received oral legal advice that the reorganization would have no impact on this arbitration.[117]

187. The Claimants submit that the merger was a corporate decision taken with a view to simplifying the corporate chain at the Cyprus level and to reduce cost.[118] This is because, at the time, Natland (as a whole collective, and distinct from the single entity Natland Group) was based in the Czech Republic, whilst a number of its associated entities were located in Cyprus.[119]

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110 Claimants' Letter to the Tribunal, 10 May 2021, p. 1, Annex I.

111 Third Witness Statement of Tomáš Raška, 16 June 2021 (hereinafter "**CWS-Raška-3**"), para. 4.

112 *See* Partial Award, para. 105.

113 2022 Hearing Transcript, Day 1, p. 175:6-14.

114 Claimants' Letter to the Tribunal, 10 May 2021, p. 1, Annexes II and III; Claimants' Letter to the Tribunal, 19 May 2021, p. 2. *See also* Expert Report of Marcos Gregorios Dracos, 26 August 2021 (hereinafter "**CER-Dracos-1**"), para. 11.

115 **CER-Dracos-1**, Order of the District Court of Larnaca, 3 February 2017, Appendix B-5, para. III; Appendix B-5, Order Exhibit B.

116 **CER-Dracos-1**, Order of the District Court of Larnaca, 3 February 2017, Appendix B-5; Order Exhibits A1-A4.

117 **CWS-Raška-3**, para. 9; Letter from the Claimants to the Tribunal, 8 July 2021, p. 2. *See also* 2022 Hearing Transcript, Day 1, pp. 179:15-185:6, 191:17-24, 192:6-19. The Claimants, however, note that no written legal advice was provided in relation to the legal consequences flowing from the merger. Letter from the Claimants to the Tribunal, 8 July 2021, pp. 1-2. *See also* 2022 Hearing Transcript, Day 1, pp. 185:7-20, 187:5-21.

118 **CWS-Raška-3**, paras. 7-8. *See also* Submission, para. 250.

119 **CWS-Raška-3**, paras. 7-8. *See also* Reply, fn. 551.

188. On 3 February 2017, the District Court of Larnaca authorized Natland Group's application to merge into Capamera and it approved a set of merger terms pursuant to Cypriot company law.[120] In the process, Natland Group (then renamed NGL) was required to transfer the "whole of [its] estate, assets and liabilities" to Capamera.[121]

189. On 15 February 2017, Natland Group was dissolved and, thereafter, ceased to exist.[122]

190. GIHG is an entity incorporated in Cyprus in 2004 "with the purpose of investing in several countries in the field of sustainable development and renewable energy".[123]

191. The Claimants state that "GIHG apparently became the sole shareholder of Natland Investment in October 2015 and changed the name [to] NIG".[124] On 7 December 2015, GIHG became the sole shareholder of NIG on 7 December 2015.[125] GIHG was then purchased by Capamera in 2020 and thereby became a member of Natland.[126]

192. Radiance is an SPV, created by the Mid Europa Fund III LP (the "**Fund**"), a private equity company incorporated in the Channel Islands,[127] to "focu[s] on aggregating, constructing and operating solar projects/parks".[128] Its specific region of focus was to be Central and Eastern Europe.[129] In matters relating to Radiance, the Fund was advised by Mid Europa Partners LLP, a buyout investor headquartered in the United Kingdom ("**MEP**").[130]

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120 **CER-Dracos-1**, Order of the District Court of Larnaca, 3 February 2017, Appendix B-5; Order Exhibit B, para. 11. *See also* Reply, para. 346.

121 Claimants' Letter to the Tribunal, 10 May 2021, Annex II; **CER-Dracos-1**, para. 11. *See* **CER-Dracos-1,** Order of the District Court of Larnaca, 3 February 2017, Appendix B-5, para. II.

122 Second Expert Report of Kypros Ioannides, 19 April 2022, para. 5. Whether Capamera is entitled to continue to Natland Group's claims in this arbitration is one of the disputed issues in the current phase of the arbitration. *See* Section V.A below.

123 Partial Award, para. 105, *citing* Statement of Claim, para. 109.

124 2022 Hearing Transcript, Day 3, p. 122:16-18.

125 Business Register Extract, Netherlands Chamber of Commerce (**Ex. R-407**).

126 2022 Hearing Transcript, Day 1, pp. 176:5-25, 177:9-11; 2022 Hearing Transcript, Day 3, p. 122:18-22.

127 Partial Award, p. v.

128 Witness Statement of Thierry Marie Baudon, 18 March 2015 (hereinafter "**CWS-Baudon-1**"), Annex III, p. 1.

129 Partial Award, para. 105.

130 Partial Award, para. 105.

2. The Claimants' Investments in Energy 21

193. Around 2008, the Claimants identified the production of electricity from PV plants as "a favorable investment" in the Czech Republic.[131] According to the Claimants, this was influenced by the RES Regime outlined above, "the stability promised by the Czech Republic", and the downward trend in the prices of solar panels.[132]

194. Therefore, the Claimants made their investments in the Czech Republic through Energy 21,[133] the parent of which was initially Natland Investment Group B.V. ("**Natland B.V**.").[134] As discussed in the Partial Award, the Claimants invested in Energy 21 through a succession of equity acquisitions and debt financings, made by individual Claimants, comprising three phases.[135]

195. The first phase of the Claimants' investment in Energy 21 occurred on 20 May 2008 when GIHG purchased 50% of Energy 21 from Natland B.V.[136] On 3 March 2009, GIHG slightly reduced its shareholding by selling a 0.75% stake to Mr Daniel Kunz.[137] Subsequently, on 19 August 2009, GIHG sold another 2.5% stake to DCEMF Mezzanine Holdings B.V ("**DCEMF Mezzanine**").[138] After doing so, GIHG's stake in Energy 21 sat at 46.75%.[139]

196. On 18 December 2009, Natland Investment made its first purchase of shares in Energy 21, acquiring a 46.75% stake in the company from Natland B.V.[140]

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131 Partial Award, para. 106.

132 Partial Award, para. 106. *See* Statement of Claim, paras. 96-101.

133 According to the Statement of Claim, fn. 56, Energy 21 was set up on 5 March 2007 with the name Sumacon a.s. which was changed to Energy 21 a.s. on 21 April 2007. *See* Witness Statement of Tomáš Raška, 18 March 2015 (hereinafter "**CWS- Raška-1**"), para.11.

134 Natland B.V. is to be distinguished from the other members of Natland that are party to this arbitration. *See* **CWS- Raška-1**, paras. 10-11.

135 *See* Partial Award, paras. 110-117.

136 Sale and purchase agreement between Natland B.V. (as seller) and GIHG (as buyer), 20 May 2008 (**Ex. C-85**).

137 Contract on transfer of securities for consideration between GIHG (as transferor) and Ing Daniel Kunz (as transferee), 3 March 2009 (**Ex. C-93**).

138 Share purchase agreement between GIHG (as seller) and DCEMF Mezzanine Holdings B.V. (as buyer), 19 August 2019 (**Ex. C-94**).

139 50.00 - (0.75 + 2.50) = 46.75. Submission, para. 36; Partial Award, para. 111.

140 Contract on the transfer of securities between Natland Investment Group B.V. (as seller) and Genus Investment (as buyer), 18 December 2009 (**Ex. C-96**). At the time of this transaction, Natland Investment was instead named Genus Investment N.V. It became Natland Investment on 1 March 2010. *See* Commerce Chamber, History – NATLAND Investment Group N.V., 2 September 2014 (34368681) (**Ex. C-95**). *See also* Partial Award, fn. 76.

197. In the course of Energy 21's operation and during some of these various acquisitions, Natland B.V., GIHG, Natland Group and two other entities, Feraton Financial Services B.V. ("**Feraton**") and Blando Investments S.A. ("**Blando**"), either extended loans to Energy 21 or entered into agreements to assign receivables associated with such loans.[141]

198. On 18 December 2009, the same day as Natland Investment's purchase, Natland Group bought the receivables associated with loans that had been previously granted to Energy 21 by Feraton.[142]

199. On 27 April 2010, GIHG sold another two minor holdings in Energy 21 to two individuals: Mr Kunz received a further 0.50% stake and Mr Pavel Maleček acquired a 0.25% stake.[143] As a result, GIHG was left with a 46% shareholding in Energy 21.[144]

200. Mirroring GIHG, on 27 April 2010, Natland Investment sold a 0.5% stake in Energy 21 to Mr Kunz and a further 0.25% stake to Mr Maleček.[145] Like GIHG, these transactions left Natland Investment with a 46% shareholding in Energy 21.[146]

201. In the second phase of the investments, Radiance acquired control of Energy 21.[147]

202. Radiance's investment occurred by way of three agreements dated 11 May 2010: (i) an agreement with GIHG and Natland Investment, whereby Radiance acquired a total of 59.26% of Energy 21 (29.63% from each of GIHG and NIG) (the "**11 May 2010 SPA**");[148] (ii) a Facility Agreement

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141 *See, e.g.*, Submission, para. 37, *referring to* Partial Award, para. 111, Statement of Claim, paras. 123-125; Reply, para. 353.

142 Contract on the transfer of securities between Natland B.V. (as seller) and GIHG (as buyer), 18 December 2009 (**Ex. C-96**). Specifically, these receivables related to loans of 11 November 2008, 27 November 2008, 11 March 2008, 3 April 2008, 15 May 2008 and 3 September 2008, the last four of which were assigned to Feraton by Natland B.V. *See* Loan agreement between Feraton (as lender) and Energy 21 (as borrower), 11 November 2008 (**Ex. C-98**); Loan agreement between Feraton (as lender) and Energy 21 (as borrower), 27 November 2008 (**Ex. C-99**); Agreement on assignment of receivables between Natland B.V. (as assigner) and Feraton (as assignee), 10 August 2009 (**Ex. C-100**); Loan agreement between Natland B.V. (as lender) and Energy 21 (as borrower), 3 September 2008 (**Ex. C-101**).

143 Contract on transfer of securities for consideration between GIHG (as transferor) and Ing Daniel Kunz (as transferee), 27 April 2010 (**Ex. C-102**); Contract on transfer of securities for consideration between GIHG (as transferor) and Ing. Pavel Maleček (as transferee), 27 April 2010 (**Ex. C-103**).

144 46.75 - (0.50 + 0.25) = 46.00. *See* Partial Award, para. 112, *referring to* Statement of Claim, fn. 75.

145 Contract on transfer of securities for consideration of 27 April 2010 between Natland Investment (as transferor) and Ing. Daniel Kunz (as transferee) (**Ex. C-104**); Contract on transfer of securities for consideration of 27 April 2010 between Natland Investment (as transferor) and Ing. Pavel Maleček (as transferee) (**Ex. C-105**).

146 46.75 - (0.50 + 0.25) = 46.00. *See* Partial Award, paras. 111-112; Statement of Claim, fn. 75.

147 Partial Award, paras. 113-115; Submission, paras. 39-40; Response, p. 87, figure 8.

148 Initially, the transaction was governed by English law. However, on 3 June 2010, Radiance entered into a s second agreement on the transfer of shares with GIHG, Natland Investment and Energy 21. This was pursuant to and on identical terms as the 11 May 2010 transaction, but was governed by Czech law so as

with Energy 21, whereby Energy 21 would be provided a loan facility of up to EUR 27,000,000 to finance the construction and development of its PV projects (the "**11 May 2010 Facility Agreement**");[149] and (iii) an Investment and Subscription Agreement entered into with all the other shareholders of Energy 21 (i.e., GIHG, Natland Investment, Mr Kunz, Mr Maleček, DCEMF Mezzanine and Bland) (the "**Investment and Subscription Agreement**") that provided mechanisms by which the ultimate purchase price to be paid by Radiance and the other shareholding interests in Energy 21 could be adjusted (collectively, the "**2010 Transaction**").[150]

203. Under the Investment and Subscription Agreement, read together with the terms of the 11 May 2010 SPA, Radiance and other shareholders were bound by a framework which provided for various mechanisms for the adjustment of the ultimate purchase price to be paid by Radiance as well as of the various shareholder interests in Energy 21.[151] The adjustments "were based, *inter alia*, on the number of effective MW that would be connected to the grid by Energy 21 in the course of 2010".[152]

204. Further, on 3 June 2010, Radiance entered into an agreement on the transfer of shares with GIHG, Natland Investment and Energy 21, which was pursuant to and on the same terms as the 11 May 2010 SPA.[153]

205. The number of MW connected by Energy 21 was determined in mid-2011, at which point various adjustments in shareholding arrangements came into effect.[154] The result of such adjustments was

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to avoid any doubt as to the validity of the transfers. *See* Agreement for the sale and purchase of shares between Natland Investment and GIHG (as sellers) and Radiance (as buyer), 11 May 2010 governed by English law (**Ex. C-106**); Agreement for the sale and purchase of shares between Natland Investment and GIHG (as sellers) and Radiance (as buyer), 3 June 2010 governed by Czech law (**Ex. C-108**). *See also* Partial Award, paras. 113-114; Statement of Claim, para. 129.

149 Facility agreement between Radiance (as lender) and Energy 21 (as borrower), 11May 2010 (**Ex. C-107**).

150 Investment and Subscription Agreement between Natland Investment Group N.V. et al. and Energy 21 concluded, 11 May 2010 (**Ex. C-109**).

151 Partial Award, para. 114.

152 Partial Award, para. 114, *citing* Statement of Claim, para. 113. *See* Submission, para. 40.

153 Partial Award, para. 114, *referring to* Agreement for the sale and purchase of shares between Natland Investment and GIHG (as sellers) and Radiance (as buyer), 3 June 2010, governed by Czech law (**Ex. C-108**).

154 These adjustments were given effect to on 20 June 2011 and 11 July 2010, by way of a number of subsequent agreements. *See* Shareholders' subscription agreement in the form of notarial deed, 20 June 2011 (**Ex. C-114**); Sale and purchase agreement between Natland Investment (as seller) and GIHG (as buyer), 20 June 2011 (**Ex. C-115**); Sale and purchase agreement between GIHG and Natland Investment (as sellers) and DCEMF Mezzanine (as buyer), 20 June 2011 (**Ex. C-116**); Agreement on the sale and purchase of shares and settlement of mutual receivables between Radiance (as seller) and GIHG and Natland Investment (as buyers), 11 July 2011 (**Ex. C-117**).

that Radiance's stake sat at 52.42%, whereas GIHG and Natland Investment's fell to 22.50% and 20.08% respectively.[155]

206. The third phase of investments occurred in 2011 when Radiance increased its shareholding in Energy 21 to 95%.[156] On 4 August 2011, E21 Holding B.V. ("**E21 Holding**"), a wholly-owned subsidiary of Radiance, entered into an agreement with Natland Investment, Natland Group, and GIHG, whereby it acquired the 42.58% of Energy 21 held by GIHG and Natland Investment, as well as their outstanding loans to Energy 21.[157] Thereafter, on 5 October 2011, Radiance passed its 52.42% holding in Energy 21 to E21 Holding, giving the latter a total holding of 95% (the "**2011 Transaction**").[158]

207. The Claimants submit that Radiance paid CZK 22.8 million for the equity of GIHG, as well as CZK 1 million for the equity of Natland Investment, thus paying overall CZK 23.8 million.[159] In addition, Radiance was assigned the shareholder loans of GIHG and Natland Investment, for which it paid CZK 179 million to each of the two sellers.[160] Accordingly, the Claimants clarify that the total amount paid by Radiance in the 2011 Transaction was CZK 381.8 million, of which CZK 201.8 million was paid to acquire GIHG and CZK 180 million was paid for Natland Investment.[161]

208. After the extension of the Solar Levy brought about on 1 January 2014, the Claimants engaged OST Energy to prepare a due diligence report on Energy 21's portfolio in the Czech Republic. This was published in May 2014.[162]

209. Radiance later exited Energy 21 on 22 December 2015.[163] At this time, E21 Holding and DCEMF Mezzanine sold their respective 95% and 5% holdings in Energy 21 to Uniastra Holding Limited (the "**2015 Transaction**"). In the lead up to the 2015 Transaction, CEE Equity Partners used OST

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155 *See* Submission, para. 40.

156 *See* Partial Award, paras. 116-117; Submission, paras. 41-43; Response, p. 87, figure 8.

157 Agreement for the sale of shares between Natland Investment, GIHG, E21 Holding, Energy 21 and Natland Group, 4 August 2011 (**Ex. R-32**).

158 *See* Submission, paras. 41-42.

159 Reply, para. 435, *referring to* the Agreement for the sale of shares between Natland Investment, GIHG, E21 Holding, Energy 21 and Natland Group, 4 August 2011, clause 3.1 (**Ex. R-32**).

160 Reply, para. 435.

161 Reply, para. 435. *See also* Second Expert Report of Richard Edwards, 9 February 2022 (hereinafter "**CER-Edwards-2**"), para. 4.19.

162 ENA Energy Analyses and OST Energy, Technical Due Diligence Energy 21 Portfolio: 61 MW Solar PV Portfolio, Czech Republic (**Ex. FTI-4**).

163 Partial Award, paras. 116-117.

Energy's Report of May 2014 to calculate Energy 21's production figures and, accordingly, its overall valuation.[164]

3. Energy 21 and the Solar Boom

210. Energy 21 invested in the Czech solar market by creating or purchasing shareholdings in SPVs incorporated under Czech law.[165] Following its establishment in 2007, Energy 21 set up or purchased shareholdings in eleven SPVs during the course of the transactions mentioned above (of which the Claimants themselves indirectly became owners).[166] These SPVs owned and operated the solar installations.[167]

211. In order to build solar installations in the Czech Republic through Energy 21's SPVs, the Claimants went through a licensing process regulated by Czech law and, in particular, by the Energy Act.[168]

212. When GIHG purchased shares in Energy 21, the latter owned only one solar plant that enjoyed benefits under the Respondent's RES Regime.[169] Towards the end of 2008, however, Energy 21 had commissioned an additional five plants, leaving it with a capacity of 6.048 MW.[170]

213. The Partial Award found that by "at least" the summer of 2009, "it was a matter of public knowledge […] that the 'solar boom' was creating a policy issue for the Czech Government, and the Government would likely to reduce the RES support".[171] On 19 June 2009, Energy 21's CEO acknowledged that the Czech Republic was seeking to curb the solar boom.[172] Shortly after, in August 2009, he acknowledged the possibility of the Czech Republic implementing legislative change to this effect.[173]

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164 Letter to Mr Victor Karadjov and Dr Martin Bacher re: Conditional Binding Offer/Confirmatory Offer for 100% interest in Energy 21 a.s., 9 December 2015 (**Ex. FTI-3**).

165 Partial Award, para. 107.

166 Partial Award, para. 108.

167 Partial Award, para. 107. *See* Overview of the solar plants operated by the SPVs (**Ex. C-153**).

168 Energy Act (**Ex. C-152**). *See also* Partial Award, paras. 108-109.

169 Response, para. 49, Annex A.

170 Response, para. 49, Annex A.

171 Partial Award, para. 422.

172 R. Zelenka, "Wind plants fight for grid connection, owners of solar plants are worried that the state will reduce development of photovoltaic", Mladá Fronta E15, 19 June 2009 (English translation) (**Ex. R-200**).

173 M. Petříček, "Solar boom is slightly excessive", Hospodářské Noviny, 13 August 2009, p. 3 (**Ex. R-143**).

214. At the same time, he publicly outlined Energy 21's aim to commission a total of 30 MW of capacity in the year of 2009.[174] By this time, Energy 21 held 11% of the PV market and was angling to "have a 20% market share" by the end of the year.[175] It was seeking to double its capacity in 2010, subject to the prevailing legislative and regulatory conditions.[176]

215. As the price of solar panels dropped during the course of 2009, Energy 21 commissioned 26 solar projects and expected to connect an additional 30 MW of capacity to the Respondent's grid.[177] By the close of 2009, 35% of Energy 21's total solar capacity had been added.[178]

216. The decline in solar panel prices was also observed by MEP in 2008. According to Mr Thierry Marie Baudon, MEP started considering RES investment opportunities in 2008 as a result of "fav[o]rable industry dynamics" which included "declining equipment prices coupled with long term incentive schemes implemented by the governments across Europe"[179]. PV plant investment was considered to be the most attractive of RES investments "due to relatively short lead times from development through construction until final commissioning of the power plants".[180]

217. One year later, MEP proposed to establish Radiance Energy, a utility company focused on "aggregating, constructing and operating PV plants in [Central and Eastern Europe]".[181] The "opportunity memorandum", according to Mr Baudon, recognized that "due to the fast growing number of new solar installations and consequent rapid increase in solar contribution to the Czech grid – the Czech government might have reduced the FIT level in 2011 and that this would have limited Radiance ability (sic) to further increase its investment after 2011. That is why we focussed our investment strategy in the year 2010. Of course, we expected a possible reduction of the incentives but only for the future."[182]

218. By 18 December 2009, when Natland Investment made its first investment in Energy 21 and after the 16 November press conference in which the retention of the 5% Limit was announced,[183]

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174 M. Petříček, "Solar boom is slightly excessive", Hospodářské Noviny, 13 August 2009, p. 3 (**Ex. R-143**).

175 M. Petříček, "Solar boom is slightly excessive", Hospodářské Noviny, 13 August 2009, p. 4 (**Ex. R-143**).

176 M. Petříček, "Solar boom is slightly excessive", Hospodářské Noviny, 13 August 2009, p. 3 (**Ex. R-143**).

177 M. Petříček, "Solar boom is slightly excessive", Hospodářské Noviny, 13 August 2009, p. 3 (**Ex. R-143**).

178 Partial Award, para. 165.

179 **CWS-Baudon-1**, para. 16.

180 **CWS-Baudon-1**, para. 16.

181 **CWS-Baudon-1**, para. 17.

182 **CWS-Baudon-1**, para. 17.

183 *See* paragraph 160 above.

Energy 21 had completed all of its 2009 PV plants.[184] Natland Investment and GIHG sought financing to further develop Energy 21's portfolio, which led it to contact the Fund and MEP.[185] According to Mr Baudon, the MEP deal team identified Energy 21 "as the leading PV company in the Czech Republic and subsequently presented it to the IAC [investment advisory committee] in January 2010". The IAC approved the submission of a non-binding indication of interest to the founding shareholders of Energy 21.[186]

219. MEP itself characterized the solar business in the Czech Republic at the start of 2010 as a "last chance rush" and encouraged the Fund to explore possible investments in Energy 21.[187] It acknowledged that this rush was prompted by the chance that investment incentives would be "reduced".[188]

220. In February 2010, MEP and Radiance started conducting due diligence regarding potential investments in Energy 21 in concert with Ernst & Young and CMS Cameron McKenna ("**CMS**").[189] While CMS' due diligence recognized "the possibility of 'retroactive' changes" to the Respondent's regulatory regime, noting that "[a]lthough uncommon … there are cases where the law has been changed with retrospective effect",[190] in this instance it dismissed such a potentiality on the grounds that it would violate Czech constitutional principles and the Respondent's treaty obligations.[191]

221. After two months, MEP's deal team completed its analysis of the merits of a proposed acquisition of a controlling interest in Energy 21. It returned to the investment advisory committee in March 2010 whereupon that body unanimously approved an investment of up to €60 million.[192]

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184 Reply, para. 60.

185 As stated by the Claimants, "[a]fter the commissioning of the 2009 plants was completed, Energy 21's then shareholders – Natland Investment and GIHG – looked for substantial financing to develop Energy 21's further projects in the pipeline and came into contact with [the Fund], advised by [MEP]". *See* Reply, para. 61.

186 **CWS-Baudon-1**, para. 18.

187 **CWS-Baudon-1**, Annex IV, Opportunity Memorandum, 11 January 2010, p. 1.

188 **CWS-Baudon-1**, Annex IV, Opportunity Memorandum, 11 January 2010, p. 1.

189 **CWS-Baudon-1**, Annex VII, CMS' Opinion, "Solar Power in the Czech Republic – regulatory overview", 5 February 2010, p. 4; EY's Financial Due Diligence Report, 12 February 2010, pp. 13, 21 (**Ex. R-21**). *See also* 2022 Hearing Transcript, Day 1, pp. 23:15-24:5.

190 **CWS-Baudon-1**, Annex VII, CMS' Opinion, "Solar Power in the Czech Republic – regulatory overview", 5 February 2010, p. 4.

191 **CWS-Baudon-1**, Annex VII, CMS' Opinion, "Solar Power in the Czech Republic – regulatory overview", 5 February 2010, p. 4.

192 **CWS-Baudon-1**, para. 21.

222. At various stages in 2010, presentations were delivered to MEP's investment advisory committee, which noted the changing conditions in the Czech Republic's solar market.[193] For instance, the IAC was informed that there were "[o]ngoing discussions" in the Czech Republic regarding the solar boom's "financial impact", particularly on consumers who were cast as "sponsors" of the Subsidies.[194] Said presentations also noted that efforts were being made to address the solar boom, including the moratorium and changes to the 5% Limit.[195]

223. Moreover, MEP's legal advisor, CMS, assessed that Energy 21 had prepared a financial plan for certain SPVs if the Subsidies were "reduced by more than 5% in 2010".[196]

224. Overall, MEP assumed that there was "[l]imited risk of any regulatory changes for the existing operations / operations connected to the grid under current regulatory regime due to material risk of [*arbitrages*] from investors".[197]

225. The 11 May 2010 Facility Agreement that was facilitated by Radiance was designed to finance a further 16 solar projects.[198] In turn, over the course of 2010, Energy 21 added approximately 52% of its total portfolio.[199] Eleven of the Claimants' plants, accounting for a total capacity of 23.25 MW, were built after August 2010.[200]

226. The Claimants submit that each of their 2010 projects that generated this capacity was eligible to entitlements under the Respondent's RES Regime, as they were organized and had received

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193 Investment advisory committee presentation, 4 May 2010 (**Ex. FTI-13**); **CWS-Baudon-1**, Annex V, Investment advisory committee presentation, 3 March 2010.

194 Investment advisory committee presentation, 4 May 2010, slide 2 (**Ex. FTI-13**); **CWS-Baudon-1**, Annex V, Investment advisory committee presentation, 3 March 2010, slide 19.

195 Investment advisory committee presentation, 4 May 2010, slide 2 (**Ex. FTI-13**); **CWS-Baudon-1**, Annex V, Investment advisory committee presentation, 3 March 2010, slide 8.

196 CMS Cameron McKenna, Equity investment in Energy 21 a.s.: Key Legal Due Diligence Issues Report, slide 57 (**Ex. R-66**); Rejoinder, para. 57.

197 **CWS-Baudon-1**, Annex V, p. 17. The Respondent interpreted the word "arbitrages" to mean "arbitrations". *See* Response, para. 243: "[…] Claimants hoped that the Czech Republic would allow the misaligned regulatory regime to persist into 2010, and they did so in the context of threats of arbitration in relation to the corrective measures proposed in 2009", *referring to* **CWS-Baudon-1**, Annex V, Investment advisory committee Presentation, 3 March 2010, p. 17: "[l]imited risk of any regulatory changes for the existing operations/ operations connected to the grid under the current regulatory regime due to material risk of arbitrages [*sic*] from investors".

198 Submission, para. 214; Investment and Subscription Agreement between Natland Investment Group N.V. et al. and Energy 21, 11 May 2010, Schedule 7, p. 68 (**Ex. C-109**).

199 *See* Partial Award, para. 428.

200 Response, Annex A. *See also* Response, paras. 246-247, fn. 645.

Binding Statements prior to the imposition of the February 2010 moratorium.[201] Any projects that had received such Binding Statements were thought not to be affected by the moratorium.[202] The Claimants also posit that they anticipated that Energy 21 would not finish six of its 16 projects by the close of 2010, and those which would not be finished were abandoned.[203]

227. By contrast, the Respondent contends that Energy 21 "engaged in various improprieties in a rush to complete as many PV plants as possible".[204] According to the Respondent, the Claimants neither deny the hurry with which the 2010 plants were commissioned, nor do they offer any evidence to counter the Respondent's claim in this regard.[205]

228. Energy 21 continued to add to its capacity during the solar boom, adding 18.6 MW in 2009 and 31.5 MW in 2010.[206] However, a number of other investors also made sizeable investments in solar energy, particularly the state-owned company ČEZ,[207] which commissioned four of the five largest PV plants in the Czech Republic in 2010.[208] As a result, whilst Energy 21's total capacity rose, its market share dropped significantly between 2008 and 2010.[209]

229. At the time of the 2011 Transaction, the Claimants acknowledge that they "were aware of the risk that the Czech Republic could have prolonged the Solar Levy beyond the period for which it was initially intended to apply".[210] Indeed, "[t]he majority of the professional public" expected that

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201 *See e.g.*, Rozvadov I, Binding Statement, 14 August 2009 (**Ex. C-231**); Rozvadov II, Binding Statement, 14 August 2009 (**Ex. C-240**); Dřínov, Binding Statement, 16 October 2009 (**Ex. C-249**).

202 V. Vácha, "Boom development of solar power plants must be balanced with the stability of the grid and distribution network", 16 February 2010 (**Ex. R-320**); Reply, para. 154.

203 Submission, fn. 271.

204 Rejoinder, para. 54, *referring to* 2016 Rejoinder, paras. 180-187. Likewise, in the 2022 Hearing the Respondent stated: "And of course, if you give prospective investors a very long notice period before legislation goes into effect, it merely causes everyone to pile in and try to build as many projects as possible. Here, Claimants and other prospective investors were told nearly a year in advance that the [FiT] [...] would be cut in 2011, and they used this interval to try and build many, many new projects in 2010, which of course exacerbated the solar boom". *See* 2022 Hearing Transcript, Day 1, p. 85:17-25. *See also* 2022 Hearing Transcript, Day 1, pp. 145:22-146:23.

205 Rejoinder, para. 54.

206 Reply, paras. 92-93.

207 ČEZ's largest shareholder was the Czech Republic, which, on 31 December 2011, held close to a 70% interest in it. *See* ČEZ Group 2011 Annual Report, p. 2 (**Ex. C-469**). *See also* J. Lopatka, "Czech lawmakers approve curbs to solar boom", reuters.com, 17 March 2010 (**Ex. R-153**), which states discusses ČEZ's pursuit of the "biggest projects" in the solar market during 2010.

208 ČEZ Annual Report 2011, p. 101 (**Ex. C-469**).

209 Specifically, the Claimants calculate that Energy 21's market share was 10.86% at the end of 2008, 5.27% at the end of 2009 and 2.86% by the end of 2010. *See* Reply, paras. 92-94.

210 Witness Statement of Thierry Marie Baudon, 4 May 2016, para. 8.

the Solar Levy would be extended, and perhaps even so as to cover the entire estimated life of PV plants.[211]

C. EUROPEAN UNION STATE AID ASSESSMENT

230. Contestation as to the Czech Republic's compliance with EU State aid rules dates back to 2003, when it promulgated the draft Act on RES Promotion.[212] Organizations representing the Czech wind and solar industries filed a complaint with the Commission regarding the Draft, prompting a review by the Commission.[213]

231. Following receipt of the Czech Republic's comments,[214] on 27 July 2004, the Commission's review concluded with an announcement that the Draft Act did not constitute State aid.[215] This accorded with the Czech Republic's position, which was that support for RES producers was not State aid, because it was not drawn directly from the State's budget.[216]

232. In the Explanatory Report accompanying the Act on RES Promotion, it was specifically outlined that the Bill was "compatible with public aid law of the European Union".[217] Subsequently, the Commission requested additional information pertaining to the impact of the Act on RES Promotion and,[218] to that end, after receiving responses from the Czech Republic,[219] it acknowledged the Czech government's position that the Subsidies were not State aid.[220] In so

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211 Apogeo Expert Opinion re PVP Drínov, 25 March 2011, p. 51 (**Ex. R-235**); *See* Rejoinder, fn. 71.

212 *See* Partial Award, para. 90.

213 Letters from Czech Society of Wind Energy and the European Association for Renewable Energies EUROSOLAR respectively to Mr Monti and Mr Loyola de Palacio, 16 December 2003 (**Ex. C-69**).

214 Letter from H. Drabbe to the Mission of the Czech Republic to the European Communities, 27 January 2004 (**Ex. R-53**); Letter from the Chairman of the Office for the Protection of Competition of the Czech Republic to H. Drabbe, 9 March 2004 (**Ex. R-54**); Letter from K. Rudolecký to H. Drabbe, 26 April 2004 (**Ex. R-56**).

215 Letter from Commission to EUROSOLAR, 27 July 2004 (**Ex. C-70**).

216 *See* Response, para. 97, figure 7.

217 Explanatory report of the draft of the Act on Promotion, 12 November 2003, p.6 (**Ex. C-72**).

218 Letter form J. Zajíček to J. Pihlatie, 18 October 2005 (**Ex. R-60**); Letter from E. Van Ginderachter to the Permanent Representative of the Czech Republic to the European Union, 3 April 2009, p. 1 (**Ex. R-159**).

219 Expert Report of Kelyn Bacon QC, 28 October 2015, para. 61, *referring to* Letter from J. Pihlatie to the Permanent Representation of the Czech Republic to the European Union, 6 September 2005 (**Ex. R-57**); Letter from J. Zajicek to the J. Pihlatie, 18 October 2005 (**Ex. R-60**).

220 Specifically, the Commission wrote "based on the fact that *the Czech authorities consider* the renewables and cogeneration support system (feed-in-tariff, green bonuses and supplement to the market price) as **not** *constituting State aid*". *See* Letter from E. van Ginderachter to the Permanent Representation of the Czech Republic to the European Union, 17 June 2010 (**Ex. R-58**).

doing, it noted that this acknowledgment was "without prejudice to any such subsequent formal position of the Commission".[221]

233. On 8 January 2013, the Czech Republic notified the Commission of the New RES Act, which included all of the measures challenged in this arbitration.[222] The Commission issued a decision in respect of this notification on 11 June 2014, concluding, *inter alia*, that the RES support scheme for installations commissioned as of 1 January 2013 was in breach of Article 108(3) of the Treaty on the Functioning of the European Union (the "**TFEU**"), i.e., the EU State aid rules, but "consider[e]d the notified aid to be compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union".[223]

234. On 11 December 2014, the Czech Republic made a second notification to the Commission, making reference to the Amended RES Regime and, in particular, the Solar Levy.[224] However, it also stressed that RES incentives were not limited to those installations commissioned from 1 January 2013 and instead, as a result of the earlier Act on RES Promotion, had been made available for those commissioned between 1 January 2006 and 31 December 2012.[225]

235. On 28 November 2016, the Commission issued its decision on this second notification, finding that the support granted through the Act on RES Promotion "was financed from State resources" and that the Czech Republic had breached its State aid obligations.[226] The Commission concluded that the aid which was the subject of the Respondent's second notification was nevertheless compatible with the EU's internal market.[227] The Parties disagree on the extent to which the Commission factored in the Solar Levy when making this decision.[228] However, it is undisputed

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221 Letter from E. Van Ginderachter to the Permanent Representative of the Czech Republic to the European Union, 17 June 2010 (**Ex. R-58**).

222 Czech Republic's SANI Notification in State Aid Case No. SA351777 (**Ex. R-7**). *See also* Partial Award, paras. 137-145.

223 European Commission, Decision in Case SA.35177 (2014/NN) Czech Republic – Promotion of electricity production from renewable energy sources, 11 June 2014, paras. 75-76 (**Ex. RLA-79**).

224 General notification form pursuant to Article 2(1) of Regulation (EC) No 794/2004, 9 December 2014 (**Ex. R-49**). *See* Reply, para. 250; Rejoinder, para. 87. *See also* Decision, para. 1 (**Ex. R-367**).

225 Supplementary information sheet pursuant to Article 2(2) of Regulation (EC) No 794/2004, 9 December 2014 (**Ex. R-50**).

226 European Commission, Decision, paras. 75, 85 (**Ex. R-367**).

227 European Commission, Decision, s. 4.8 (**Ex. R-367**).

228 *See* Response, para. 107; Reply, para. 267; Rejoinder, paras. 100-102.

that the Commission at least considered it and made its decision on the notification taking into account the Solar Levy .[229]

236. Specifically, the Commission approved a rate of return for PV electricity between 6.3% and 8.4% for photovoltaic plants.[230] It noted that the rates of return for the installations subject to review "do not exceed the level of 8.4%" – and that "[s]uch levels of return are in line with levels of return of similar photovoltaic installations under similar conditions observed in other EU Member States".[231] Whilst the decision approved the PV rate of return at 8.4%, it also approved higher rates of return for biomass (up to 9.5%) and biogas (up to 10.6%).[232]

237. In its decision of 28 November 2016, the Commission also opined that any compensation "which [an Arbitral Tribunal constituted on the basis of the ECT or an intra-EU BIT] were to grant would constitute in and of itself State aid", adding that tribunals do not have the competence to authorize the granting of such aid. Rather, this power falls into the exclusive competence of the Commission and, should a tribunal award such compensation, this would be contrary to Article 108(3) of the TFEU, and such an award would not be enforceable.[233]

238. On 3 April 2017, the Claimants applied to the EU General Court (the "**General Court**") in an attempt to set aside the Commission's decision of 28 November 2016.[234] This application, *inter alia*, challenged the finding that the Czech Republic's RES Regime had constituted State aid, particularly on the basis that discussions between the Commission and the Czech Republic implied otherwise.[235] In response, the Commission stated to the General Court that "any compensation granted by an arbitration court would constitute State aid in itself, would infringe [TEFU] Article 108 and would not be enforceable".[236]

239. On 20 September 2019, the General Court dismissed the Claimants' case, finding that the Commission's correspondence with the Respondent did not produce binding legal effects and

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229 Decision, para. 91 (**Ex. R-367**). *See also* Reply, para. 267; Rejoinder, para. 102.

230 Decision, para. 99, Table 3 (**Ex. R-367**).

231 Decision, para. 117, Table 3 (**Ex. R-367**).

232 Decision, para. 117 (**Ex. R-367**).

233 Decision, para. 150 (**Ex. R-367**).

234 Application of the Natland Claimants and others v. the European Commission to the General Court of the European Union, 3 April 2017 (**Ex. R-399**).

235 Application of the Natland Claimants and others v. the European Commission to the General Court of the European Union, 3 April 2017 (**Ex. R-399**).

236 Case T-217 *FVE Holýšov I s. r. o. and Others v. European Commission*, ECLI:EU:T:2019-633, para. 151 (**Ex. RLA-366**); Decision, para. 150 (**Ex. R-367**).

instead was a "mere legal opinion".[237] In particular, the General Court dismissed the Claimants' argument that they could derive legitimate expectations from the Commission's 2004 letter in which it deemed the draft Act on RES Promotion not to be State aid.[238] This was due to the fact that said correspondence did not surpass the threshold sufficient to be considered "precise, unconditional and consistent assurances".[239]

240. The Claimants appealed to the European Court of Justice (the "**ECJ**") in September 2019.[240] On 21 September 2021, the ECJ upheld the General Court's judgment in full.[241]

IV. THE PARTIES' REQUESTS FOR RELIEF

A. THE CLAIMANTS' REQUEST FOR RELIEF

241. In their Submission, the Claimants request that the Tribunal order the Respondent to:

> (i) compensate Claimants for all losses caused to them as a result of the introduction and the prolongation of the Solar Levy, in an amount of not less than CZK 1,769.8 million (inclusive of pre-award interest), apportioned among Claimants as follows:
>
> - GIHG **CZK 331.8 million**
> - Natland Group / Natland Investment
>   - **CZK 296.1 million**, in case compensation is paid to Natland Group, or
>   - **CZK 393.2 million** (inclusive of tax gross-up), in case compensation is paid to Natland Investment
> - Radiance **CZK 1,141.9 million**
>
> (ii) pay to Claimants post-award interest on any amount of damages awarded under (i) above, from the date of the final award until payment of the amounts determined therein at the interest rate of pre-award interest plus 2%, compounded annually; and
>
> (iii) reimburse 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

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237 Case T-217 *FVE Holýšov I s. r. o. and Others v. European Commission*, ECLI:EU:T:2019-633, para. 49 (**Ex. RLA-366**).

238 Case T-217 *FVE Holýšov I s. r. o. and Others v. European Commission*, ECLI:EU:T:2019-633, paras. 67, 72 (**Ex. RLA-366**).

239 Case T-217 *FVE Holýšov I s. r. o. and Others v. European Commission*, ECLI:EU:T:2019-633, para. 70 (**Ex. RLA-366**).

240 C-850/19 P *FVE Holýšov I s. r. o. and Others v. European Commission*, ECLI:EU:C:2021-740 (**Ex. RLA-353**). *See also* Response, paras. 106-107.

241 C-850/19 P *FVE Holýšov I s. r. o. and Others v. European Commission*, ECLI:EU:C:2021-740 (**Ex. RLA-353**). *See also* Response, p. 58, paras. 106-107.

and expenses of the Arbitral Tribunal, and all other costs of the arbitration, including any expenses arising from the participation of third parties.[242]

242. In their Reply, the Claimants request that the Tribunal order the Respondent to:

> (i) compensate Claimants for all losses caused to them as a result of the introduction and the prolongation of the Solar Levy, in an amount of not less than **CZK 1,769.8 million** (inclusive of pre-award interest), apportioned among Claimants as follows:
>
> - GIHG **CZK 331.8 million**
> - Natland Group (now Capamera) / Natland Investment (now NIG)
>   - in case compensation is paid to Natland Group (now Capamera) **CZK 296.1 million**, or
>   - in case compensation is paid to Natland Investment (now NIG) **CZK 393.2 million** (if the Tribunal awards tax gross-up), or, in the alternative, **CZK 296.1 million** plus a declaration that the Czech Republic is bound to refund any taxes that Natland Investment will pay in the Netherlands on the compensation awarded to it in the final award,
> - Radiance, **CZK 1,141.9 million**
>
> (ii) pay to Claimants post-award interest on any amount of damages awarded under (i) above, from the date of the final award until the payment of the amounts determined therein at the higher of the following rates: (i) the rate of the pre-award interest plus 2%, or, alternatively (ii) the 10-year yield of the Czech zero-coupon bond on the date of the final award.
>
> (iii) reimburse 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.[243]

243. In their Submission on Costs, the Claimants request that the Tribunal order the Respondent to:

> (i) reimburse Claimants **Euro 7,825,214.42**, i.e. all costs of the merits phase of this arbitration that culminated in the Partial Award issued on December 20, 2017;
>
> (ii) reimburse Claimants **Euro 1,912,956.59**, i.e. all costs of the quantum phase in the event that Claimants be awarded damages, regardless of their amount and, in any case, at least Euro 99.829,97, as the legal costs they incurred in relation to Respondent's challenge of Mr. Beechey, its *Achmea* Objection, its applications concerning the Funding Agreement, and its objection giving rise to the "Capamera issue", as well as the non-legal costs relating to these procedural incidents;
>
> (iii) pay interest compounded annually on any amount awarded to Claimants under (i) and (ii) above, at the rate indicated in para. 507(*ii*) of the Reply – or at the higher rate that the Tribunal considers more appropriate to reflect the current environment of high and still rising inflation[244] – from December 20, 2017 until full payment for any sum

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242 Submission, para. 252.

243 Reply, para. 507.

244 Claimants' Submission on Costs, para. 35; Reply, para. 503.

awarded under (i) above, and from the date of the final award until full payment for any sum awarded under (ii) above; and

(iv) reject any request by Respondent to be reimbursed any portion of its costs relating to this arbitration.[245]

B. THE RESPONDENT'S REQUEST FOR RELIEF

244. In its Response, the Respondent requests that the Tribunal grant the following relief:

(i) Reject Claimants' requests in respect of Capamera;

(ii) Declare that Claimants are not entitled to any damages; and

(iii) Award to the Czech Republic any additional relief as the Tribunal may consider just and appropriate, including costs, legal fees and expenses, and interest.[246]

245. In its Rejoinder, the Respondent requests that the Tribunal grant the following relief:

(i) Reject Claimants' requests in respect of Capamera;

(ii) Declare that Claimants are not entitled to any damages; and

(iii) Award to the Czech Republic the totality of its costs, legal fees, and expenses, as well as interest thereon; and

(iv) Grant such additional relief as the Tribunal may consider just and appropriate.[247]

246. In its Submission on Costs, the Respondent requests that the Tribunal grant the following relief:

(i) Reject Claimants' request for the Czech Republic to bear any of their costs, legal fees, or expenses; and

(ii) Order Claimants Natland Investment, G.I.H.G., and Radiance, jointly and severally, to bear, in whole or in appropriate part, the costs, fees, and expenses incurred by the Czech Republic in the arbitration, plus interest at the six-month U.S. Treasury rate (or such other rate as the Tribunal deems appropriate) until the date of payment.[248]

V. THE CLAIMANTS' ENTITLEMENT TO MONETARY RELIEF

247. The Parties concur that the standard of compensation under customary law is that set forth in the *Chorzów Factory* case: "reparation must, as far as possible, wipe out all the consequences of the

245 Claimants' Submission on Costs, para. 35.

246 Response, para. 312.

247 Rejoinder, para. 176.

248 Respondent's Submission on Costs, para. 14.

illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[249]

248. However, the Parties disagree as to whether the Claimants are entitled to monetary relief under the aforementioned standard of full reparation. Notably, the Parties disagree on the following issues, which include the specific issues raised by the Tribunal in the Partial Award and deferred to this phase of the proceedings:

(a) Whether the Claimants have identified any compensable injury;

(b) Whether the Claimants assumed the risk that ultimately could affect the profitability of their investments and, if so, what is the impact of the assumption of that risk on quantum;

(c) Whether the Claimants willfully contributed to the solar boom and, if so, what impact does that have on quantum;

(d) Whether EU State aid law bars the awarding of any compensation to the Claimants;

(e) Whether Natland Group has a claim on the merits that is separate from that of Natland Investment;

(f) Whether Natland Group and Natland Investment are entitled to claim collectively for the same loss;

(g) Whether Natland Investment has made a claim under the Netherlands-Czech BIT that relates to a protected investment; and

(h) What is the effect on quantum, if any, of the Claimant[s] Radiance's wholly-owned subsidiary, E21 Holding B.V., purchasing GIHG's and Natland Investment's remaining shareholdings in Energy 21 (22.50% and 20.08% respectively, or 16.37% and 19.37%, respectively) after the Solar Levy was enacted.

249. In addition to these issues, the Parties also disagree on the Claimants' Request to Amend the Case Caption, in order to include Capamera as successor of Natland Group.

250. The Tribunal will first address the Request to Amend the Case Caption, followed by the questions arising by the claims brought by Natland Group and Natland Investment, since these issues

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[249] Submission, para. 67, *citing Case Concerning the Factory at Chorzów (Germany v. Poland)*, Claim for Indemnity (The Merits), Permanent Court of International Justice, Judgment of 13 September 1928, PCIJ Series A No. 17 (1928), p. 47 (**Ex. CLA-118**) (hereinafter "***Case Concerning the Factory at Chorzów (Germany v. Poland)***"); Response, para. 65.

determine which entities shall be entitled to reparation following the breach identified in the Partial Award. The Tribunal will then address the Respondent's arguments regarding the alleged lack of identification of a compensable injury, assumption of risks, contributory fault, and EU State aid rules, which the Respondent avers should deprive the Claimants from receiving any compensation.

A. WHETHER CAPAMERA IS ENTITLED TO CONTINUE NATLAND GROUP'S CLAIMS

251. The Claimants seek leave of the Tribunal to amend the case caption to reflect the new name of Natland Group resulting from a merger so as to allow Capamera to pursue the claims in this arbitration originally brought by Natland Group.[250] The Claimants, relying on Dr Dracos' Reports, argue that, as a matter of Cypriot law, Capamera became the universal successor of Natland Group and therefore it is entitled to continue the claims of Natland Group in these proceedings.

252. Objecting to the Claimants' request, the Respondent relies on Mr Ioannides' Reports. It argues that Capamera has no standing in this arbitration, given that (i) it is a standalone entity distinct from Natland Group that has not established jurisdiction in its own right; and (ii) the Claimants have not shown that Natland Group's investment treaty claims were transferred to Capamera.

1. The Claimants' Position

253. According to the Claimants, in accordance with investor-State arbitral jurisprudence,[251] the effects of the merger at issue must be assessed exclusively under Cypriot law, given that all companies involved in the merger were incorporated in Cyprus.[252] Conversely, nothing in the jurisprudence supports the Respondent's position that international law or EU conflict-of laws rules are applicable in the specific context of assignment by way of merger.[253]

254. As explained by Dr Dracos, the Claimants assert that the Court of Larnaka approved the merger pursuant to Sections 198 and 200 of the Cypriot Companies Law, allowing Capamera to acquire all properties of Natland Group, so as to become "in substance, the 'successor' of Natland Group".[254] The properties acquired by Capamera, the Claimants continue, included Natland

250 *See* Section II.E of the Final Award. *See also* 2022 Hearing Transcript, Day 1, pp. 57:15-60:23.

251 *See* Claimants' letters to the Tribunal, 19 May 2021 and 8 July 2021. *See also* Reply, fn. 542.

252 Reply, paras. 350-351. *See also* 2022 Hearing Transcript, Day 1, p. 57:19-21.

253 Reply, paras. 352-353. *See also* 2022 Hearing Transcript, Day 1, p. 58:11-17.

254 Submission, para. 249, *referring to* **CER-Dracos-1**, paras. 12-14, 17-23, 26.

Group's treaty claims because, under Cypriot law, causes of action are considered a form of intangible property that can be transferred in a merger.[255] In particular, the Claimants note that there was nothing abusive in Natland Group merging with Capamera as the merger was carried out only to reduce costs.[256]

255. The Claimants contest the Respondent's interpretation of "property" in Section 200 of Cypriot law, which it bases on a judgment of the majority of the House of Lords in 1940.[257] Noting that the present circumstances deal with "a completely different situation, in a completely different world", the Claimants' expert, Dr Dracos asserts that this "old precedent […] [i]f applied in Cyprus […] would create significant problems in the operation of the merger provisions in Cypriot Companies Law, and run contrary to business realities and business needs".[258]

256. Even assuming *arguendo* that international law were relevant to decide the present issue, the Claimants point out that nothing under international law prohibits the assignment of treaty claims.[259] Therefore, contrary to the Respondent's assertion that Capamera must establish jurisdiction anew as a new party to this arbitration, the Claimants contend that Capamera, as the universal successor to the entirety of Natland Group's rights and obligations, can rely on the Partial Award's jurisdictional findings in respect of Natland Group, in application of the principle that the standing of a party before an arbitral tribunal for jurisdictional purposes must be determined by reference to the date on which the proceedings are instituted.[260]

2. The Respondent's Position

257. The Respondent objects to the Claimants' request to amend the case caption on the basis that investor-State jurisprudence prevents Capamera from joining these proceedings as a new party without the Respondent's consent.[261] In this respect, the Respondent argues that the issue of standing in this case is governed by international law and that the Claimants have failed to cite

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255 Submission, para. 249, *citing* **CER-Dracos-1**, paras. 16-23. *See also* Expert Report of Marcos Dracos, 7 February 2022 (hereinafter "**CER-Dracos-2**"), para. 5.

256 Submission, para. 250. *See also* **CWS-Raška-1**, para. 7.

257 Reply, para. 358, *referring to* UK House of Lords, *Nokes v. Doncaster Amalgamated Collieries Ltd* [1940] A.C. 1014 (**Ex. KI-4**).

258 Reply, paras. 359-360, *citing* **CER-Dracos-2**, para. 39(3). *See also* 2022 Hearing Transcript, Day 1, pp. 58:18-59:10.

259 Reply, paras. 354-355.

260 Reply, para. 363. *See also* 2022 Hearing Transcript, Day 1, p. 59:18-25.

261 Response, para. 195, *referring to Tulip Real Estate and Development Netherlands B.V. v. Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, paras. 228-229 (**Ex. RLA-369**).

any authority that would allow a putative new claimant entity, without proving the jurisdictional prerequisites, unilaterally to add itself as a party to an ongoing investor-State arbitration.[262]

258. Even assuming *arguendo* that Capamera's standing in this arbitration turned exclusively on Cypriot law, the Respondent relies on Mr Ioannides' report to argue that "Section 200 of the Cypriot Companies Law does not allow for the transfer of property rights which are not as a matter of law transferable or assignable" and that this provision only concerns those property rights, "with which the original company has the right to deal without having to obtain the consent of some third party".[263] In fact, the Respondent points out that Dr Dracos, in contradiction to the Claimants' arguments, has twice stated that a Cypriot court would not have jurisdiction to order that Capamera be made a claimant in this case.[264]

259. Furthermore, the Respondent notes that while the question of transferability or assignability of a chose in action in Cyprus is a matter to be determined under the law governing such chose in action, the Claimants' claims in this arbitration are brought under international law by virtue of international treaties and, hence, "[there is] no reason to believe that Cypriot law governs the [c]laims".[265]

260. Consequently, for the Respondent, the Claimants have failed to discharge their burden of showing that Natland Group transferred its investment treaty claims to Capamera and that Capamera is entitled to continue Natland Group's claims and seek damages.[266]

3. The Tribunal's Analysis

261. The Tribunal considers that the Claimants' request regarding the case caption to replace "Natland Group" with "Capamera" should be granted.

262. *First*, the issue underlying the Claimants' request is one of party succession, not one of admitting a third party into an ongoing arbitration. The Tribunal has not identified any requirement in the applicable treaties, nor in international law broadly considered, establishing that party succession requires consent by a respondent. In consequence, if Capamera is the successor to a party that the Tribunal has already determined was a proper party to the arbitration, it is not necessary for the

262 Response, para. 201; Rejoinder, para. 29(b).

263 Submission, para. 200, *citing* Expert Report of Kypros Ioannides, 23 November 2021 (hereinafter "**RER-Ioannides-1**"), para. 6(d).

264 Rejoinder, para. 29(f), *referring to* **CER-Dracos-1**, para. 25; **CER-Dracos-2**, para. 38.

265 Response, para. 200, *citing* **RER-Ioannides-1**, para. 6(f).

266 Rejoinder, para. 29(d).

Respondent to consent to the substitution of Capamera for Natland Group. Capamera would not be adding itself to the arbitration; it would, rather, be carrying on the arbitration to which Natland Group was a proper party. Thus, the key point is whether Capamera can be considered the successor of Natland Group for the purposes of the present case.

263. *Second*, in the Tribunal's view, the effects of Natland Group's merger into Capamera are principally determined by reference to Cypriot law, since it is the law of the company's place of incorporation. This approach to the applicable law has been applied in many prior cases, for example, by the tribunal in *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, where the effects of the merger of Samedan Oil Corporation into the claimant – Noble Energy Inc. – for the purposes of party succession were determined based on the laws of the state of Delaware:

> According to the Claimants, Delaware law governs the merger and its effects. It follows that the consequences of the merger are that "Noble Energy succeeded to all of Samedan's rights and obligations under its contracts" […]. Section 259(a) of the Delaware General Corporations Law refers to the surviving or resulting company as "possessing all the rights" of the merged companies and states that all property "shall be vested" in the surviving or resulting company […].
>
> The Respondents contend that Ecuador law and the terms of the Investment Agreement govern the consequences of the merger. The Tribunal will revert later to the applicability of the Investment Agreement. At this juncture, with respect to the applicable national law, it agrees with the Claimants that Delaware law governs the validity and effects of the merger between Samedan Oil Corporation and Noble Energy, both being companies incorporated under the laws of Delaware.
>
> On the basis of the certificate of ownership and merger of 17 December 2002 […], the Tribunal is satisfied that Samedan Oil Corporation was merged into Noble Energy and that Noble Energy is the surviving entity of the merger, it being understood that "all property, rights, privileges, powers and franchises, and every other interest shall be thereafter as effectually the property of the surviving […] corporation" and that "all debts, liabilities and duties of the respective constituent corporation shall thenceforth attach to said surviving […] corporation […]. In other words, Noble Energy has absorbed Samedan Oil Corporation and succeeded to all its rights and obligations.[267]

264. *Third*, Mr Dracos and Mr Ioannides agree that universal succession does not exist under Cypriot law.[268] Nonetheless, in the Tribunal's view, the terms of the merger in the present case did include Natland Group's claim in the present arbitration.

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267 *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICISD Case No. ARB/05/12, Decision on Jurisdiction, paras. 87-89 (**Ex. RLA-16**).

268 **CER-Dracos-1**, fn. 14; **RER-Ioannides-1**, para. 8.2.

265. Natland Group's merger into Capamera was approved by the District Court of Larnaka on 3 February 2017.[269] The terms of the merger were established in the Draft Terms of the Merger dated 15 October 2016, which state as follows:

> From an accounting point of view, all the actions of the Absorved Companies which are carried out on behalf of the Transfer Company as of 1st January 2017 will be considered as actions of the Transfer Company CAPAMERA LTD.
>
> All assets and liabilities of the Absorbed Companies will be transferred to the Transfer Company CAPAMERA LTD.[270]

266. Mr Dracos has opined that, by virtue of section 200 of the Cypriot Companies Law, the property transferred from Natland Group to Capamera included the claims in this proceeding, as a type of intangible property.[271] On the other hand, Mr Ioannides has explained that the transfer of all property cannot include "property rights which were not as a matter of law, transferable or assignable",[272] although he took no view on whether Natland Group's treaty claims fall within such a category of rights under international investment law.[273]

267. The Tribunal agrees with the Respondent and Mr Ioannides that the transferability of the treaty claims is subject to international law. On the facts of the present case and the submissions presented by the Parties, however, the Tribunal cannot identify a rule of public international law that would restrain the assumption of an established treaty claim by an entity which has merged with the party which previously held such claim in accordance with applicable municipal law.

268. Consequently, it is the Tribunal's view that, since, to use the Larnaka District Court's phrasing, all assets and liabilities of Natland Group having been transferred to Capamera, such transfer validly includes the former's treaty claims. Therefore, Capamera shall be considered as Natland Group's successor for the purposes of the present arbitration.

269. Although this finding upholds Capamera's substitution of Natland Group, before moving on to other matters, the Tribunal considers it necessary to express its disapproval of the way in which the Claimants handled the Capamera issue. Although Natland Group approved the plan to restructure on 15 November 2016, and the merger was approved on 7 February 2017, the Claimants did not disclose this fact until May 2021. Notably, Mr Raška, who had testified that

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269 **CER-Dracos-1**, Appendix B-5, Cypriot Order.

270 **CER-Dracos-1**, Appendix B-5, Order Exhibit B.

271 **CER-Dracos-1**, para. 15.

272 **RER-Ioannides-1**, para. 10.13(c).

273 **RER-Ioannides-1**, para. 10.22.

Natland Group was still existent in his Second Statement dated 4 May 2016,[274] failed to update the Tribunal on the matter in the hearing held in March 2017, a month after the merger was effected. This should have been disclosed openly to the Tribunal and to the Respondent. It was not, and as a result it caused unnecessary complications in the current phase of the proceeding. As explained in paragraph 732 below, this fact has been taken into account by the Tribunal when deciding the allocation of the costs of the arbitration.

B. CLAIMS BROUGHT BY NATLAND GROUP AND NATLAND INVESTMENT

270. The Partial Award deferred to this phase of the proceedings the determination of:

(a) whether Natland Group has a claim on the merits that is separate from that of Natland Investment;[275]

(b) whether Natland Group and Natland Investment are entitled to claim collectively for the same loss;[276] and

(c) whether Natland Investment has made a claim under the Netherlands-Czech BIT that relates to a protected investment (i.e., Energy 21).[277]

271. The Claimants answer each question in the affirmative. The Respondent disagrees.

1. The Claimants' Position

272. The Claimants submit that Natland Investment and Natland Group are entitled to pursue independent investment treaty claims with regard to the same investment comprising the 20.08% interest in Energy 21, "which, as at 1 January 2011, was directly held by Natland Investment and indirectly held by Natland Group via its wholly owned subsidiary Natland Investment".[278] According to the Claimants, this is permitted under the ECT and the BITs, which recognize shareholdings in a company as a form of protected investment.[279] The Claimants further note that it is well established under international investment law that shareholders generally have standing

274 Witness Statement of Thomas Raška, 4 May 2016, para. 18.

275 Partial Award, para. 241.

276 Partial Award, para. 241.

277 Partial Award, paras. 241, 266.

278 Submission, para. 237.

279 Submission, para. 238, *referring to* ECT, Art. 1(6)(b); Netherlands-Czech Republic BIT, Art. 1(a)(ii); Cyprus-Czech Republic BIT, Art. 1(1)(b).

to bring claims for damages arising from measures that affect the local companies in which they hold a direct or indirect interest.[280]

273. For the Claimants, the Respondent's assertion that only Natland Group may claim damages is incompatible with the fact that Natland Group's qualifying investment consists, *inter alia*, of its indirect shareholding in Energy 21, and not of its direct shareholding in Natland Investment.[281] In any event, the Claimants consider that the Respondent's objection has no practical significance, given that the damages would come out the same, even if the claim only concerned Natland Group's shareholding in Natland Investment.[282]

274. That said, the Claimants submit that Natland Group and Natland Investment "do not intend to abuse the ISDS system" and therefore "accept that compensation in respect of their (then) 20.08% interest in Energy 21 will be paid only to one of them" in order to avoid double recovery.[283]

275. As to the Tribunal's question whether Natland Investment made a claim under the Netherlands-Czech BIT that relates to a protected investment (i.e., Energy 21), the Claimants clarify that Natland Investment's substantive claims in this arbitration have consistently concerned the loss it suffered due to its "direct" shareholding in Energy 21, which the Tribunal has already found to be protected under the Netherlands-Czech BIT.[284] Such position, the Claimants note, is also consistent with Mr Edwards' damages calculation, which is based on the diminution of the fair market value of the Claimants' investments in Energy 21 caused by the imposition of the Solar Levy.[285]

276. Consequently, for the Claimants, "the only issue that remains to be decided in this phase of the arbitration is the quantification of the damage suffered by Natland Investment's 'direct' investment in Energy 21", because of the imposition of the Solar Levy, which the Tribunal has found to be a breach of the FET standard under the Netherlands-Czech BIT.[286]

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280 Submission, paras. 238-239; Reply para. 297.

281 Submission, para. 240.

282 Submission, para. 240.

283 Submission, para. 241; Reply para. 298.

284 Submission, para. 243; Reply, para. 302, *referring to* Partial Award, paras. 266, 437, 508(f). *See also* 2022 Hearing Transcript, Day 1, p. 61:14-23.

285 Reply, para. 304. *See also* Expert Report of Richard Edwards, 1 September 2021 (hereinafter "**CER-Edwards-1**"), para. 1.39. *See also* 2022 Hearing Transcript, Day 1, p. 62:4-7.

286 Reply, paras. 302-303, 305, *referring to* Partial Award, paras. 437, 508(f).

277. Lastly, rejecting the Respondent's argument that Natland Investment is not entitled to damages, because the Solar Levy had an impact only on the PV plants, which are not protected under the Netherlands-Czech Republic BIT, the Claimants contend that Natland Investment would in any event be entitled to recover damages under the ECT, which protects both "direct" and "indirect" investments.[287] The Claimants further assert that the Solar Levy "severely impaired Energy 21's value, and in turn Natland Investment's shareholding in Energy 21, which – as the Tribunal found – is a 'protected investment' under Article 1(a) of the Netherlands BIT".[288] Given that Natland Investment is not requesting compensation in respect of "investments and expenses incurred by entities over which there is no jurisdiction", the Claimants consider the present case distinguishable from *PSEG v. Turkey*.[289]

2. The Respondent's Position

278. The Respondent submits that the Tribunal cannot award compensation to Natland Group, because Natland Group and Natland Investment are advancing identical claims despite being two entities with two separate investments.[290]

279. The Respondent considers that the "proposed solution", namely that the two Natland entities bring one claim collectively, is also untenable, since Natland Group no longer exists.[291] In this respect, the Respondent emphasizes that while Mr Raška could have left Natland Group intact for a *de minimus* sum (at an annual cost of EUR 350), he chose voluntarily to dissolve Natland Group and revealed this information only in May 2021, over four years after the Cypriot court approved the restructuring.[292]

280. Moreover, considering that Mr Raška—a Czech national—was able to bring claims in this arbitration by relying only on Natland Group's place of incorporation and its "permanent seat" in Cyprus,[293] the Respondent avers that "it is inappropriate for [the] Claimants to argue at this

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287 Reply, paras. 306-308. *See also* Partial Award, para. 508(d).

288 Reply, para. 309.

289 Reply, paras. 310-311, *citing PSEG Global, Inc., And Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 325 (**Ex. CLA-29**) (hereinafter "***PSEG Global v. Turkey, Award***").

290 Response, para. 172.

291 Response, para. 173.

292 Response, paras. 177-179, Figure 9.

293 Response, paras. 174-176.

stage that a corporate reality such as the non-existence of Natland Group should be ignored".[294] Instead, the choices made by Mr Raška should "carry consequences".

281. Finally, the Respondent posits that the Claimants have failed to show that Natland Investment's damages claims are related to the Energy 21 shares, which it owned directly, and are not based on alleged harm to an asset, like the SPVs and the PV plants, which it held indirectly through Energy 21.[295] In this respect, the Respondent points out that Mr Edwards' damages model analyzes the alleged impact of the Solar Levy on "the PV plants' cash flows", i.e., on the cash flows of assets that the Tribunal has deemed to not qualify as "investments".[296]

282. The Respondent further takes issue with the Claimants' decision to insist on the claims based on the Netherlands-Czech Republic BIT if Natland Investment would nonetheless be entitled to recover the same damages under the ECT as the Claimants submit.[297]

283. In the Respondent's view, *PSEG v. Turkey* is instructive, because the tribunal rejected the claimant's damages claim on the grounds that it "w[ould] not undo with one hand what it did with the other".[298] As the Tribunal has already determined that the Netherlands-Czech Republic BIT does not protect any Czech assets that a Dutch entity owns through a Czech intermediary, the Respondent argues that an alleged injury to assets like the PV plants and the Czech SPVs cannot be the subject of a damages claim by Natland Investment.[299] After all, one of the "most basic rules in investor-State arbitration is that '[t]he claim must relate to the claimant's investment, and not someone else's investment'".[300]

3. The Tribunal's Analysis

284. The Tribunal considers the Respondent's argument regarding Natland Investment's claims in relation to a protected investment and the possibility for it to posit a claim in conjunction with Natland Group's claim to be unfounded.

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294 Rejoinder, para. 30.

295 Response, para. 163; Rejoinder, para. 26.

296 Response, para. 163, *citing* **CER-Edwards-1**, para. 3.7.

297 Rejoinder, para. 27.

298 Response, para. 164, *citing PSEG Global v. Turkey, Award*, para. 325 (**Ex. CLA-29**).

299 Response, para. 164.

300 Rejoinder, para. 25, *citing* Z. Douglas, The International Law of Investment Claims, p. 248 (**Ex. RLA-3**).

285. The Partial Award granted (i) "[t]he Claimants' claim that the Respondent has breached the fair and equitable treatment standard in Article 10 of the Energy Charter Treaty"; (ii) "Natland Group's claims that the Respondent has breached the fair and equitable treatment standard in Article 2(2) of the Cyprus-Czech Republic Bilateral Investment Treaty"; and, (iii) Natland Investment's claim that the Respondent has breached the fair and equitable treatment standard in Article 3(1) of the Netherlands-Czech Republic Bilateral Investment Treaty.[301]

286. This decision, which is *res judicata*, was made considering that the Claimants' investment in the Czech Republic was made through Energy 21.[302]

287. Regarding the Netherlands-Czech Republic BIT, the Respondent challenged the Tribunal's jurisdiction, arguing that Natland Investment had failed to make an "investment" within the meaning of Article 1(a), which defines "investments" as "every kind of asset invested either directly or through an investor of a third State".[303] However, the Tribunal upheld its jurisdiction by stating the following:

> 266. However, this is not the end of the matter in the present case. The Tribunal notes that according to Article 1(a)(ii) of the Netherlands-Czech Republic BIT, the term "investments" "shall comprise every kind of asset invested either directly or indirectly through an investor of a third State and more particularly, though not exclusively … shares … and other kinds of interests in companies and joint ventures, as rights derived therefrom." It is undisputed that Natland Investment, an entity incorporated in the Netherlands, was during the relevant period a shareholder in Energy 21, a legal entity incorporated in the Czech Republic. It would therefore appear to be indisputable, and the Tribunal finds, that Natland Investment has made an "investment" in the Czech Republic through its shareholding in Energy 21. For purposes of this determination, it does not matter whether Natland Investment's substantive claims in this arbitration are for compensation for damage sustained by Energy 21, or for damage sustained by the SPVs in which Energy 21 held shares, or for damage to the assets held by the SPVs. This is a matter for the merits, not for jurisdiction, and the Tribunal therefore defers the determination of whether Natland Investment has made a claim that relates to a protected investment (i.e., Energy 21) to the merits, specifically quantum.[304]

288. Therefore, the Tribunal's understanding that the Claimants' protected investment is composed by their shareholding in Energy 21 is also *res judicata*. What has been left open for this phase of the proceedings in this regard is the determination of whether Natland Investment's claim is effectively related to this protected investment.

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301 Partial Award, para. 508.

302 Partial Award, para. 107; Statement of Claim, para. 103.

303 Partial Award, para. 260.

304 Partial Award, para. 266.

289. In response to this question, the Claimants maintain that their "substantive claim in this arbitration is for damages inflicted to its interest in Energy 21".[305] As such, the report prepared by their quantum expert, Mr Edwards, contains an instruction "to assess the Claimants' losses from the diminution in the fair market value […] of their investments in Energy 21 caused by the imposition of the [Solar Levy]".[306] The methodology used by Mr Edwards then focuses on the enterprise value of the SPVs, considering that it is reflected on the equity value of Energy 21.[307]

290. The Respondent, however, asserts that there is no evidence to support the relation between Natland Investment's claim and the protected investment under the Netherlands-Czech Republic BIT. In the Respondent's view, Mr Edwards' damages model does not refer to a protected investment, because it revolves around the alleged impact of the Solar Levy on the PV plants' cash flows, which do not qualify as "investments".[308]

291. As a matter of law, the Tribunal considers and concludes that the Claimants' allegation that Natland Investment's claims substantively refer to its shareholding in Energy 21 should be sufficient to consider that its claim is related to a protected investment, which is precisely the shareholding in Energy 21. That is all the more so, considering that one of the possibilities of calculating the impact on this investment is through its main assets, as the Claimants have proposed:

> 3.7 I understand that it it's the Claimants' case that the First and Second Solar Levies affected the cash flows that the PV plants were expected to generate. It follows that the impact of the levies on the cash flows generated by the PV plants will be reflected in the value of the PV plants and (in full) in the value of the Energy 21 SPVs which own the plants. This impact will, through its 100% ownership of the SPVs be reflected (in full) in the value of Energy 21 and, therefore, in the value of the Claimant's investments in Energy 21 in proportion to their respective shareholdings.[309]

292. A different matter, discussed in Section VII, is whether the Claimants' assertions and methodology sufficiently prove the damages claimed to have been inflicted on their protected investment, their shareholding in Energy 21.

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305 Submission, para. 244.

306 Submission, para. 244, *citing* **CER-Edwards-1**, para. 1.39.

307 Submission, para. 244, *citing* **CER-Edwards-1**, para. 1.49.

308 **CER-Edwards-1**, para. 3.7.

309 Response, para. 163, *citing* **CER-Edwards-1**, para. 3.7.

293. The Tribunal has also considered the issues brought forth on *PSEG v. Turkey*. In that case, the tribunal first dismissed the claims brought by one of the claimants for lack of jurisdiction.[310] Nonetheless, another claimant continued to claim damages in relation to events affecting the entity over which jurisdiction was rejected, with the result that it was no longer a party.[311] Accordingly, the *PSEG v. Turkey* tribunal rejected the possibility of awarding compensation "in respect of investments or expenses incurred by entities over which there is no jurisdiction".[312]

294. As stated above, the Tribunal finds that Natland Investment's claims are, in fact, related to their protected investment, their shareholding in Energy 21. The Tribunal has not found that it lacks jurisdiction over Natland Investment's claims. Thus, the present case stands on a different factual footing from that of the *PSEG v. Turkey* case.

295. Regarding Natland Investment and Natland Group, during the first phase of the proceedings, the Respondent also contested the Tribunal's jurisdiction by stating that "Natland Group in any event cannot assert claims based on the same interest as its subsidiary Natland Investment, except if it makes a claim for loss of value of its subsidiary. However, Natland Group has not made any such claim".[313]

296. The Tribunal upheld its jurisdiction, considering that the issue raised was a matter related to quantum and not to jurisdiction, and deferred the decision to this phase:

> 241. Finally, as to the Respondent's argument that Natland Group cannot claim for the same loss as Natland Investment, the Tribunal considers that the issue is not one of standing but rather a question of whether the Natland Group has a claim on the merits that is separate from that of Natland Investment, and whether Natland Group and Natland Investment are entitled to claim collectively for the same loss. The Tribunal considers that this issue is closely linked to the merits and will therefore consider it on the merits, specifically quantum.[314]

297. The Claimants argue that Natland Investment and Natland Group are entitled to pursue independent claims in respect of the same 20.8% interest in Energy 21. The reason would be that such share was directly held by Natland Investment and indirectly by Natland Group, precisely via Natland Investment.[315]

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310 *PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketiv. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, paras. 188-194, (**Ex.CLA-282**).

311 *PSEG Global v. Turkey*, Award, para. 322 **(Ex. CLA-29**).

312 *PSEG Global v. Turkey*, Award, para. 325 **(Ex. CLA-29**).

313 Partial Award, para. 238.

314 Partial Award, para. 241.

315 Submission, paras. 237-239.

298. The Respondent contends that it would be impossible to advance two identical claims over different investments.[316]

299. As explained above, the Tribunal's jurisdiction over the Claimants' claims is derived from their shareholding in Energy 21. This shareholding, was, as of 1 January 2011, directly owned by Natland Investment and, as such, qualifies as a direct investment under the ECT[317] and the Netherlands-Czech Republic BIT.[318]

300. During this period, Natland Investment was also wholly owned by Natland Group. This means that Natland Group was also the owner of the shareholding in Energy 21 that Natland Investment possessed, but in an indirect manner. The Tribunal notes that this ownership also qualifies as an "investment" under the ECT[319] and the Cyprus-Czech Republic BIT.[320] In fact, the Tribunal has upheld its jurisdiction over Natland Group's claim considering that the investment consists of the shareholding in Energy 21.

301. In this sense, the issue left open by the Partial Award is whether Natland Investment's and Natland Group's claims differ in terms of damages, and whether they can claim them collectively.

302. The Tribunal considers that, in order to answer this question, three distinctions should be made. *First*, as a matter of fact, if there is an economic loss suffered by Energy 21, both Natland Investment and Natland Group would see it reflected in their respective balance sheets, in one case directly, and in the other, indirectly. Both would have suffered the same or similar damages as a consequence of the same action, in this case, as a consequence of the Respondent's breach of the fair and equitable treatment.

303. *Second*, as a matter of law, each entity has a right to claim for such damages, even under different legal treaties, as is the case here. Natland Investment has a right to claim the damages suffered under the ECT and the Netherland-Czech Republic BIT. Natland Group has a right to claim the damages suffered under the ECT and the Cyprus-Czech Republic BIT.

304. *Third*, however, as a matter of enforcement, since Natland Investment is a wholly-owned subsidiary of Natland Group, any payment received by Natland Investment would also benefit Natland Group. The Claimants are not allowed to receive double recovery and the fact that they

316 Response, para. 172.

317 ECT, Article 1(6)(b).

318 Netherlands-Czech Republic BIT, Article 1(a)(ii).

319 ECT, Article 1(6)(b).

320 Cyprus-Czech Republic BIT, Article 1(1)(b).

are pursuing claims in relation to the same shareholding in Energy 21 means that, should any compensation be ordered for the offending measure's impact on this investment, the Respondent would only need to pay the compensation ordered to one of them. This has been explicitly recognized by the Claimants.[321]

305. That being the case, the Tribunal considers it best to establish that the payment be made to only one of the entities. In doing so, the Tribunal takes into consideration that (i) it has already determined that both companies' investment is comprised of their shareholding in Energy 21 and that (ii) according to Claimants, should the compensation be paid entirely to Natland Group (now Capamera), there would be no need for a tax gross up[322] (discussed in Section VII.F.2). Consequently, the Tribunal will order that the payment be made in favor of Natland Group (now Capamera).

306. The Respondent has also questioned Natland Group's grounds over the fact that this enterprise no longer exists.[323] The Tribunal considers that this objection was already answered in Section V.A.3 above, which dealt with the question whether Capamera is entitled to continue Natland Group's claims.

C. WHETHER THE CLAIMANTS HAVE IDENTIFIED ANY COMPENSABLE INJURY

307. The Claimants submit that they are entitled to damages, because the Solar Levy decreased the value of Energy 21 by reducing the cash flows generated by the PV plants. By contrast, the Respondent argues that the reduction in cash flows caused by the Solar Levy cannot be construed as a compensable injury in light of the Tribunal's findings in the Partial Award.

1. The Claimants' Position

308. The Claimants submit that they are entitled to compensation because the Solar Levy decreased the value of Energy 21 by (i) reducing the PV plants' cash flows; and (ii) increasing the perception of risk associated with the Czech PV market.[324] In this respect, the Claimants reject the Respondent's arguments that the Claimants contributed to the solar boom and that the Solar Levy was "a reasonable and appropriately tailored response" to the problems created by the solar

321 Submission, para. 241.

322 Submission, para. 168.

323 Response, para. 179.

324 *See* Submission, para. 158.

boom.[325] The Respondent's position, the Claimants argue, is irreconcilable with the Tribunal's "unquestionabl[e]" finding that the Solar Levy was an unlawful measure in breach of the FET standard and with the Tribunal's request that the Parties present a valuation model that "segregate[s] the impact of the Solar Levy".[326]

309. The Claimants also take issue with the Respondent's understanding of the principle of full reparation, namely that the Tribunal needs to assess what would have happened if the unlawful measure (i.e., Solar Levy) had not been enacted.[327] In the Claimants' view, while reparation is due only to the extent necessary to "reestablish the situation which would, in all probability, have existed", this does not call for speculation as to alternative courses of action the Respondent might have followed had it not adopted the Solar Levy or whether any hypothetical actions by the Czech Republic would have affected the investors' investment in a way similar to the Solar Levy.[328] In particular, the phrase "in all probability", the Claimants submit, requires a probabilistic assessment of damages and "the use of an ex ante or ex post approach to valuation".[329]

310. In any event, the Claimants posit that the Respondent has failed to demonstrate that it would have enacted "corrective measures" to address the solar boom.[330] Moreover, while it must be assumed that the Respondent would have enacted lawful measures to counter the solar boom had it not imposed the Solar Levy, the fact that measures of that kind could have been adopted, in the Claimants' view, does not justify any hypothetical reduction to the Claimants' damages.[331] Even if the Respondent could not have enacted any lawful measures that would include reducing the FiT, the Claimants argue that this too would have violated Section 6(1)(b)(2) of the Act on RES Promotion that guarantees a fixed FiT level.[332]

311. According to the Claimants, the cases cited by the Respondent in which the tribunals considered a but-for scenario of the State adopting alternative corrective measures to reduce subsidies, are distinguishable from the present case, given that (i) the Tribunal in the Partial Award has

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325 Reply, para. 313, *citing* Response, para. 64.

326 Reply, paras. 314, 316-317, *citing* Partial Award, para. 504.

327 Reply, para. 319.

328 Reply, paras. 320-321, *citing Case Concerning the Factory at Chorzów (Germany v. Poland)*, p. 47 (**Ex. CLA-118**).

329 Reply, para. 321.

330 Reply, para. 322.

331 Reply, para. 323.

332 Reply, paras. 324, 327.

determined that the Act on RES Promotion guaranteed a stable FiT level, rather than a reasonable rate of return, and that the Respondent is liable for having violated that guarantee; (ii) it was not "inevitable" that the Claimants would be called to bear the financial burden of the support they would be receiving under the Act on RES Promotion; and (iii) the crisis which led the State to adopt measures is not comparable to the situation in which the Czech Republic adopted the Solar Levy.[333]

2. The Respondent's Position

312. Recalling the Partial Award's findings that the reduction in the level of RES support was "a reasonable and appropriately tailored response to the problems that the solar boom had created", to which the Claimants had contributed,[334] the Respondent rejects the Claimants' assertion that the Solar Levy decreased the value of Energy 21 by (i) reducing cash flows to the PV plants that Energy 21 owned indirectly; or (ii) creating a purportedly higher perception of risk.[335] The Respondent concludes that the reduction in cash flows as a result of the Solar Levy cannot be construed as an injury for which any compensation is due.[336]

313. *First*, relying on the *Chorzów Factory* decision, as well as other decisions of investment tribunals, the Respondent submits that reparation under the international standard is due only to the extent necessary to "re-establish the situation which would, *in all probability*, have existed if the [unlawful State] act had not been committed" which, in the Respondent's view, means that the Tribunal must assess the situation if the Solar Levy had not been enacted.[337] Therefore, the Respondent contends that situations in which the State would have enacted different corrective measures that would have reduced the level of cash flows to the Claimants' PV plants in the same or similar ways as the Solar Levy must be taken into account.[338]

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333 Reply, paras. 324-326, *citing Hydro Energy v. Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, para. 690 (**Ex. RLA-351**) (hereinafter "***Hydro Energy v. Spain***"); *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 442 (**Ex. RLA-177**) (hereinafter "***Sempra Energy International v. The Argentine Republic***").

334 Response, para. 64, *citing* Partial Award, para. 451; Rejoinder, para. 35.

335 Response, para. 63.

336 Response, para. 64.

337 Response, paras. 65-68, *citing Case Concerning the Factory at Chorzów (Germany v. Poland)*, p. 47 (**Ex. CLA-118**) [emphasis added by the Respondent]; *Hydro Energy v. Spain*, para. 686 (**Ex. RLA-351**); *Sempra Energy International v. The Argentine Republic*, para. 400 (**RLA-177**); *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020 para. 659 (**Ex. CLA-262**).

338 Response, para. 70.

314. In light of the solar boom, the Respondent submits that (i) it would have "in all events" enacted corrective measures; and (ii) "last chance rush" investors, such as the Claimants, would have been "called upon to bear some part of the burden of such measures".[339] In this respect, the Respondent emphasizes that the Tribunal never found that the amount that the Claimants and the other solar investors were asked to contribute was unfair or inequitable or otherwise in violation of the Respondent's international commitments.[340] It follows therefrom, the Respondent avers, that the Claimants are not entitled to compensation based on the reduction in cash flows to Energy 21's PV plants, given that such reduction was deemed reasonable and proportionate by the Tribunal.[341]

315. *Second*, the Respondent maintains that the Claimants have failed to prove that the Solar Levy resulted in a higher perception of risk in the Czech PV market.[342] Noting that the Claimants' contention is based on Mr Edwards' calculations that the "purported value of Energy 21 shares at different times implies an increase in regulatory risk between 2010 and 2011",[343] the Respondent, relying on Mr Peer's calculations, argues that the differences between theoretical and implied discount rates are in fact "much narrower, leaving less room for the purported technological or regulatory risk premiums assumed to exist by Mr Edwards".[344]

316. As further discussed below in the context of challenging Mr Edwards' assignment of a regulatory risk premium in his two calculations,[345] the Respondent considers that the claim that the Solar Levy increased the perception of risk is unsupported by contemporaneous evidence.[346] In fact, the Respondent takes the view that the introduction of various corrective measures, including the Solar Levy, reduced, rather than increased, the level of uncertainty and the regulatory risk.[347] Moreover, the Respondent posits that the Claimants have failed to show that any change in the regulatory risk is necessarily attributable to the Solar Levy, as opposed to other contemporaneous

339 Response, para. 69.

340 Response, para. 69.

341 Response, para. 70.

342 Response, para. 71.

343 Response, para. 72.

344 Response, para. 72, *referring to* Expert Report of Michael Peer, 24 November 2021 (hereinafter "**RER-Peer-4**"), para. 2.2.7.

345 *See* Section VII.B.2(a) of the Final Award.

346 Response, para. 72.

347 Response, para. 72.

measures in the Czech Republic, or indeed elsewhere in Europe, or other economic or political developments.[348]

3. The Tribunal's Analysis

317. The Tribunal considers the Respondent's argument that there is no compensable injury to be unfounded.

318. *First*, both Parties agree, as is widely accepted in international law, that damages resulting from a breach such as that found by the Partial Award should be determined based on the principle of full reparation.[349] Using the terms of the PCIJ in the *Factory at Chorzów* case, this means that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[350]

319. *Second*, the Tribunal agrees with the Claimants that assessing the situation which would have existed "in all probability", had the Solar Levy not been enacted, is not an invitation to speculate about alternative legitimate measures the Respondent might have adopted to counter the effects of the solar boom.[351] The Tribunal also agrees with the Claimants that such but-for scenario should be one in which the Respondent adopted lawful measures. That is, measures that would not have violated the commitment embedded in Section 6(1)(b)(2) of the Act on RES Promotion.[352]

320. *Third*, such speculation is not needed in the present case. The Partial Award already established that there was only one exception under which the minimum level of revenue that the Respondent undertook to guarantee could be legitimately reduced. That is, the "review and control under EU State aid rules applied by the Commission":

> 419. The Tribunal concludes that Section 6(1)(a)(2) of the Act on RES Promotion amounts to an intrinsic guarantee of stability, in terms of both the level of support and the time period over which the guarantee is intended to be in force. It also cannot be seriously disputed that the stability of the regulatory framework is one of the elements governed by the FET obligation in Article 10 of the ECT; indeed, Article 10 specifically mentions stability as one of the relevant elements, providing that "[e]ach Contracting Party shall, in accordance with the provisions of the 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

348 Response, para. 73.

349 Submission, para. 67; Response, para. 65.

350 *Case Concerning the Factory at Chorzów (Germany v. Poland)*, p. 47 (**Ex. CLA-118**).

351 Reply, para. 321.

352 Reply, para. 323.

> Investors of other Contracting Parties fair and equitable treatment." In the present case, the Respondent not only had an obligation under Article 10 of the ECT to "encourage and create stable … conditions for Investors" **it specifically undertook to guarantee a minimum level of revenue for a period of fifteen, later twenty years, subject only to review and control under EU State aid rules applied by the Commission**.[353]

321. As shall be seen, the Partial Award's recognition of the European Commission's role to "review and control" State aid assumes importance when applying the *Chorzów Factory* case's "in all probability" analysis. The Tribunal rejects various of the Respondent's arguments aimed at reducing or even eliminating an award of damages, but it has accepted the assertion that there was a legitimate policy issue facing the Czech Republic as to the continued sustainability of the PV segment of the RES sector. Of particular relevance to the present analysis is the fact that the evidence shows that the Respondent concluded that the regime could not continue in its then-present state without recourse to State financial resources. It follows that in the but-for scenario, the required direct State aid would increase the likelihood of the Commission exercising its review and control function (as indeed it did when the revised RES regime was notified to it). Accordingly, in the present phase of the proceeding, the Tribunal must consider whether, based on the evidence available, a reduction of the PV plants' cash flows would still have happened "in all probability", by virtue of the "review and control under EU State aid rules applied by the Commission". This is consistent with paragraph 505 of the Partial Award, where the Tribunal indicated that "the relevance of the EU State aid rules and of the Commission's decisions, to the extent not already addressed above, will also be addressed" in the current stage.[354]

322. *Fourth*, the Tribunal agrees with the Respondent's view that the PV plants' cash flows would have been reduced in the but-for scenario due to the levels of revenue deemed acceptable to the Commission under EU State aid rules, as explained in detail in Section V.F.3 below. However, the Tribunal does not share the Respondent's view that the application of State aid rules "would have reasonably and proportionately reduced the level of cash flows to Claimants' PV plants in the same or similar ways as the Solar Levy".[355]

323. As explained in greater depth in Section VII.F.1 below, the evidence on the record shows that a reduction of the PV plants' cash flows under EU State aid rules would not have had the same effect as the Solar Levy. Consequently, in the but-for scenario, the lower cash flows are a

353 Partial Award, para. 419 [emphasis added].

354 Partial Award, para. 505. The Tribunal has not found it necessary to decide the much-contested point as to whether EU State aid law forms part of the applicable law for the purposes of this arbitration or whether EU rules on State aid and the Commission's enforcement thereof is simply part of the factual matrix of the case. In the Tribunal's view, any EU investor making an investment in another EU country must be taken to be aware of the possibility of EC intervention in any incentive regime such as the Czech Republic's RES regime. In that respect, the State aid issue must be taken into consideration in the but-for analysis.

355 Response, para. 70.

compensable injury, albeit not one of the magnitude argued by the Claimants. EU State aid rules as applied by the Commission thus affect the quantum of the monetary relief owed to the Claimants, but not the Claimants' entitlement to such relief *per se*.

324. As to the alleged increase in the perception of risk following the imposition of the Solar Levy, the Tribunal considers the risk of losing the benefits of the RES scheme already existed, given that the level of revenue of the PV plants could have been reduced by virtue of EU State aid rules. This point is also explained in greater detail in Section V.F.3 below.

D. ASSUMPTION OF RISKS

325. In the Partial Award, the Tribunal held that:

(a) section 6(1)(a)(2) of the Act on RES Promotion contains an "intrinsic stabilization guarantee", which includes "the stability of the regulatory framework";[356]

(b) the Claimants "could thus continue to rely on Section 6(1)(a)(2) and to legitimately expect that the investments they would be making in 2009 and 2010 would be entitled to the level of the RES support fixed by ERO for these two years", notwithstanding "the fact that the Claimants were aware, as of summer 2009, that the solar boom was creating a policy issue for the Government that would likely lead to changes in the FiT";[357] and

(c) the imposition of the Solar Levy was a breach of this guarantee in violation of the Respondent's FET obligations in Article 10 of the ECT.[358]

326. The Tribunal however deferred to this phase of the proceedings the issue of:

> whether the fact that a great bulk of the Claimants' total installed photovoltaic electricity generation capacity was installed in 2009 and 2010, when the "solar boom" was already emerging as a legitimate policy issue in the Czech Republic, has any impact on the Claimants' claims, in relation to quantum.[359]

327. For the Claimants, the Tribunal's question above relates to risk allocation, "specifically on whether Claimants' damages should be reduced to account for hypothetical adverse regulatory risk that Claimants perceived at the time of their decisions to invest in the Czech Republic".[360] In this regard, the Claimants submit that their damages should not be reduced, because (i) as a

356 Partial Award, paras. 416, 419.

357 Partial Award, para. 427.

358 Partial Award, para. 428.

359 Partial Award, para. 505. *See also* Partial Award, para. 428.

360 Submission, para. 203.

matter of law, the Claimants should not bear the risk of the Respondent's unlawful actions; and (ii) in any event, they did not perceive any significant regulatory risk at the time of their investments.

328. The Respondent disagrees, arguing that the Claimants must have perceived and must bear the risk that (i) the Czech Republic would enact certain measures to address the consequence of the solar boom; and (ii) such a measure could affect the revenues of the Claimants' PV plants.

329. If the Tribunal were to account for the risk of regulatory changes that the Claimants could have perceived affecting their PV plants, the Parties concur that the Tribunal would need to determine the following dates:

(a) the "cut-off date" the Claimants are deemed to have known the serious consequences of the solar boom and thus assumed the risk of potential regulatory changes that could affect their PV plants;

(b) the date at which the Claimants assumed the risk of regulatory changes with respect each of the Claimants' PV plants; and

(c) the impact on quantum of excluding from damages assessment the plants with respect to which the Claimants are deemed to have assumed the risk.[361]

1. The Claimants' Position

330. According to the Claimants, their damages should not be reduced on the basis that the Claimants assumed the risk of a material regulatory change that could impact the profitability of the PV plants for the following two reasons: (i) the Claimants should not bear the risk for the Respondent's unlawful act, such as the Solar Levy; and (ii) in any event, the Claimants' investments in the Czech PV market were the product of sound business judgments after conducting appropriate due diligence.[362]

(a) The Claimants must not bear the risk of the Respondent's unlawful act

331. As a matter of international law, the Claimants argue that they cannot be made to bear the risk of an illegal measure enacted by the Respondent by reducing their damages to account for that

361 Response, para. 251; Reply, para. 133.

362 Submission, para. 204; Reply, para. 99.

risk.[363] As observed by other investment tribunals, any reduction in damages in this regard, the Claimants submit, would violate the principle of full reparation because damages would not "as far as possible wipe out all the consequences" of the Solar Levy.[364]

332. In response to the Respondent's argument that the Claimants should assume the risk of a rational and proportionate policy response, the Claimants contend that the Tribunal's finding that the Solar Levy met "the loose standard of reasonableness" does not change the fact that the Tribunal explicitly held that the Solar Levy was a violation of the FET standard, and as such an unlawful measure.[365] In this respect, the Claimants point out that the Respondent has not proffered any authority that the application of the principle of full reparation depends on the reasons underlying a finding of unlawfulness.[366]

333. As to the Respondent's assertion that the Claimants must bear the risk of a measure that could affect the revenues of the Claimants' PV plants, the Claimants recall the Partial Award's findings that the Act on RES Promotion contained a guarantee of fixed FiT (i.e., fixed revenues for unit of electricity produced), that the Claimants could rely on it, and that the Solar Levy breached it by reducing the FiT.[367]

334. According to the Claimants, the sudden introduction of the Solar Levy made the support system unreliable and destabilized the RES regime of the Czech Republic.[368] In this regard, the Claimants rely on the Commission's comments regarding the Czech RES sector, which recognized that the "retroactive tax on solar energy" resulted in a "static market", created "significant uncertainty and have resulted in higher capital costs for current and future investments as well as a negative public perception".[369] The Claimants add that the protection of

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363 Submission, paras. 205-206; Reply, para. 105. *See also* 2022 Hearing Transcript, Day 1, pp. 9:20-10:4, 15:18-20, 17:19-20:18.

364 Submission, paras. 206-208, *citing Case Concerning the Factory at Chorzów (Germany v. Poland)*, p. 47 (**Ex. CLA-118**); *Greentech Energy Systems A/S et al. v. Italian Republic*, SCC Case No. 2015/095, Award, 23 December 2018, para. 547 (**Ex. CLA-190**) (hereinafter "***Greentech Energy Systems v. Italian Republic***"); *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award, 8 March 2019, paras. 906, 908 (**Ex. CLA- 257**) (hereinafter "***ConocoPhillips Petrozuata. v. Bolivarian Republic of Venezuela***"). *See also* Reply, para. 109. *See also* 2022 Hearing Transcript, Day 1, pp. 17:23-18:24.

365 Reply, para. 107. *See also* 2022 Hearing Transcript, Day 1, pp. 18:25-19:11.

366 Reply, para. 108.

367 Reply, para. 111.

368 Submission, para. 220.

369 Submission, paras. 221-222, *citing* "Country Report Czech Republic 2019" (European Commission Staff Working Document) accompanying the document "Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank and the Eurogroup", 27 February 2019, p. 37 (**Ex. C-481**).

foreign investors from treaty violations like the Solar Levy, which constitute a sudden change to the key feature of the regulatory framework in reliance of which the Claimants invested, is "precisely the goal of investment treaties".[370]

(b) The Claimants did not perceive any adverse regulatory risk in respect of their investments

335. Even if the Tribunal determines that the negative impact of the Respondent's unlawful measure could have been objectively assumed at the time of the investment, the Claimants submit that their damages must not be reduced, because they did not perceive, and could not have perceived, any significant risk of that kind at the time of their investments in Energy 21.[371]

336. In respect of the timing of risk assessment, the Claimants submit that the perception of risk must be assessed at the time of the Claimants' acquisition of shareholdings in Energy 21, and granting of financing to it, because those shareholdings and financing qualify as protected investments under the applicable treaties.[372] As such, the Claimants consider that the relevant dates for the assessment of risk perception are: (i) 20 May 2008 for GIHG; (ii) 18 December 2009 for Natland Investment and Natland Group; and (iii) 11 May 2010 for Radiance.[373]

337. Conversely, the Claimants reject the Respondent's focus on the timing of Energy 21's PV projects on the grounds that (i) the Claimants' investments in Energy 21 were made in reliance on the guarantee of the fixed FiT set out in Section 6(1)(a)(2) of the Act on RES Promotion, which was "intended to provide the requisite business certainty to investors precisely as to the future developments of their RES projects"; and (ii) the legal framework applicable to PV plants commissioned in 2009 and 2010 did not change between the Claimants' investments in Energy 21 until the completion of all PV projects relevant to this dispute.[374]

338. Recalling the Partial Award's finding that "until the fall of 2010, there was no indication that the impending regulatory changes would affect plants commissioned in 2009 and 2010", the

370 Reply, para. 112.

371 Submission, para. 209; Reply, paras. 114-115.

372 Reply, para. 117.

373 Reply, para. 119.

374 Reply, para. 118.

Claimants contend that the risk of retrospective changes to the regulations was not foreseeable to each Claimant at the relevant dates identified above.[375]

339. The Claimants further submit that extensive due diligence was conducted by Radiance for the acquisition of Energy 21 at relevant times.[376] In this regard, the Claimants stress that MEP, after engaging experienced advisors and consulting with prime international investment banks, did not assess the Czech support system as unstable, especially after the enactment of Act No. 137/2010, which confirmed the Czech Republic's policy decision to accept the influx of PV investments in 2010.[377] Accordingly, in the Claimants' view, the imposition of the Solar Levy, which directly affected the level of support available to 2009 and 2010 PV plants, cannot be considered as an investment risk that must be borne by the Claimants.[378] Rather, their investments in the Czech PV market, the Claimants assert, were a product of sensible business judgment.[379]

340. The perception that the Claimants were investing in a stable regulatory environment, the Claimants add, is further confirmed by Mr Edwards' analysis that the cost of capital implied in the 2010 Transaction did not relate to the risk of retrospective revision of the FiT for 2009 and 2010 PV plants.[380] According to Mr Edwards, the 2.6% increase in the actual cost of capital after the implementation of the Measures (from 8.4% to 11.0%)[381] is largely driven by the Solar Levy and indicates that the "Measures made PV investments look more risky".[382] To the contrary, if the Solar Levy was indeed predictable, the Claimants aver that the cost of capital would have caused a decrease in the cost of capital of subsequent transactions, like the 2011 Transaction, because "significant risk would already have been manifest in 2010, and the 2011 Solar Levy came to rebalance the system, thereby reducing the risk of future regulatory interferences".[383]

341. In view of the above, the Claimants submit that the "Solar Levy came completely out of the blue" and "transformed the Czech RES sector into a very hostile environment for investments".[384] The

375 Submission, paras. 212-214, *citing* Partial Award, para. 426; Reply, para. 120. *See also* 2022 Hearing Transcript, Day 1, pp. 22:23-23:10.

376 Submission, paras. 215-216. *See also* **CWS-Baudon-1**, paras. 17-21, 26-28.

377 Submission, paras. 215-216.

378 Submission, para. 216.

379 Submission, para. 209.

380 Submission, para. 217; Reply, para. 121, *referring to* **CER-Edwards-2**, paras. 4.24-4.29. *See also* paragraphs 510 of the Final Award.

381 *See* paragraph 512 of the Final Award.

382 Submission, para. 218; Reply, para. 121. *See also* **CER-Edwards-1**, paras. 4.35-4.38.

383 Submission, para. 219; Reply, para. 122.

384 Reply, para. 123.

Claimants further note that the Solar Levy was heavily criticized by the Commission for its "retroactive character".[385]

(c) Alternative risk assessment

342. Notwithstanding their position that the perception of risk must be assessed at the time of the Claimants' acquisition of shareholdings in Energy 21, if the Tribunal were to account for the risk of regulatory changes that the Claimants could have perceived affecting their PV plants, the Claimants agree that the following dates would be relevant:

(a) the "cut-off date" as of which the Claimants started to perceive the risk of potential regulatory changes that would affect their plants;

(b) the "relevant moment" after which, in light of the stage reached by the PV project, it would be unreasonable to abandon it;

(c) for each of Claimants' PV plant(s), whether the "relevant moment" identified above fell before or after the cut-off date; and

(d) the impact on quantum of the fact that, for a certain PV plant, the relevant moment is deemed to fall after the cut-off date.[386]

i. Cut-off dates

343. Among the four cut-off dates proposed by the Respondent, the Claimants argue that only the date on which the Czech Government approved Act 402/2010 and introduced the Solar Levy (i.e., 9 November 2010) faithfully represents the moment when they could have perceived a risk of exposure to adverse regulatory changes that would affect their PV plants.[387] For the Claimants, the 9 November 2010 cut-off date is the only date which accords with the Partial Award's conclusion that there was no indication of possible regulatory change that would affect the Claimants' 2009 and 2010 plants until "the fall of 2010".[388]

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385 Reply, para. 124, *referring to* Letter from Ms Hedegaard and Mr Oettinger to Mr Kocourek, 11 January 2011 (**Ex. C-337**).

386 Reply, para. 133. *See also* Response, para. 251.

387 Reply, paras. 136-137; 2022 Hearing Transcript, Day 1, p. 30:6-25; 2022 Hearing, Claimants' Opening Presentation, slide 38.

388 Partial Award, para. 426; 2022 Hearing Transcript, Day 1, p. 30:7-13.

344. As to the Respondent's preferred cut-off date of 24 August 2009, the Claimants contend that a one-page press release issued from the Ministry of Industry and Trade containing the Ministry's proposal to amend the Act on RES Promotion, in particular, by repealing the 5% Limit as of 1 January 2010, cannot be considered a sufficient indication based on which the Claimants could have perceived a risk of potential regulatory changes affecting their PV plants.[389] The Claimants add that the statements by government officials before and after the press release did not provide clear indications on the amendments and their timeline to suggest that the changes to the FiT would affect the Claimants' PV plants, neither those to be commissioned in 2010 nor *a fortiori* those that were being built for connection in 2009.[390]

345. The Claimants consider 17 March 2010—the date the Chamber of Deputies adopted Act No. 137/2010 repealing the 5% Limit—unsuitable as a cut-off date.[391] In this respect, the Claimants assert that ERO's presentation given on the same day "clearly referre[d] to the FiT for plants commissioned in 2011, as the repeal of the 5% Limit applied from 2011".[392]

346. In response to the Respondent's contention that the legal due diligence report by CMS discussed the possibility of retroactive changes, the Claimants explain that it did not put them on alert because those changes were described as "uncommon", as well as likely to be violating "constitutional principles", and "result[ing] in a breach of the Czech obligations towards foreign investors".[393] According to the Claimants, the financial due diligence of EY received on the same date also confirmed that the changes to the Act on RES Promotion were expected only from 2011 onwards.[394]

347. The Claimants also reject the proposed cut-off date of 27 August 2010 because, according to the Claimants, the Czech Prime Minister in his statements never referred specifically to retroactive taxes that would apply to plants to be commissioned by the end of the year, let alone to plants already commissioned.[395] The Claimants point out that a bill submitted by the Government on

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389 Reply, paras. 140-141, *referring to* Tomáš Bartovský, "Ministry of Industry and Trade will Equalize the Support of Renewable Energy Sources", <www.mpo.cz>, 24 August 2009 (**Ex. R-138**).

390 Reply, paras. 142-146.

391 Reply, para. 152.

392 Reply, para. 153, *referring to* "Support of photovoltaic power generation from the viewpoint of ERO", ERO Presentation, 17 March 2010, slide 30 (**Ex. R-164**).

393 Reply, para. 155, *citing* Report Annex VII to **CWS-Baudon-1**, "Solar power in the Czech Republic – regulatory overview", prepared by CMS Cameron McKenna, 5 February 2010, p. 4.

394 Reply, para. 155, *referring to* ENERGY 21 – Financial due diligence report prepared by Ernst & Young, 12 February 2010, p. 13 (**Ex. R-21**). *See also* 2022 Hearing Transcript, Day 1, p. 23:11-25.

395 Reply, para. 157, *referring to* P. Honzejk, "We will slow down the process of electricity price increases and even reverse it", iHned.cz **(Ex. R-186**).

13 October 2010 expressly provided that plants commissioned by the end of 2010 would maintain the level of FiT that existed at that time.[396]

348. In light of the foregoing, the Claimants submit that their installation of PV plants of which the construction commenced prior to 9 November 2010 has no impact on quantum.[397]

ii. Relevant moment

349. The Claimants reject the Respondent's suggestion that the "relevant moment" after which it would be unreasonable to abandon a PV project in light of the stage reached by it, would be the date of commissioning.[398] For the Claimants, adopting the date of commissioning (or the ERO License) as the relevant moment would be the same as requiring the full completion of the plants before the cut-off date because, alternatively, the Claimants would "simply have put a stop to their investment in a certain PV plant (and are entitled to zero damages for the plant)" after the cut-off date despite having completed the necessary licensing and construction-related steps.[399]

350. The Claimants instead consider the date of the commencement of the construction works or, alternatively, the date before which construction could not legally have started,[400] to be the appropriate "relevant moment", as it takes account of the various licensing processes and the important economic resources that have already been committed to the project before the beginning of the plant's construction.[401]

iii. The Claimants' PV plants that fall beyond the cut-off date

351. The Claimants submit that the number of PV projects and their aggregate capacity in MW whose construction works commenced beyond the cut-off date, as well as the Respondent's alternative cut-off dates, are as follows:

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396 Reply, para. 160, *referring to* Government Document No. 145/10, Government proposal of an act amending the Act on Promotion, 13 October 2010, p. 4 (**Ex. R-268**). *See also* Reply, para. 45.

397 Reply, para. 162.

398 Reply, paras. 163, 165.

399 Reply, paras. 166-168, 171.

400 While the Claimants note that the precise date of the beginning of the works can be known, they agree to look at the date before which construction could not legally have started as suggested by the Respondent. According to the Claimants, this date is determined as the latest between (i) the date of the construction permit, zoning decision or public law contract with the local authority; and (ii) the date of commencement of the works indicated in the EPC contracts. *See* Reply, paras. 175-176.

401 Reply, paras. 172-174. The Claimants agree to use the dates for each of the Claimants' plants that correspond to those indicated by the Respondent in Annex A to its Response. *See* Reply, para. 177.

Relevant event **Cut-off date**	**Commencement of the constructions works**
9 November 2010[402]	0 plants
27 August 2010[403]	3 plants (7 MW)
17 March 2010[404]	11 plants (30.3 MW)
24 August 2009[405]	19 plants (38.3 MW)

352. The impact on quantum of the above analysis is discussed in Section VII.B.1(f) below in the context of whether any reduction of damages is warranted.

2. The Respondent's Position

353. The Respondent argues that the Claimants are not entitled to damages in respect of plants in which they invested with knowledge of the consequences of the solar boom.[406] In this respect, the Respondent underscores that the Tribunal's findings that the Respondent breached its treaty obligations do not imply that an investor could not have assumed any risk whatsoever nor can it ever assume the risk of a treaty violation as a matter of law.[407]

354. Accordingly, the Respondent rejects the Claimants' assertion that no risk should be allocated to the Claimants, because, for the Respondent, the evidence confirms that the Claimants were aware, or at a minimum, should have been aware of a risk that regulatory changes could have an impact on their 2009 and 2010 PV plants.[408]

402 This corresponds with the public revelation that the Respondent was implementing the Solar Levy. *See* paragraph 175 of the Final Award.

403 This corresponds with the announcement of then Prime Minister Petr Nečas regarding the halting of PV development. *See* paragraph 365 of the Final Award.

404 This corresponds with the adoption by the Chamber of Deputies of Act No. 137/2010, which repealed the 5% Limit. *See* paragraph 364 of the Final Award.

405 This corresponds with a proposal by the Ministry of Industry and Trade to amend the Act on RES Promotion, in particular, by repealing the 5% Limit. *See* paragraph 344 of the Final Award.

406 Response, para. 240.

407 Rejoinder, para. 51.

408 Rejoinder, para. 52.

(a) Investment treaties cannot be used as insurance policies against business risks

355. As observed by investment tribunals, the Respondent posits that "[investment treaties] are not insurance against business risk" or against "bad decisions".[409] Nevertheless, the Respondent argues that the Claimants, despite being fully aware that further investments in the Czech PV industry were deemed undesirable, "hoped that the Czech Republic would allow the misaligned regulatory regime to persist into 2010, and they did so in the context of threats of arbitration in relation to the corrective measures proposed in 2009".[410] Such "misuse of investment treaties", in the Respondent's view, exacerbated the solar boom, which in turn forced the Czech Republic to impose the Solar Levy in 2010.[411]

356. As such, the Respondent takes the view that the Claimants should be deemed to have assumed the risk of the Czech Republic's policy response, which the Tribunal concluded to be reasonable and proportionate.[412]

357. Additionally, the Respondent contends that the Claimants assumed certain other business risks in regard to Energy 21's construction and commissioning goals and those relating to the Energy 21's procurement practice.[413]

358. As to the Claimants' assertion that they merely answered a call from the Government to make additional solar investments, the Respondent recalls the Tribunal's findings that the EU Target, which applied to all forms of renewables, was merely "indicative" and "non-binding".[414] The Respondent further clarifies that the Binding Statements cannot be construed as an unencumbered right to connect a PV plant to the grid, as demonstrated in CMS' due diligence report.[415]

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409 Response, para. 243, *citing MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 178 (**CLA-51**) (hereinafter "***MTD Equity and MTD Chile v. Republic of Chile***"); *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, para. 478 (**RLA-343**) (hereinafter "***Renée Rose v. Republic of Peru***"); Rejoinder, para. 50.

410 Response, para. 243.

411 Response, para. 243.

412 Response, para. 243, *referring to* Partial Award, para. 451.

413 Rejoinder, para. 58.

414 Rejoinder, para. 48, *citing* Partial Award, para. 88.

415 Rejoinder, para. 49, *referring to* Key legal due diligence issues report prepared by CMS Cameron McKenna, 19 February 2010, PDF p. 10 (**Ex. R-66**).

(b) The Claimants perceived the adverse regulatory risk in respect of their investments

359. For the Respondent, the Claimants' submission that they could not have perceived any risks that the Czech Republic could enact measures that would have an impact on the plants commissioned in 2009 and 2010 is inconsistent with (i) the conclusion in the Partial Award that the "Claimants must have understood" that the "Czech Government[,] when looking for ways to deal with the consequences of the solar boom […] was addressing a legitimate policy issue";[416] (ii) contemporaneous public statements by the Claimants' principals;[417] and (iii) the Claimants' internal documents as well as the evidence on the record, all of which confirm that the Claimants "knowingly invested into a bubble".[418]

360. Refuting the Claimants' argument that a proper due diligence was conducted, the Respondent points out that the due diligence by Radiance was commissioned only after the other Claimant entities had made their investments.[419] In addition, the Respondent notes that the Claimants' descriptions of their due diligence are "incomplete and inaccurate", omitting to mention, *inter alia*, that (i) the MEP presentation of 3 March 2010 only discussed that the "risk of regulatory changes was "limited" in light of the threats of arbitration that investors had made";[420] (ii) the MEP presentation of 4 May 2010 acknowledged the "increasing pressure against further expansion of the solar sector in the Czech Republic" and calculated "a downward revision of E21's 2010 pipeline [capacity]";[421] and (iii) CMS confirmed that Energy 21 had accounted for the possibility that "the tariff is reduced by more than 5% *in 2010*".[422]

(c) Risk assessment

361. The Respondent argues that the Claimants' awareness of the solar boom should be assessed with reference to the (i) the "cut-off date" and (ii) the date at which the Claimants pursued investment in individual solar plants, rather than at the time the Claimants acquired their shareholding in

416 Response, para. 244, *citing* Partial Award, para. 428.

417 Response, para. 247.

418 Response, paras. 246-247. *See* **CWS-Baudon-1**, Annex VII, p. 4, Annex V, p. 17.

419 Rejoinder, para. 55.

420 Rejoinder, para. 55, *citing* **CWS-Baudon-1**, Annex V, p. 17.

421 Rejoinder, para. 56, *citing* MEP deal team's presentation to the IAC, 4 May 2010, slides 2-3 (**Ex. C-480**).

422 Rejoinder, para. 57, *citing* Key legal due diligence issues report prepared by CMS Cameron McKenna, 19 February 2010, p. 57 (**Ex. R-66**) [emphasis added by the Respondent].

Energy 21.[423] According to the Respondent, treating each of the individual solar plants as a "separate" investment is consistent with the Tribunal's instructions in the Partial Award and investment treaty precedents.[424]

i. Cut-off dates

362. The Respondent disagrees with the Claimants' assertion that no risk of a regulatory change affecting the solar plants could have been perceived until 9 November 2010.[425] In the Respondent's view, the Claimants conflate the perception of risk, in essence the possibility of adverse regulatory changes, with knowledge.[426] In this respect, the Respondent emphasizes that there were multiple signs in 2009-2010 that the Czech Government could realistically introduce measures affecting the existing solar plants.[427] The Respondent considers that the fact that different views existed in relation to the growth of the solar industry in 2009-2010 is indeed a "sign of uncertainty (and a measure of risk)".[428]

363. Accordingly, for the Respondent, the appropriate cut-off date upon which the Claimants should be deemed to have known the serious consequences of the solar boom is 25 August 2009, i.e., the date the Ministry of Industry and Trade issued a press release discussing the negative developments in regards to the PV plants.[429] Noting that the press release and other media reports reflecting the technical, financial, and socio-economic consequences of the solar boom were widely publicized, the Respondent argues that the "Claimants were not just contributing to the solar boom, with full knowledge of its consequences, but also assumed the risk of an adverse regulatory measure".[430]

364. In the alternative, the Respondent proposes that 17 March 2010 be regarded as an appropriate cut-off date.[431] According to the Respondent, several relevant developments occurred by this

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423 Rejoinder, para. 130.

424 Rejoinder, para. 131, *referring to* A*ES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, paras. 9.3.12-9.3.17 (**Ex. CLA-62**).

425 Rejoinder, para. 133.

426 Rejoinder, para. 134(a)-(b).

427 Rejoinder, para. 134(d)-(g).

428 Rejoinder, para. 134(c).

429 Response, para. 255, *referring to* Tomáš Bartovský, "Ministry of Industry and Trade will Equalize the Support of Renewable Energy Sources", <www.mpo.cz>, 24 August 2009 (**Ex. R-138**); 2022 Hearing Transcript, Day 1, p. 169:16-18; 2022 Hearing, Claimants' Opening Presentation, slide 145.

430 Response, paras. 255-260.

431 Response, para. 261.

date, including, *inter alia*, (i) an imposition of a moratorium on new grid connection agreements by the Czech transmission operator ČEPS ("**ČEPS**"); (ii) the abolition of the 5% Limit by the Chamber of Deputies; (iii) advice from the Claimants' due diligence experts regarding the "uncommon" but possible retroactive changes to the RES support scheme that would affect the existing investments; and (iv) a public announcement by a senior ERO official, Rostislav Krejcar, that the ERO was "prepared to decrease support of photovoltaic electricity production dramatically".[432] In respect of the ERO's announcement, the Respondent clarifies that it was made in the context of ERO's declaration that "[a]n amendment of the law [was] expected in 2010" and that ERO was thus referring to a separate, anticipated legislative amendment that would result in a "dramatic[]" reduction of the FiT.[433]

365. The third alternative date that the Respondent advances is 27 August 2010, the day on which Prime Minister Petr Nečas expressed his view that the PV development should be decreased "with the help of taxes" and that the Government aimed to counter the price increase from the solar boom.[434] Observing that the 5% Limit had already been abolished by August 2010, the Respondent posits that the Prime Minister's declaration "must have referred to the possibility that new taxes would be imposed on existing solar plants".[435]

366. Moreover, as the warnings about potential new taxation measures had been widely published in the press by this date, the Respondent takes the view that it was "clear that the Government was determined to introduce further measures", including taxation measures that were being expressly discussed.[436]

367. As a final alternative, the Respondent proposes 9 November 2010 as the cut-off date when the Government publicized its intent to adopt the Solar Levy.[437] According to the Respondent, any

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432 Response, paras. 261-263, Soňa Holingerová, "ČEZ Distribuce responds to ČEPS's demand", 16 February 2010 (**Ex. R-319**); AF Power Press Release, "ČEPS calls for the suspension of connections for new renewable energy sources", <allforpower.cz>, 10 February 2010 (**Ex. R-316**); **CER-Baudon-1**, Annex VII, CMS Cameron McKenna report "Solar power in the Czech Republic – regulatory overview", 5 February 2010, para. 2.1.3; "The Government draft amendment to the act on the promotion of electricity from RES passed", <TZB-info.cz>, 17 March 2010 (**Ex. R-154**).

433 Rejoinder, para. 134(f).

434 Response, para. 264, *citing* P. Honzejk, "We will slow down the process of electricity price increases and even reverse it", iHned.cz **(Ex. R-186**).

435 Rejoinder, para. 134(g).

436 Response, paras. 265-266; Rejoinder, para. 134(e).

437 Response, para. 267.

investor which proceeded with new investments after this date must be deemed to have had the knowledge that the Solar Levy would apply to its plants.[438]

ii. Plant-specific dates

368. The Respondent submits that the appropriate dates to be used for the purpose of determining whether a PV plant falls beyond the cut-off date is the date of commissioning because, in its view, such date represents the moment when the investor has obtained a right to the FiT.[439] As such, according to the Respondent, "[a]n investor who considers that a measure has rendered non-viable its yet-to-be commissioned plant" is not entitled to the full expectation value of damages.[440] While the investor could, at most, be entitled to recovery of the sunk investment costs made in reliance on the pre-existing regime, the Respondent notes that the Claimants did not file a claim for the recovery of sunk cost in regard to their PV plants.[441]

369. According to the Respondent, a plant is commissioned when the following two conditions are satisfied: (i) a plant operator has received the ERO license for the plant; and (ii) the first parallel connection to the grid has taken place.[442] In the absence of information regarding the latter,[443] the Respondent asserts that the dates of the ERO licenses, being the earliest dates when commissioning could have potentially taken place, have been adopted in Mr Peer's calculations of impact on damages.[444]

370. In the alternative, the Respondent proposes to use the date of the commencement of construction, or rather "the date before which construction could not have legally started", to determine whether a PV plant falls beyond the cut-off date.[445] Taking the "conservative approach", the Respondent (i) accepts the Claimants' assertion that construction works for three of the plants commenced on the basis of a verbal agreement before the date of the relevant EPC contract (and

438 Response, para. 267.

439 Response, para. 270. *See also* Rejoinder, para. 135(b).

440 Response, para. 270.

441 Rejoinder, para. 135; Rejoinder, para. 135(a).

442 Response, para. 272.

443 The Respondent notes that the Claimants did not produce documents that would allow the Tribunal to confirm the exact dates on which each plant was commissioned. *See* Rejoinder, para. 135(c).

444 Response, paras. 273-274.

445 Response, paras. 275-276 [emphasis added by the Respondent].

thus not taking into account the relevant EPC contract dates); and (ii) in the case of the plants that were constructed in stages, uses the date relating to the first stage of construction.[446]

371. Based on the foregoing, Mr Peer calculates the impact on damages of excluding the PV plants falling outside the cut-off date as discussed in Section VII.B.2(c) below.

3. The Tribunal's Analysis

372. The Tribunal considers the Respondent's argument regarding an alleged assumption of risks by the Claimants to be unfounded.

373. *First*, as a matter of principle, the Tribunal agrees that investment treaties are not insurance policies against business risks.[447] However, this commonly accepted position does not mean that investors must bear the risk that the treaty may be breached, nor that they must internalize the damages resulting from such breach. Not every government decision that affects an investment will amount to a treaty breach. But in those cases where a breach has been found to exist (as in the present case), "reparation must, as far as possible, wipe out all the consequences of the illegal act"[448] (leaving aside for present purposes the principle of contributory fault, which Respondent has invoked as the basis of a separate argument, analyzed in Section V.E.3).

374. *Second*, the latter is confirmed when considering and analyzing the decisions of previous tribunals cited by the Respondent in support of its objection. These decisions do not support the Respondent's position.

375. For instance, in *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, the tribunal asserted: "The BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen".[449] Nevertheless, this assertion was not made as a justification to deny monetary relief for a proven treaty breach, as sought by the Respondent's argument in the present case. It was an argument

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446 Response, para. 277.

447 Response, para. 243, *citing MTD Equity and MTD Chile v. Republic of Chile*, para. 178 (**Ex. CLA-51**); *Renée Rose v. Republic of Peru*, para. 478 (**Ex. RLA-343**); Rejoinder, para. 50.

448 Submission, paras. 206-208, *citing Case Concerning the Factory at Chorzów (Germany v. Poland)*, p. 47 (**Ex. CLA-180**); *Greentech Energy Systems v. Italian Republic*, para. 547 (**Ex. CLA-190**); *ConocoPhillips Petrozuata. v. Bolivarian Republic of Venezuela*, paras. 906, 908 (**Ex. CLA-257**). *See also* Reply, para. 109. *See also* 2022 Hearing Transcript, Day 1, pp. 17:23-18:24.

449 *MTD Equity and MTD Chile v. Republic of Chile*, para. 178 (**Ex. CLA-51**).

for the conclusion that no breach (in that case, the alleged violation of the fair and equitable treatment required by Article 2(2) of the Malaysia-Chile BIT) had existed in the first place.[450]

376. In *Renée Rose Levy de Levi v. Republic of Peru*, the tribunal held that: "no investment treaty is an insurance or guarantee of investment success, especially when the investor makes bad business decisions".[451] However, this assertion was not made to deny compensation to the investor despite the existence of a treaty breach either. It was an argument for the conclusion that "it is not true that there was an expropriation" (i.e., there was no breach of Article 5(2) of the France-Peru BIT), given the "repeated non-compliance with the banking regulations" which rendered the investment's "intervention and subsequent dissolution and liquidation inevitable".[452]

377. Likewise, the tribunal in *UAB E Energija v. Republic of Latvia* considered the investor's assumption of risk as a reason to conclude that the host State had not breached the applicable treaty.[453] This is certainly not the Claimants' case, where the Partial Award already found Respondent to be liable for breaching Article 10 of the ECT, Article 2(2) of the Cyprus-Czech Republic BIT, and Article 3(1) of the Netherlands-Czech Republic BIT.

378. *Third*, the Partial Award has already established that the Claimants were entitled to act upon the assumption that the intrinsic stability guarantee would be applied to all PV plants commissioned in 2009 and 2010 (with the only legitimate exception being the review and control under EU State aid rules applied by the Commission). As held in paragraph 427 of the Partial Award:

> 427. The Tribunal concludes that, in the circumstances, as there was no indication at the time that the level of RES support would be reduced for plants commissioned in 2009 and 2010, the fact that the Claimants were aware, as of summer 2009, that the solar boom was creating a policy issue for the Government that would likely lead to changes in the FiT, cannot affect the stability guarantee in Section 6(1)(a)(2) of the Act on RES Promotion. The Claimants could thus continue to rely on Section 6(1)(a)(2) and to legitimately expect that the investments they would be making in 2009 and 2010 would be entitled to the level of RES support fixed by ERO for these two years. Consequently the Respondent's decision in December 2011 to amend Section 6(1)(a)(2) of the Act on RES Promotion so as to lift the stability guarantee for investments made in 2010 and 2011 must be considered incompatible with the intrinsic stabilization guarantee in Section 6(1)(a)(2) of the Act and therefore in breach of its obligation to treat the Claimants in a fair and equitable manner in accordance with Article 10 of the ECT. The fact that the Czech Republic was led by a caretaker government during the period May 2009 to July 2010 cannot change the outcome of the analysis. There is no evidence before the Tribunal that taking of measures to address the

450 *MTD Equity and MTD Chile v. Republic of Chile*, para. 167 (**Ex. CLA-51**).

451 *Renée Rose v. Republic of Peru*, para. 478 (**Ex. RLA-343**).

452 *Renée Rose v. Republic of Peru*, para. 478 (**Ex. RLA-343**).

453 *UAB E Energija v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, paras. 848-854 (**Ex. RLA-342**).

> solar boom would have been considered "politically or ideologically polarizing proposals" and thus outside the remit of the caretaker government.[454]

379. If the Claimants were entitled to rely on the intrinsic stability guarantee, it cannot be held that they assumed the risk that such guarantee would be breached, even with regards to the PV plants commissioned in late-2010. Such is precisely the point of the guarantee: that investors can trust in the host State's word that certain rules will not be modified. And the guarantee is that, if such rules are modified, the investor will have the right to be compensated for the damages caused by said modification. The fact that the Solar Levy pursued a legitimate goal – which is the reason why the Partial Award concluded it did not violate the non-impairment standard under the ECT[455] – does not change this conclusion.

380. *Fourth*, the conclusion that the Claimants did not assume the risk of a treaty breach (such as the enactment of policy responses *contrary* to the intrinsic stability guarantee of Article 6(1)(a)(2) of the Act on RES Promotion) does not mean that they did not assume the risk of regulatory changes that are *consistent* with such guarantee. Such policy response would have been the review and control of the PV plants' level of revenue under State aid rules applied by the Commission, a risk of which the Claimants could have been aware since 2008, as explained in Section V.E.3.

381. Nevertheless, even in such but-for scenario, the PV plants would still have obtained higher cashflows than they did under the Solar Levy, as explained in Section VII.F.1 below. Consequently, the fact that Claimants assumed the risk that this review and control could take place and reduce the PV plants' cashflows does not in itself deprive Claimants of their entitlement to monetary relief.

E. CONTRIBUTORY FAULT

382. For the Respondent, the Tribunal's findings summarized in paragraphs 325-326 above raise the doctrine of contributory fault and the question of whether the Claimants' contribution to the solar boom serves as a bar to any monetary relief, which the Respondent answers in the affirmative.

383. The Claimants consider that the concepts of assumption of risk and contributory fault overlap. They submit that the Respondent's defense on contributory fault is a "meritless attempt to duplicate hypothetical grounds" for the reduction of the Claimants' damages.[456] In any event, the Claimants argue that the defense on contributory fault fails, because the Claimants did not engage

454 Partial Award, para. 427.

455 Partial Award, para. 451.

456 Reply, para. 78.

in any willful or negligent conduct as their investments were the result of sound business judgements.

1. The Respondent's Position

384. Considering that the Tribunal has already found that, notwithstanding their awareness of the impending changes in the RES support, "the Claimants went on to substantially invest in solar energy production"[457] and thus "contribut[ed] to the solar boom" and that the issue of such contribution "is relevant to the issue of quantum", the Respondent submits that the Claimants' willful contribution to the solar boom "provoked" the Czech Republic to enact the Solar Levy that allegedly caused loss to the Claimants.[458] Therefore, in accordance with the Articles on State Responsibility, the Respondent asserts that such willful actions bar any award of compensation under the doctrine of contributory fault.[459]

385. In support of its contention, the Respondent notes that the Claimants lobbied the Czech Government and threatened arbitrations in 2009, caused a delay in the Government's decision "to enact the very corrective measure that Claimants now say that the Government should have adopted", took advantage of the subsidiary in late 2009 and 2010, and aggravat[ed] the solar boom which led the Czech Republic to enact corrective measures, including the Solar Levy.[460]

386. Contrary to the Claimants' assertion, the Respondent argues that unlawful conduct by the Claimants need not exist for the doctrine of contributory fault to be triggered; rather, it requires only willful or negligent conduct on the part of the investor, which the Respondent has established in this case.[461] The Respondent, in this regard, clarifies that it is not calling on the Claimants to bear the cost of the solar boom in its entirety nor was that the implication of the Solar Levy.[462]

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457 Response, para. 249.

458 Response, paras. 76-78, *citing* Partial Award, para. 428; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paras. 677-680 (**Ex. RLA-336**) (hereinafter "***Occidental Petroleum v. Republic of Ecuador***"); Rejoinder, paras. 40, 42. The Respondent argues that these passages of the Partial Award are *res judicata*. *See* 2022 Hearing Transcript, Day 3, pp. 109:18-24, 112:23-113:8.

459 Response, paras. 75-76. The Respondent disagrees with the Claimants that the Tribunal's findings in paragraph 428 of the Partial Award can only be construed as implicating the doctrine of assumption of risk. *See* Rejoinder, para. 46.

460 Response, para. 78. *See also* 2022 Hearing Transcript, Day 1, pp. 123:14-125:12, 133:8-17.

461 Rejoinder, para. 41.

462 Rejoinder, para. 44.

387. As to the Claimants' argument that their contribution to the solar boom was negligible, the Respondent points to the Claimants' own assertions that Energy 21 was a major player in the Czech solar sector and that Energy 21 had constructed certain PV plants for ČEZ.[463]

388. Noting that investment tribunals have wide discretion to consider a claimant's contribution to its injury when assessing damages, the Respondent submits that account should be taken of the Claimants' willful contribution to the solar boom in accordance with the Articles on State Responsibility and, as a result, bar the Claimants from recovering any damages.[464]

2. The Claimants' Position

389. The Claimants do not consider that the observations in the Partial Award to the effect that the Claimants commissioned PV plants in 2009 and 2010 when the solar boom was "already emerging as a legitimate policy issues in the Czech Republic" constitute a legal finding of contributory fault on the part of the Claimants.[465] Moreover, the Claimants maintain that none of the requirements is satisfied in the present case to establish contributory fault in accordance with Article 39 of the Articles on State Responsibility.[466]

390. *First*, unlike the cases cited by the Respondent, which concerned a variety of unlawful conduct on the part of the investors, the Claimants submit that they did not engage in willful or negligent conduct to trigger the Czech Republic to introduce the Solar Levy.[467] Rather, the Claimants consider that their conduct "ha[d] always been reasonable" by carrying out proper due diligence and they had engaged in business in line with industry standards.[468]

391. *Second*, the Claimants contend that there is no causal link between their alleged conduct and the injury that they have suffered, because the Solar Levy was not introduced as a response to the

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463 Rejoinder, paras. 43-44, *referring to* Reply, para. 75.

464 Reply, para. 76, *referring to* Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission, United Nations, Article 39 (**Ex. RLA-243**) (hereinafter "**Draft Articles on Responsibility of States for Internationally Wrongful Acts**").

465 Reply, para. 318, *citing* Partial Award, para. 505. *See* 2022 Hearing Transcript, Day 3, pp. 91:16-92:1, 93:2-22.

466 Reply, paras. 81-82. *See also* 2022 Hearing Transcript, Day 1, pp. 10:21-24, 27:1-29.2.

467 Reply, paras. 83-84, *referring to Veteran Petroleum Limited v. The Russian Federation*, PCA Case No. 2005-05/AA28, Award, 18 July 2014, paras. 1610-1615 (**Ex. CLA-18**) (hereinafter "***Veteran Petroleum Limited v. Russia***"); *Occidental Petroleum v. Republic of Ecuador*, paras. 663-687 (**Ex. RLA-336**); *Antoine Goetz and others v. Republic of Burundi II*, ICSID Case No. ARB/01/2, Award, 21 June 2012 paras. 237-259 (**Ex. RLA-337**); *See also* 2022 Hearing Transcript, Day 1, pp. 26:22-27:11; 2022 Hearing, Claimants' Opening Presentation, slide 32.

468 Reply, paras. 85-86.

Claimants' conduct or PV capacity.[469] In this respect, the Claimants point out that the Solar Levy was only one of the many possible options that the Respondent considered to offset part of the State funds intended to be applied to RES energy.[470]

392. *Lastly*, even assuming *arguendo* that the Claimants' conduct triggered the introduction of the Solar Levy, the Claimants argue that their contribution still would not be material and significant.[471] In fact, their contribution to the increase of PV capacity between 2008 and 2010, the Claimants posit, was relatively insignificant and constantly decreased over that period: in 2009, Energy 21's market share decreased from 10.86% in 2008 to 5.27% with an annual growth of 4.53%, whereas by the end of 2010, Energy 21's market share decreased further to 2.86% with an annual growth of 2.11%.[472] The Claimants conclude that their contribution to the solar boom was negligible compared to other actors in the Czech PV market, such as ČEZ.[473]

3. The Tribunal's Analysis

393. The Tribunal considers the Respondent's argument regarding the alleged contributory fault by the Claimants to be unfounded.

394. The Respondent avers that the Claimants "aggravated the solar boom and provoked the Czech Republic into enacting corrective measures, including the Solar Levy" and, thus, should be denied damages (or have them greatly reduced) based on the doctrine of contributory fault.[474] However, contributory fault requires a willful or negligent conduct by the entity which seeks reparation, defined as a "lack of due care for its property or rights".[475] The Tribunal does not consider that the Claimants acted in such way in the present case.

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469 Reply, para. 88. *See also* 2022 Hearing Transcript, Day 1, pp. 27:20-28:10; 2022 Hearing, Claimants' Opening Presentation, slide 33.

470 Reply, para. 89.

471 Reply, para. 90. *See also* Reply, fn. 30; 2022 Hearing Transcript, Day 1, pp. 28:11-29:2.

472 Reply, paras. 90-94.

473 Reply, paras. 95-98. *See* 2022 Hearing Transcript, Day 1, pp. 28:21-29:7; 2022 Hearing, Claimants' Opening Presentation, slide 35.

474 Response, para. 78.

475 Draft Articles on Responsibility of States for Internationally Wrongful ActsCommentary to Article 39 (**Ex. RLA-243**); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award,7 February 2017, para. 576 (**Ex. CLA-229**) (hereinafter "***Burlington v. Ecuador***"); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award,27 September 2017, para. 1192 (**Ex. RLA-320**); *Copper Mesa Mining Corporation v. Republico of Ecuador*, PCA Case No. 2012-2, Award, paras. 6.91-6.92 (**Ex. CLA-267**).

395. The Respondent is right to point out that the Partial Award concluded that the Claimants were aware that the solar boom created a policy issue that the government needed to solve.[476] However, the Partial Award also found that the Claimants could not foresee that, as part of the solution, the Solar Levy would affect plants commissioned before 2011:

> 426. The evidence before the Tribunal shows that during this period when the solar boom was debated within and outside the Czech Government, the Claimants continued to invest in new plants. Based on the evidence before the Tribunal, of the 31 plants directly or indirectly owned by the Claimants, for nine plants an EPC contract was concluded in 2009 and for twelve plants such a contract was concluded in 2010. In other words, the Claimants concluded a contract for the engineering, procurement and construction of 21 out of the 31 plants during a period when the drastic increase in the development of the photovoltaic power had already emerged as a policy issue in the country, given its potential impact on consumer prices and the State's treasury. At the same time, it is also clear from the evidence that, until the fall of 2010, there was no indication that the impending regulatory changes would affect plants commissioned in 2009 and 2010. The Tribunal also notes that the timing of the Claimants' investments coincided with the rapid fall in the cost of solar panels, as a result of market developments, spurred mainly by cheap imports from Asia.
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> 427. The Tribunal concludes that, in the circumstances, as there was no indication at the time that the level of RES support would be reduced for plants commissioned in 2009 and 2010, the fact that the Claimants were aware, as of summer 2009, that the solar boom was creating a policy issue for the Government that would likely lead to changes in the FiT, cannot affect the stability guarantee in Section 6(1)(a)(2) of the Act on RES Promotion.[477]

396. If the Claimants did not know – and could not have known – that the Solar Levy would be applied to the PV plants commissioned in 2009 and 2010, it cannot be said that they "knowingly invested into a bubble" and "cannot now claim they were surprised when the Government took steps to mitigate the negative effects of that bubble", as the Respondent avers.[478] Nor can the Tribunal agree that the "Claimants must have known (or at least should have known) that the Government might ultimately ask the "last chance rush" solar investors to bear some part of the burden of mitigating the negative consequences of the solar boom".[479]

397. As the Partial Award concluded, the information available at the time indicated that any reform of the existing RES scheme would be applied to PV plants commissioned from 1 January 2011 onwards[480] and the Claimants could "legitimately expect that the investments they would be making in 2009 and 2010 would be entitled to the level of RES support fixed by ERO for these two years".[481] Acting upon such expectation cannot be considered to reflect a "lack of due care"

476 Partial Award, para. 427.

477 Partial Award, paras. 426-427.

478 Response, para. 247.

479 Response, para. 245.

480 Partial Award, paras. 424-425.

481 Partial Award, para. 427.

by the Claimants towards their own property or rights, but a reasonable act within the rules that the Respondent had laid out. Thus, the investments made in 2009 and 2010 were made under "the rules of the game" and therefore fall within the scope of the guarantee granted by the Respondent. This was already clearly established in the Partial Award.

398. The Respondent has argued that the Claimants acted with "extreme haste and carelessness in their rush to complete their solar projects by the end of each respective calendar year and especially by the end of 2010".[482] However, there is no causal link between the Claimants' rush and the Respondent's breach of the applicable treaties, nor between the former and the damages pursued in the current stage. Acting legitimately under the guarantee granted cannot be considered a willful or negligent contribution to the unlawful act. The Solar Levy was not a response to the Claimants' rush, nor were the damages pursued for the PV plants commissioned in late-2010 a consequence of their commissioning date. It was solely a result of the Respondent's decision to apply the modifications to the RES scheme to plants commissioned before 1 January 2011. In fact, the Parties have not disputed that the PV plants commissioned in late-2010 did go into operation and produce solar energy, as sought by the Act on RES promotion, before the Respondent chose to change its policy stance.

399. Consequently, as explained in paragraph 380 above, the only risk assumed by the Claimants when investing was the review and control of the Act of RES promotion under EU State aid rules. Their decision to further their investment, even in late-2010, cannot be considered a negligent or willful contribution to the damages suffered as a consequence of the Solar Levy.

400. In any event, even assuming that negligence or willful misconduct by the Claimants did exist, in the Tribunal's view, it cannot, by its mere existence, fully deprive the aggrieved party of its entitlement to monetary relief, as the Respondent contends. It is only a factor that may be considered to reduce the quantum to be paid.[483]

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482 Rejoinder, para. 54.

483 Brigitte Stern, *Le préjudice dans la théorie de la responsabilité internationale*, p. 326 (**Ex. RLA-372**). In fact, none of the cases cited by Respondent in support of its argument was the investor fully deprived of monetary relief. See: *Occidental Petroleum v. Republic of Ecuador*, para. 687 (**Ex. RLA-336**); *Veteran Petroleum Limited v. Russia*, para. 1637 (**Ex. CLA-18**).

F. EU STATE AID RULES

401. In the Partial Award, the Tribunal deferred the question of the relevance of EU State aid rules and the Commission's decisions assessing the compatibility of the Czech RES Support scheme with EU State aid rules, in the context of quantum, to the current stage of the proceedings.[484]

402. For the Claimants, both EU State aid rules and the Commission's decisions relating thereto are irrelevant for the determination of their damages, because (i) EU law is only relevant as a fact and is not part of the legal framework of this arbitration; (ii) even assuming that EU law were part of the applicable law, EU State aid rules would not justify a refusal to issue an award for damages in the Claimants' favor; and (iii) any conflict between the ECT and EU State aid rules would be resolved in favor of the ECT.

403. By contrast, the Respondent submits that EU State aid law is part of the legal framework of this arbitration and, as a result, precludes the Claimants receiving, by way of an award for damages, compensation for amounts that they would not have been entitled to receive pursuant to EU State aid law rules.

1. The Claimants' Position

404. At the outset, the Claimants submit that EU State aid rules are irrelevant for the determination of their damages claim.[485] The Claimants argue that the Respondent's defense relating to EU State aid must be rejected because, in their view, it aims to re-litigate the finding of the Partial Award that the Solar Levy violated the FET standard.[486] Moreover, the Respondent's argument that an award of damages in favor of the Claimants would be prohibited by EU State rules, the Claimants assert, "is essentially an attempt to plead (or re-plead, this time from the perspective of EU law) the compatibility of the Solar Levy with the guarantee of stability of Section 6(1)(b)(2)" of the Act on RES Promotion.[487] The Claimants instead insist that the Partial Award necessarily implies that EU law is treated as fact.[488] It follows therefrom, the Claimants argue, that the finding that EU law is to be treated as a fact becomes *res judicata* at this present phase of the proceedings.[489]

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484 Partial Award, para. 505.

485 Submission, para. 224.

486 Reply, paras. 192, 194, *referring to* Partial Award, paras. 416, 419-420.

487 Reply, para. 199.

488 2022 Hearing Transcript, Day 1, pp. 36:20-39:2.

489 2022 Hearing Transcript, Day 3, pp. 97:19-98:14, 102:3-9. *See also* 2022 Hearing, Claimants' Responses to Tribunal's Questions, 25 May 2022, pp. 20-21.

405. The Claimants take issue with the Respondent's request that the Tribunal determine the amount of damages owed to the Claimants (quantifying them at zero) not by reference to the amount guaranteed under Section 6(1)(b)(2) of the Act on RES Promotion, but by reference to the level of FiT allegedly permitted under EU State aid rules.[490] Yet, in light of the Tribunal's finding that Section 6(1)(b)(2) contains a guarantee of stability protected under the FET standard, the Claimants consider that "any attempt to invoke EU State aid law to frustrate [this] guarantee is foreclosed".[491]

406. According to the Claimants, contrary to what the Respondent alleges, contemporaneous documents show that the Commission was aware of the RES scheme and that the "review and control" of the Czech RES scheme without the Solar Levy did in fact take place.[492] The Claimants further emphasize that the Commission never took issue with the original 2009 and 2010 FiT, despite having had multiple opportunities to do so since 2003.[493] Therefore, in the Claimants' view, "it is not for the Arbitral Tribunal (let alone the Czech Republic) to second-guess how the [Commission] would have applied the rules on State aid if it had further investigated the original 2009 and 2010 FiT".[494]

(a) EU State aid law is only relevant as part of the factual matrix of this case

407. With reference to *9Ren Holding v. Spain*, the Claimants submit that EU State aid rules are irrelevant as part of the legal framework of this case because the Claimants in this arbitration are "not asserting a right to State Aid under EU law", but rather a right to compensation arising from the Respondent's breach to accord FET to the Claimants pursuant to the ECT and the BITs.[495] Therefore, EU State aid law, the Claimants assert, is only relevant as part of the factual matrix of this case, particularly, to consider whether, as a matter of fact, the State aid rules had an impact

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490 Reply, para. 196.

491 Reply, paras. 197-198, *citing* Partial Award, para. 419.

492 Reply, paras. 206-210, *citing* Partial Award, para. 419. *See* Letters from the Czech Society of Wind Energy and the European Association for Renewable Energies EUROSOLAR respectively to Mr Monti and Mr Loyola de Palacio, 16 December 2003 (**Ex. C-69**); Letter from the Commission to EUROSOLAR, 27 July 2014 (**Ex. C-70**); Letter from J. Pihlatie to the Permanent Representation of the Czech Republic to the European Union, 6 September 2005 (**Ex. R-57**); Letter from E. van Ginderachter to the Permanent Representation of the Czech Republic to the European Union, 3 April 2009 (**Ex. R-159**). *See* Decision, 28 November 2016, paras. 91-92 (**Ex. R-367**).

493 Reply, para. 212.

494 Reply, para. 211.

495 Submission, paras. 224-225, *citing 9REN Holding S.à.r.l. v. The Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, para. 169 (**Ex. CLA-236**). *See also* 2022 Hearing Transcript, Day 1, pp. 36:16-39:14.

on the Claimants' expectations at the time of their investments, i.e., "whether [the] Claimants did or could perceive an incompatibility of the original 2009 and 2010 FiT with EU State aid law and whether and how that impacts on quantum".[496]

408. *First*, the Claimants aver that EU law is not to be considered as part of the "applicable rules and principles of international law", which the Tribunal must apply to decide the pending issues of quantum in accordance with Article 26(6) of the ECT.[497] In view of the fact that not all Contracting States of the ECT are Member States of the EU, the Claimants contend that only the "rules" and "principles" of international law that are common to all Contracting States are applicable in ECT disputes under Article 26(6) of the ECT, whereas "a sub-system of international law, such as EU law" that is only "regional and not a worldwide system of law", is not.[498]

409. Conversely, if EU law is elevated to the status of applicable law, the Claimants contend that the Tribunal would have to step into the Commission's shoes, interpret and apply EU State aid law, and determine the compatibility of the original 2009 and 2010 FiT with the EU internal market.[499]

410. *Second*, relying on conclusions reached by other investment tribunals, the Claimants argue that EU State aid law is only relevant as a matter of fact to assess whether the Claimants did or could expect the original 2009 and 2010 FiT to amount to State aid at the time of their investments.[500] In this respect, the Claimants point out that the Respondent in the first phase of these proceedings

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496 Reply, para. 237. *See also* 2022 Hearing Transcript, Day 1, p. 41:21-25.

497 Reply, paras. 221-222. *See also* 2022 Hearing Transcript, Day 1, pp. 39:18-41:3.

498 Reply, paras, 226-234, *citing Eskosol S.p.a. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, paras. 120-121 (**Ex. CLA-272**); *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, para. 158 (**Ex. CLA-263**) (hereinafter "***Cube Infrastructure v. Spain***"). *See also* 2022 Hearing Transcript, Day 1, pp. 40:9-41:3.

499 Reply, para. 243. *See also* 2022 Hearing Transcript, Day 1, p. 51:13-21.

500 Reply, paras. 238-241, *referring to STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Principles of Quantum, 8 October 2020 (**Ex. CLA-275**); *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (**Ex. CLA-189**) (hereinafter "***Antin v. Spain***"); *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, paras. 159-160 (**Ex. CLA-263**); *FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Case V 2017/060, Final Award, 8 March 2021, para. 533 (**Ex. CLA-273**); *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019, paras. 167, 441 (**Ex. CLA-235**) (hereinafter "***SolEs v. Spain***"). *See also* 2022 Hearing Transcript, Day 1, p. 46:3-18.

in fact recognized that EU law is "relevant as a fact when assessing the rationality of the Czech Republic's conduct, as well as the legitimacy of [the] Claimants' expectations".[501]

411. *Third*, having established the role of EU State aid law in this case,[502] the Claimants submit that they did not, and could not, expect an incompatibility between the original 2009 and 2010 FiT and EU State aid law when they invested in Energy 21 at the following times: GIHG in May 2008, Natland Investment and Natland Group in December 2009, and Radiance partly in May 2010 and partly in August 2011.[503] This is because:

412. The Commission never declared the original 2009 and 2010 FiT to be incompatible State aid.[504]

413. The Respondent never notified the original RES scheme to the Commission.[505] In this respect, the Claimants emphasize that the Respondent cannot benefit from its failure to notify the Commission in breach of EU law.[506]

414. The Respondent repeatedly sent "clear signals" to investors that State aid posed no problem for the original 2009 and 2010 FiT, since no public resource "whatsoever" was involved in the scheme.[507]

415. The Commission did not express any disagreement with the Respondent's view and did not consider it necessary or desirable to continue the investigation on the original RES scheme.[508]

416. The Solar Levy was not introduced to respond to any State aid concern regarding alleged "overcompensation" of PV investors. In fact, the Claimants point out, the Commission criticized

501 Reply, para. 240, *citing* Statement of Defense, para. 373.

502 According to the Claimants, the relevant inquiry is "assessing whether [the] Claimants could or could not perceive a risk of State aid when they invested; in other words, whether they could expect State aid to preclude the payment of the [FiTs]". *See* 2022 Hearing Transcript, Day 1, p. 46:5-8.

503 Reply, paras. 246, 247-248. *See* 2022 Hearing Transcript, Day 1, pp. 48:12-16, 49:6-7, 49:10-12.

504 Submission, para. 231. The Claimants highlight that this understanding is common ground between the Parties. *See* Reply, para. 249; Response, paras. 109, 123.

505 Reply, para. 250. The Claimants note that the Respondent has admitted this. *See also* Response, paras. 97, 109, 123, 127; 2022 Hearing Transcript, Day 1, p. 46:19-21.

506 Reply, para. 256. *See* 2022 Hearing Transcript, Day 1, p. 49:23-25.

507 Reply, paras. 251-252, *citing* Czech Republic's Reply to the European Commission's Questions of 3 April 2009, 20 May 2009, p. 3 (**Ex. R-160**). *See* 2022 Hearing Transcript, Day 1, pp. 47:17-49:12.

508 Reply, para. 252, *referring to* Letter from the Commission to EUROSOLAR, 27 July 2014 (**Ex. C-70**).

the Solar Levy for its "retroactive character", underscoring that it undermined RES investors' confidence and expectations.[509]

417. For the Claimants, the fact that the Commission never formally approved the original RES scheme entitled the Claimants to form "the *expectation* (not the right) to believe" that the then-existing FiT did not entail State aid.[510]

418. In response to the Respondent's argument that the General Court and the CJEU already rejected the Claimants' position, the Claimants maintain that "this Tribunal operates in a public international law context, outside the EU".[511]

419. Lastly, even assuming *arguendo* that the EU law is part of the legal framework of this case, the Claimants argue that the rules on State aid would not justify a refusal to issue an award for damages in the Claimants' favor, nor would those rules lead to a reduction in damages.[512] In this respect, the Claimants highlight that the Commission declined to assess the original RES scheme despite having had the opportunity to do so.[513] Further, there is nothing in the Commission's decision, the Claimants assert, with respect to the compatibility of the amended RES scheme that suggests that the Commission would have reached a different conclusion for the original RES scheme.[514] Considering that the Commission approved returns higher than 10.6% for biogas installations and 12% for PV plants in other Member States, the Claimants add that the Commission would most likely have approved returns higher than 8.4% had it investigated the original RES scheme.[515]

(b) ECT prevails over EU law

420. In the alternative, even if EU law were deemed to be part of the legal framework and therefore prohibits an award for damages, the Claimants argue that the ECT prevails over EU law.[516] This is because, according to the Claimants, any potential conflict between the ECT and EU law is to be resolved by reference to Article 16 of the ECT, which provides that the ECT prevails over

509 Submission, para. 230, *citing* Letter from Ms Hedegaard and Mr Oettinger to Mr Kocourek, 11 January 2011 (**Ex. C-337**).

510 Reply, paras. 255, 257.

511 Reply, paras. 253-254.

512 Reply, para. 260.

513 Reply, para. 263.

514 Reply, paras. 264-254, *referring to* Decision, para. 116 (**Ex. R-367**).

515 Reply, para. 265.

516 Reply, para. 268. *See generally* 2022 Hearing Transcript, Day 1, p. 52:8-22.

other prior or subsequent treaties when it is more favorable to the investors.[517] In this case, Article 10 of the ECT granting investors FET treatment and the customary principle of full reparation of damages, which the Claimants have invoked, are "plainly more favorable" to the Claimants than the interpretation that the Respondent gives to the EU State aid rules.[518]

421. Moreover, irrespective of Article 16 of the ECT, the Claimants note that tribunals have established that "the ECT prevails over any other norm (apart from those *ius cogens* […])" because the "'hierarchy' between norms to be applied by the [t]ribunal […] must be determined from the perspective of public international law, not of EU law".[519]

422. The Claimants reject the Respondent's reliance on *Electrabel v. Hungary* to argue otherwise, noting that the holding in the *Electrabel* award, which resolved the conflict in favor of EU law based on Article 351 of TFEU, was rejected by subsequent decisions.[520]

423. In the Claimants' view, Article 31(3) of the Vienna Convention on the Law of Treaties (the "**VCLT**") does not support the Respondent's case, given that (i) it contains supplementary rules of treaty interpretation and does not address the conflicts between treaties; and (ii) EU Treaties, in any event, do not qualify as "subsequent agreement[s] between the parties" because many ECT Contracting States are not EU Member States.[521]

(c) An award of damages does not constitute unlawful State aid

424. Addressing the Respondent's argument that an award of damages would itself amount to unlawful State aid and therefore be precluded, the Claimants argue that the facts of this case are fundamentally different from those addressed in the Commission's 2015 decision in *Micula v. Romania* (the "***Micula* Decision**").[522]

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517 Reply, para. 276. *See also* 2022 Hearing Transcript, Day 1, p. 53:18-20.

518 Reply, paras. 277-279.

519 Submission, para. 235; Reply, para. 280, *citing RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 75 (**Ex. CLA-175**).

520 Reply, para. 274.

521 Reply, para. 275, *citing* Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31(3) (**Ex. RLA-145**). *See also* 2022 Hearing Transcript, Day 1, p. 53:7-11.

522 Submission, para. 233, *referring to* Commission Decision 2015/1470 of 30 March 2015 on State aid SA.38517 implemented by Romania - Arbitral award *Micula v. Romania* [2015] OJ L232/43 (30 March 2015) (**Ex. RLA-91**); Reply, para. 287.

425. Specifically, the Claimants assert that, unlike the situation in *Micula* where the claimant's claims for compensation related to State aid that had been determined to be incompatible with the EU internal market, no such declaration was made with respect to the original 2009 and 2010 FiT.[523] The Claimants further reject the Respondent's interpretation that the "illegal aid" referred to in the *Micula* Decision encompasses unnotified aid, in addition to incompatible aid.[524] In any event, as the *Micula* Decision was set aside by the General Court, the Claimants do not consider the Decision to be a valid precedent.[525]

426. The Claimants aver that an award for damages cannot be construed as State aid, because it would not be liable to distort or threaten competition as the "Claimants are no longer involved in the RES business".[526]

427. In any event, the Claimants clarify that they are not seeking payment of the original 2009 and 2010 FiT; instead, they seek damages corresponding to the diminution in the FMV of their investments in Energy 21.[527] As such, they take the view that whether the additional funds received by the Claimants under the original RES scheme would have constituted unlawful State aid is irrelevant for the purposes of quantum.[528]

428. In light of the foregoing, this Swiss-seated Tribunal, the Claimants submit, is not prevented from issuing an award of damages in the Claimants' favor even if the enforceability of the award within the EU seems uncertain and difficult.[529] Moreover, as long as there is a slight chance that the award is deemed compatible with State aid rules—which there is, according to the Claimants—the Tribunal cannot refuse to award damages.[530]

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523 Submission, para. 233.

524 Reply, para. 289, *citing to* Commission Decision 2015/1470 of 30 March 2015 on State aid SA.38517 implemented by Romania - Arbitral award *Micula v. Romania* [2015] OJ L232/43 (30 March 2015), paras. 103-104 (**Ex. RLA-91**).

525 Submission, para. 233.

526 Submission, para. 233.

527 Reply, para. 266.

528 Reply, para. 266.

529 Reply, paras. 293-294.

530 2022 Hearing Transcript, Day 1, pp. 54:5-55:5.

2. The Respondent's Position

429. The Respondent submits that the Claimants are not entitled to monetary relief, because an award of compensation in favor of the Claimants would be contrary to EU State aid rules.[531]

430. The Respondent rejects the Claimants' argument that it is attempting to reopen the Tribunal's finding that Article 6(1)(b)(2) of the Act on the RES Promotion contains an "intrinsic stabilization guarantee".[532] Rather, the Respondent explains that it is "simply giving meaning to the Tribunal's definition of the content of that guarantee" which, in the Respondent's view, is a necessary step in determining the compensation, if any, to which the Claimants are entitled.[533]

431. For the Respondent, the Tribunal's finding in paragraph 419 of the Partial Award, which outlines the contours of the "intrinsic guarantee of stability" to which the Respondent had committed, observes that such undertaking was always circumscribed by EU State aid rules.[534] Consequently, it is the Respondent's position that the Tribunal, in the current phase of the proceedings, must analyze what subsidies the Respondent could have paid, consistent with its obligations under "EU State aid rules applied by the Commission", in order to determine what subsidies the Claimants could have received (and retained) lawfully, but for the imposition of the Solar Levy.[535]

432. The Respondent clarifies that it is not asking the Tribunal to conduct a compatibility analysis of the original RES scheme, any more than it is asking the Tribunal to second-guess the Commission or to interpret EU law.[536] Rather, it asks the Tribunal to recognize that (i) the Commission never approved the original RES scheme (without the Solar Levy); and (ii) the consequence of that reality is that any amounts paid pursuant to such a scheme are *per se* illegal State aid that cannot be awarded as compensation in this arbitration.[537] Such recognition by the Tribunal, in the Respondent's view, can be held irrespective of whether EU State aid rules apply as international law in these proceedings or only as part of the factual matrix of this case.[538]

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531 Submission, para. 79.

532 Rejoinder, para. 65, *referring to* Reply, paras. 193-200.

533 Rejoinder, para. 65.

534 Rejoinder, paras. 67, 70. *See also* 2022 Hearing Transcript, Day 1, pp. 97:19-98:13.

535 Rejoinder, paras. 71, 73, *citing* Partial Award, para. 419. *See also* 2022 Hearing, Respondent's Responses to Tribunal's Questions, 25 May 2022, p. 5.

536 Rejoinder, para. 75.

537 Rejoinder, para. 75.

538 Rejoinder, para. 75.

(a) The EU State aid law is key to the quantum analysis

433. Noting the Tribunal's finding that the scope of the "intrinsic stabilization guarantee" is "subject […] to review and control under EU State aid rules applied by the Commission", the Respondent argues that the Tribunal explicitly recognized that the EU State aid rules form an integral part of the legal framework the stability of which the Respondent is committed to ensure.[539] Therefore, contrary to the Claimants' contention, the relevance of EU State aid law is not confined to assessing the Claimants' legitimate expectations.[540] Instead, EU State aid rules must be taken into account in determining the scope of the Respondent's legal obligations, including any obligation to compensate the Claimants for the injuries caused by the treaty violations that the Tribunal identified in the Partial Award.[541]

434. Relying on *Electrabel v. Hungary*, the Respondent submits that it is well established that EU law applies as international law in intra-EU investor-State disputes, such as the present arbitration.[542] In this respect, the Respondent underlines that even those tribunals that have viewed EU law as only a matter of fact recognized the broader relevance of a State's EU law obligations when resolving a dispute under the ECT.[543] The Respondent adds that international cases in which EU law was held to be irrelevant or inapplicable were almost always at the jurisdictional phase, and not the merits or damages phase.[544]

435. In any event, irrespective of whether EU State aid law is a matter of law or a matter of fact in these proceedings, the Respondent argues that the EU State aid law is of critical relevance to the quantification of the Claimants' damages, because it sets a ceiling on the amount of subsidies that the Claimants could have legally obtained from the Respondent.[545] The Respondent, in this regard, points out that the Claimants do not dispute that (i) the Commission never approved the

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539 Response, paras. 83-84, *citing* Partial Award, para. 419; Rejoinder, para. 60. *See* 2022 Hearing Transcript, Day 1, pp. 97:19-98:13.

540 Rejoinder, para. 60.

541 Response, para. 99.

542 Response, para. 101, *referring to Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.120 (**Ex. CLA-4**); 2022 Hearing Transcript, Day 1, p. 96:17-24.

543 Rejoinder, para. 89, *referring to Eskosol S.p.a. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, para. 123 (**Ex. CLA-272**).

544 2022 Hearing Transcript, Day 1, p. 96:7-16.

545 Response, paras. 103, 118.

original RES scheme;[546] (ii) the only Czech RES scheme that was ever notified to, and approved by, the Commission was the amended RES scheme; and (iii) the Commission expressed no view with respect to the compatibility of the original RES scheme with the EU internal market.[547]

436. Observing that the Commission has exclusive jurisdiction to determine the compatibility of State aid with the internal market, the Respondent asserts that any aid that a Member State grants without prior notification to, and approval by, the Commission is *per se* unlawful State aid.[548] Since the Commission has never made any affirmative determination on the compatibility of the original RES scheme, the Respondent is of the view that the original 2009 and 2010 FiT are thus presumptively incompatible with the State aid rules.[549]

437. The Respondent contends that the Claimants, as businesses operating in the EU, would have, or should have, been aware of the importance of the EU State aid rules, as well as the possible consequences of accepting subsidies that might later be determined to constitute incompatible State aid.[550] Consequently, the Respondent considers that whether, as a matter of law, it should have notified the original RES scheme to the Commission is immaterial to the present dispute.[551] Furthermore, it is "implausible" for the Claimants to suggest that they could legitimately have expected that subsidies under the original RES scheme could lawfully be paid to, and retained by, the beneficiaries of that scheme.[552]

438. As to the "signals" from the Czech Republic and the Commission that allegedly created legitimate expectations regarding the compatibility of the original RES scheme, the Respondent posits that the statements made in exchanges of correspondence between the Commission and the Czech Republic or with third parties do not qualify as "precise, unconditional and consistent assurances" by the Commission of the type which an enterprise may obtain to mitigate the risks associated

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546 *See* 2022 Hearing Transcript, Day 1, pp. 98:23-99:7: "A fundamental principle of State aid law is that any aid requires prior approval by the European Commission. If it has not been pre-approved, then it is *per se* unlawful. This is distinct from the issue of whether the state aid is substantively compatible or incompatible with the common market. A determination about compatibility is within the exclusive competence of the Commission. State aid cannot be considered lawful unless and until it is approved by the Commission as compatible".

547 Rejoinder, para. 88. *See also* Reply, paras. 250, 257, 261.

548 Submission, paras. 89-91, 110.

549 Submission, paras. 127-128; Rejoinder, para. 91.

550 Response, para. 111.

551 Rejoinder, para. 93.

552 Rejoinder, paras. 92, 94.

with subsidies that have not been notified to and approved by the Commission.[553] The Claimants' argument, the Respondent adds, was rejected by the General Court and the ECJ.[554] According to the Respondent, the decisions of these EU courts not only provide the EU State law principles, but also confirm what a reasonable investor operating in the EU would have known, namely that, absent precise assurances from the Commission, any investor that accepted unnotified, unapproved subsidies assumed the risk that such subsidies might in fact constitute incompatible State aid.[555]

(b) Any conflict would resolve in favor of EU law

439. While it is the Respondent's primary position that the ECT can be interpreted harmoniously with the EU law in accordance with the ECJ's decision that the ECT "must be interpreted" in a way that avoids a conflict with EU Treaties,[556] the Respondent rejects the Claimants' alternative argument that the ECT must always prevail over EU law in situations of conflict.[557]

440. According to the Respondent, if a conflict arises between EU law and the ECT, any such conflict would be resolved in favor of EU law because, as confirmed in *Electrabel v. Hungary*, EU law under the EU Treaties enjoys "primacy" over conflicting norms that may otherwise apply in intra-EU relations.[558] Furthermore, considering that EU Treaties are "subsequent agreement[s]" which the Tribunal must take into account pursuant to Article 31(3) of the VCLT, the Respondent maintains that any incompatibility between the EU Treaties and other international agreements would be resolved in favor of EU law.[559]

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553 Response, para. 92, *citing* Expert Report of Kelyn Bacon QC, 28 October 2015, para. 121; Rejoinder, para. 95.

554 Response, para. 107, *referring to* Case T-217/17, *FVE Holýšov I and Others v. Commission* ECLI:EU:T:2019:633, paras. 70-85 (**Ex. RLA-366**); C-850/19 P *FVE Holýšov I s. r. o. and Others v. European Commission*, ECLI:EU:C:2021-740 (**Ex. RLA-353**).

555 Response, para. 118; Rejoinder, para. 96.

556 Response, paras. 113-114, *referring to* Case No. C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655, paras. 23, 49, 66 (**Ex. RLA-354**); Rejoinder, para. 82.

557 Submission, para. 112; Rejoinder, para. 80.

558 Response, para. 115, *referring to Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.189 (**Ex. CLA-4**); Rejoinder, para. 84. To the contrary, the Respondent asserts that the tribunal in *RREEF v. Spain* gave no consideration to the principles of EU law and treaty interpretation, as the Respondent has discussed here. *See* Response, para. 117, *referring to RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 87 (**Ex. CLA-163**); Rejoinder, para. 83.

559 Response, paras. 116-117, *citing* Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31(3) (**Ex. RLA-145**).

441. As to the Claimants' argument regarding Article 16 of the ECT, the Respondent posits that (i) Article 16 by its terms is merely a rule of construction, not a conflict-of-laws provision; and (ii) in any event, it cannot apply in intra-EU relations, because EU Treaties "take[] precedence" between EU Member States, as confirmed by the CJEU.[560]

(c) The Claimants can only recover damages to the extent such recovery is consistent with EU law

442. In view of the above, the Respondent submits that the only support that the Claimants may lawfully receive under EU law consists of the returns set forth in the amended RES scheme, given that the Commission never approved any Czech RES scheme that did not include the Solar Levy.[561] Since the Commission never evaluated the compatibility of the 2009 and 2010 FiT, the Respondent argues that any subsidies paid under such a scheme would constitute presumptively unlawful State aid, to which the Claimants had neither right nor entitlement.[562]

443. The Respondent rejects the Claimants' argument that the Commission impliedly confirmed that the original RES scheme was compatible with the internal market and that the Claimants are thus entitled to the amount that they have requested.[563] Recalling that the Commission exercises its authority to assess State aid only at the Member State's notification, the Respondent contends that the Commission's rejection of the investor's request for assessment cannot be understood as an implicit ruling on the compatibility of the 2009 and 2010 FiT.[564]

444. According to the Respondent, the Commission's decision to approve the amended RES scheme as compatible with the internal market was based *inter alia* on the reasonable rate of return it provided the solar investors.[565] As such, the Respondent maintains that the maximum amount the Claimants could have lawfully obtained from the Respondent in any but-for scenario would be "a return sufficient to allow them to recover their investment along with a reasonable rate of return as determined by the cost of capital".[566]

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560 Rejoinder, para. 85, *citing* Case 10/61, *Commission v. Italy* [1962] ECR 1, p. 10 (**Ex. RLA-94**).

561 Response, para. 120; Rejoinder, para. 87.

562 Response, para. 123.

563 Response, para. 142; Rejoinder, paras. 90, 98, 102.

564 Rejoinder, para. 101. *See also* 2022 Hearing Transcript, Day 1, p. 99:8-12.

565 Response, paras, 120-122, *referring to* Decision, paras. 75, 82, 84, 99 (**Ex. R-367**).

566 Response, para. 85.

445. In assessing the compatibility of the amended RES scheme, the Respondent notes that the Commission referred to its 2008 Guidelines on State Aid for Environmental Protection, which provided that a Member State "may grant operating aid […] [that] may also cover a normal return on capital".[567] There is nothing in the Guidelines, nor under EU law, the Respondent asserts, that authorizes environmental aid to overcompensate RES producers by providing subsidies in excess of the cost of capital.[568]

446. Even if the Tribunal were inclined to adopt the rates of return set forth in the Commission's decision for PV installations (i.e., 6.3% to 8.4%) as the returns that the Claimants would have achieved in the but-for scenario, the Respondent argues that the Claimants would not be entitled to damages, because each of the Claimants' plants met or exceeded those rates of return.[569] In addition, in the Respondent's view, approval by the Commission of certain rates of return under subsidy schemes enacted for different kinds of technology and/or by other countries does not necessarily mean that the Commission would have endorsed the rates of return pertaining to PV installations in the Czech Republic.[570]

(d) An award of damages would constitute unlawful State aid

447. According to the Respondent, an award of damages granting the Claimants compensation for diminished profits as a result of the Solar Levy would itself constitute unlawful State aid, unless it was notified to, and approved by, the Commission.[571] In support of its contention, the Respondent relies on the *Micula* Decision in which the Commission confirmed that (i) "any compensation which the Arbitral Tribunal were to grant would constitute in and of itself State aid"; (ii) arbitral tribunals are not competent to authorize the granting of State aid; and (iii) compensation awarded by the arbitral tribunal would be in violation of Article 108(3) of TFEU and therefore would not be enforceable.[572]

448. Underscoring the fact that the Claimants do not dispute these findings of the *Micula* Decision, the Respondent clarifies that the General Court set aside the Decision based on unrelated temporal

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567 Response, paras. 136-137, *citing* Commission Guidelines on State Aid for Environmental Protection, [2008] OJ C 82/1, 1 April 2008, para. 109(a) (**Ex. R-43**). *See also* Commission Notice on the notion of State aid as referred to in Art. 107(1) TFEU, [2016] OJ C 262/1, 19 July 2016, para. 102 (**Ex. RLA-207**).

568 Response, para. 138; Rejoinder, para. 97. *See also* 2022 Hearing Transcript, Day 1, p. 99:13-20.

569 Response, paras. 131, 133. *See also* **RER-Peer-2**, p. 9, Table 2.

570 Response, paras. 129-132; Rejoinder, para. 103.

571 Response, para. 143. *See also* 2022 Hearing Transcript, Day 1, pp. 106:16-107:13.

572 Response, para. 144, *referring to* Decision, para. 150 (**Ex. R-367**).

grounds, but expressed no misgivings about the well-accepted principle that an arbitral award constitutes State aid within the meaning of Article 107(1) of TFEU.[573]

449. As such, even if the Tribunal were to agree with the Claimants that EU State aid rules did not preclude an award of damages in these proceedings, the Respondent argues that this "does not obviate the fact that an award would be subject to a State aid compatibility assessment" and would trigger the question of enforceability of the award.[574] In this respect, the Respondent notes that so long as the Claimants are in business anywhere in the EU, an award of damages as compensation for the Solar Levy would constitute improper State aid.[575] According to the Respondent, enforcing the award outside the EU would also be difficult, since the courts in non-EU countries would need to "order an EU Member State to pay an EU business an award that is contrary to EU law".[576]

450. The Respondent further rejects the Claimants' reliance on *9Ren Holding v. Spain*, arguing that the determination of whether an award of damages constitutes State aid does not arise out of question whether the Claimants submitted claims under EU law or invoked a "right to State aid".[577] Rather, it concerns the question of whether an arbitral award, in practice, would result in granting an amount that would be equivalent to a State aid subsidy.[578]

451. Finally, the Respondent forewarns that an award of damages in a range exceeding the normal cost of capital would not be authorized by the Commission, because, according to the Respondent, such an award would confer on the Claimants an anti-competitive advantage over other RES investors, which are not entitled to receive government support at such levels, and which do not have recourse to remedies available under investment treaties.[579] Consequently, the Respondent posits that any amount that the Respondent actually pays under such an award would, as a matter of EU law, "be subject to clawback by the Czech Republic, at the direction of the Commission".[580]

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573 Response, paras. 149-151, *referring to* T-624/15, T-694/15, T-704/15, *European Food SA and Others v. European Commission (Micula)* EU:T:2019:423, Judgment of the General Court (Second Chamber, Extended Composition), 18 June 2019, para. 75 (**Ex. CLA-264**).

574 Rejoinder, para. 109.

575 Response, paras. 153-154.

576 Rejoinder, para. 110.

577 Rejoinder, paras. 105-106, *citing 9REN Holding S.à.r.l. v. The Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, para. 161 (**Ex. CLA-236**).

578 Rejoinder, para. 106.

579 Response, para. 155.

580 Response, para. 155. *See also* 2022 Hearing Transcript, Day 1, pp. 107:14-108:2.

3. The Tribunal's Analysis

452. As noted previously, the Tribunal agrees with the Respondent that EU State aid rules are a factor to be considered in the context of quantum that limits the cash flows that the PV plants would have obtained, in all probability, absent the imposition of the Solar Levy. Nevertheless, the Tribunal considers the Respondent's argument to go too far insofar as it purports to deny the Claimants any reparation at all.

453. *First*, the Partial Award already held that EU State aid rules are relevant to the controversy. Both the level of support and the period of time over which the guarantee was to be in force had to be respected by the Respondent, with the only possible exception being the review and control of the original RES scheme under EU State aid rules applied by the Commission.[581] The question left to be determined in the current stage is whether, for the purposes of quantum, such review and control would have taken place absent the Solar Levy, and were it the case, what would have been its economic consequences.

454. *Second*, the Tribunal considers that, in the but-for scenario, the Commission would have "in all probability" considered the original RES scheme as State aid.

455. It is true, as the Claimants have noted, that the Respondent failed for many years to notify the original RES scheme to the Commission, in order for the latter to qualify it as State aid and evaluate its compatibility under EU State aid rules.[582] However, in this respect, the Respondent seems only to have acted consistently with the approach then being taken by the ECJ. In 2001, in the *PreussenElektra* case, the ECJ held that obligatory purchases on the part of energy companies did not qualify as State aid under EU law:

> In this case, the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity.
>
> Therefore, the allocation of the financial burden arising from that obligation for those private electricity supply undertakings as between them and other private undertakings cannot constitute a direct or indirect transfer of State resources either.
>
> In those circumstances, the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of Article 92(1) of the Treaty.
>
> […]

581 Partial Award, para. 419.

582 Reply, para. 251.

> The answer to the first question referred must therefore be that a statutory provision of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distributes the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators, does not constitute State aid within the meaning of Article 92(1) of the Treaty.[583]

456. However, this position was clarified over a period of years, both *before and after* the enactment of the Solar Levy. For instance, in the *Essent Netwerk Noord BV* case, decided in 2008, the ECJ held that the approach established in the *PreussenElektra* case did *not* apply to cases where purchasing obligations were financed by compulsory charges to consumers. As the ECJ stated:

> As regards the first condition [intervention by the State or through State resources], it is necessary to ascertain whether the amounts paid to SEP constitute intervention by the State or through State resources.
>
> Article 9 of the OEPS provides for the payment to the designated company, namely SEP, of NLG 400 million and for the payment of the excess of the charge received to the Minister, who must set that amount aside for the purpose of defraying the costs referred to in Article 7 of the OEPS — which will not, however, enter into force — namely the non-market-compatible costs associated with urban heating and the Demkolec coal gas plant. In that regard, it must be borne in mind that those amounts have their origin in the price surcharge imposed by the State on purchasers of electricity under Article 9 of the OEPS, a surcharge with regard to which it has been established, in paragraph 47 of this judgment, that it constitutes a charge. Those amounts thus have their origin in a State resource.
>
> […]
>
> Likewise, the measure in question differs from that referred to in Case C-379/98 *PreussenElektra* [2001] ECR I-2009, in which the Court held, at paragraph 59, that the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any direct or indirect transfer of State resources to undertakings which produced that type of electricity. In the latter case, the undertakings had not been appointed by the State to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources.
>
> If follows from all those points that the amounts paid to SEP constitute intervention by the State through State resources.[584]

457. This was reaffirmed in cases following the Solar Levy. For instance, in *Association Vent De Colère! and others*, the ECJ held:

> As regards, in the second place, the condition that the advantage must be granted directly or indirectly through State resources, it is to be recalled that measures not involving a transfer of State resources may fall within the concept of aid […].

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583 Case C-379/98 *PreussenElektra AG v. Schleswag AG*, ECLI:EU:C:2001:160, paras. 59-61, 66 (**Ex. CLA-1**).

584 Case C-206/06 *Essent Netwerk Noord* ECLI:EU:C:2008:413, paras. 65-66, 74-75. (**Ex. RLA-66**), *citing* Case C-379/98 *PreussenElektra AG v. Schleswag AG*, ECLI:EU:C:2001:160, para. 59 (**Ex. CLA-1**).

> The concept of 'intervention through State resources' is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid […].
>
> The Court has also held that Article 107(1) of the TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources […].
>
> […]
>
> The Court has held that funds financed through compulsory charges imposed by the legislation of the Member State, managed and apportioned in accordance with the provisions of that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are managed by entities separate from the public authorities […].[585]

458. Consequently, at the time that the Solar Levy was imposed, as EU investors who must be taken to have been aware of the existence of EU State aid law and the fundamental objective of avoiding distortions in the internal market of the European Union, the Claimants reasonably could have expected that the original RES scheme could sooner or later be considered to be State aid. This would entail that the scheme would be subject to review and control by the Commission.

459. *Third*, even assuming that the Claimants could not reasonably perceive the risk that the original RES scheme could be qualified as State aid, the evidence is that the alternatives to the Solar Levy would have required State resources to finance the FiT. In this respect, the Claimants themselves have averred:

> Moreover, the Solar Levy was only one possible option to offset a portion of the State funds intended to subsidize RES energy in place of electricity users. As [the] Respondent acknowledges, other options considered were "a VAT hike; increased taxation of large businesses; increased energy taxes; borrowing funds from the pension reform scheme; taxation of banks; use of the EU's Emission's Trading System funds; an asset tax per KW of installed capacity; a government loan" and so on. It follows that there is no necessary link between [the] Claimants' alleged contributory conduct and the Solar Levy, which [the] Respondent introduced at its own discretion.[586]

460. The fact that the alternatives to the Solar Levy would have included the direct use of State resources to finance the PV plants' level of revenue guaranteed by Article 6(1)(b)(2) of the Act on RES Promotion confirms that review and control under State aid rules would "in all probability" have occurred, even absent the Respondent's breach. The Claimants' reparation cannot be quantified without considering the fact of EC supervision as part of the but-for scenario. This is precisely the analysis that the Partial Award required the Tribunal to carry out in this stage.

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585 Case C-262/12 *Association Vent De Colère!* ECLI:EU:C:2013:851, paras. 19-21, 25 (**Ex. RLA-67**).

586 Reply, para. 89.

461. *Fourth*, notwithstanding the foregoing, the Tribunal does not agree with the Respondent that the latter implies that Claimants should be awarded zero damages. This would only be the case if it were assumed that the Commission would, "in all probability", have declared the RES scheme to be either unapproved or incompatible State aid. However, the evidence on the record suggests that that would not have been the case in the but-for scenario.

462. As to the lack of approval, it is true that the original RES scheme was never approved by the Commission. This has already been discussed above at paragraphs 442 to 444 of the Final Award. To the extent that the Respondent wrongly or incorrectly chose not to notify it as State aid, despite that being its obligation under EU State aid rules, the Tribunal agrees with the Claimants that the Respondent cannot rely on its own failure to submit its policy for consideration before the Commission in order to avoid full reparation.[587]

463. As to the incompatibility, although the Commission never reviewed the original RES scheme, it did review the amended RES scheme, and in doing so, arrived at the conclusion that it was compatible State aid. The reason for this finding was that investors were provided levels of return "in line with [those] similar photovoltaic installations under similar conditions observed in other EU Member States",[588] with the PV plants analyzed by the Commission having an IRR ranging from 6.3% to 8.4%.[589] These calculations were, of course, performed with the Solar Levy in place.

464. The Tribunal finds this decision to be both illustrative and useful in determining the appropriate parameters for evaluating the impact of the State aid rules on the determination of damages. In employing the Commission's analysis as a guide to calculating damages, the Tribunal is not to be taken as seeking to usurp the Commission's exclusive right to apply State aid rules. Rather, in discharging its duty to render an award, the Tribunal has carefully taken note of the range of returns calculated by the Commission for the RES sector as a whole, and for the PV segment generally, and it has sought to apply them to the specific circumstances of the PV plants at issue in this case.

465. The Commission's decision over what it deemed reasonable for the modified RES scheme is thus a highly relevant fact that affects the determination of quantum. The Commission made an *ex ante* analysis of a proposed measure to determine whether, in general, it had an adverse effect on the common market. In so judging, the Commission's analysis was based on *average ranges of*

587 Reply, para. 256.

588 Decision, para. 117 (**Ex. R-367**).

589 Decision, Table 3 (**Ex. R-367**).

performance of the industry, while in the present case, Tribunal must make *a plant-by-plant analysis* to determine the Solar Levy's effect on the Claimants' specific investments. Thus, when assessing the reasonableness of the damages sought, the Tribunal must seek to ensure that the Award does not affect the essence of the State aid rules application, namely, preventing the common market from being distorted.

466. Turning to the *ex ante* analysis performed by the Commission, this employed available information based on aggregate data and averages of certain industries and market conditions. But in the real world, there may be particular plants that, due to their specific conditions, may have cash flows greater than those anticipated in the *ex ante* evaluation. This does not make the plants' financial performance illegal *per se*. Thus, the possibility of certain plants producing higher cash flows does not automatically preclude those cash flows from being compensated, so long as they reasonably relate to the criteria established by the Commission, having regard to the circumstances under evaluation.

467. The Respondent has asserted that "[e]ach of [the] Claimants' plants met or exceeded the rates of return approved by the Commission's decision".[590] However, that is not the case. As shown in Mr Peer's Second Report, after the Solar Levy, some of the Claimants' PV plants' IRRs dropped down to (or even below) 8.4%:

590 Response, para. 133.

Results of the simple payback and rate of return calculation - Claimants' inputs		
Scenario	Simple Payback (years)	Rate of Return (Zero NPV) (%)
ERO reference plant 2008	11.5	6.2%
PVP Divčice - Supplemental calculation	8.5	10.3%
PVP Velký Karlov - Supplemental calculation	8.1	11.0%
PVP Krhovice - Supplemental calculation	7.3	12.6%
PVP Jaroslavice - Supplemental calculation	8.2	10.8%
PVP Hrádek - Supplemental calculation	7.9	11.3%
PVP Vojkovice - Supplemental calculation	7.6	12.0%
ERO reference plant 2009	11.0	7.0%
PVP Protivín - My First Report	10.1	8.1%
PVP České Velenice - My First Report	10.0	8.2%
PVP Litenčice - My First Report	8.7	10.3%
PVP Jaroslavice II - My First Report	8.9	10.0%
PVP Milovice I - My First Report	7.1	13.8%
PVP Hrušovany - My First Report	9.9	8.4%
PVP Chropyně - My First Report	8.5	10.6%
PVP Určice - My First Report	9.8	8.5%
PVP Rozvadov - My First Report	7.4	13.0%
PVP Micmanice - My First Report	7.8	12.0%
PVP Velká nad Veličkou - My First Report	9.8	8.4%
PVP Určice 2 - My First Report	8.2	11.3%
PVP Netolice - My First Report	8.2	11.2%
ERO reference plant 2010	9.9	8.4%
PVP Milovice II - My First Report	7.8	12.0%
PVP Blatná - Supplemental calculation	7.3	12.8%
PVP Bojkovice - Supplemental calculation	9.2	9.2%
PVP Rozvadov II A - Supplemental calculation	8.2	11.0%
PVP Dřínov - My First Report	8.5	10.4%
PVP Štítary - My First Report	8.3	10.9%
PVP Tasov - My First Report	9.2	9.2%
PVP Pravčice - My First Report	9.3	9.0%
PVP Určice IV - My First Report	9.3	9.1%
PVP Držovice - My First Report	10.8	7.0%
PVP Jarošov - My First Report	10.7	7.1%
PVP Stráž - My First Report	9.1	9.3%

Source: KPMG calculation (Appendix 3 to this report and Appendix 4 to My First Report) [591]

468. Had the Solar Levy not been imposed, the IRRs of such PV plants would not have fallen below 8.4%. This can be verified in Mr Peer's estimations of the effect of incorporating the Solar Levy on cashflows, considering a referential plant according to the ERO methodology. It is worth noting that the Commission also took the ERO methodology as a reference in its estimates. The ERO reference plants show a significant reduction in IRR when applying Solar Levy:

591 **RER-Peer-2**, Table 2.

IRR calculations			
	IRR		
PVPs	No Measures	Other Measures Only	All Measures incl. both Solar Levies
*ERO reference plant 2008**	*6.8%*	*6.2%*	*6.2%*
PVP Dívčice	11.1%	10.3%	10.3%
PVP Velký Karlov	11.9%	11.0%	11.0%
PVP Krhovice	13.6%	12.6%	12.6%
PVP Jaroslavice	11.6%	10.8%	10.8%
PVP Hrádek	12.2%	11.3%	11.3%
PVP Vojkovice	13.0%	12.0%	12.0%
2008 PVPs collectively	11.8%	10.9%	10.9%
*ERO reference plant 2009**	*8.4%*	*7.7%*	*7.0%*
PVP Protivín	9.9%	9.0%	8.1%
PVP České Velenice	10.0%	9.1%	8.2%
PVP Litenčice	12.5%	11.4%	10.3%
PVP Jaroslavice II	12.2%	11.1%	10.0%
PVP Milovice I	16.8%	15.3%	13.8%
PVP Hrušovany	10.2%	9.3%	8.4%
PVP Chropyně	12.9%	11.7%	10.6%
PVP Určice	10.3%	9.4%	8.5%
PVP Rozvadov	15.8%	14.4%	13.0%
PVP Micmanice	14.5%	13.2%	12.0%
PVP Velká nad Veličkou	10.3%	9.4%	8.4%
PVP Určice 2	13.8%	12.5%	11.3%
PVP Netolice	13.7%	12.4%	11.2%
2009 PVPs collectively	12.1%	11.0%	10.0%
*ERO reference plant 2010**	*11.4%*	*10.3%*	*8.4%*
PVP Milovice II	16.3%	14.6%	12.0%
PVP Blatná	17.9%	15.9%	12.8%
PVP Bojkovice	13.1%	11.7%	9.2%
PVP Rozvadov II A	15.3%	13.6%	11.0%
PVP Dřínov	14.6%	12.9%	10.4%
PVP Štítary	15.3%	13.5%	10.9%
PVP Tasov	13.0%	11.6%	9.2%
PVP Pravčice	12.9%	11.4%	9.0%
PVP Určice IV	13.1%	11.6%	9.1%
PVP Držovice	10.3%	9.1%	7.0%
PVP Jarošov	10.7%	9.5%	7.1%
PVP Stráž	13.4%	11.9%	9.2%
2010 PVPs collectively	13.4%	11.9%	9.4%
Total collective IRR	**12.7%**	**11.5%**	**9.8%**

(*) Note: ERO reference plant for comparison purposes only. Not included in the aggregate IRR figures.

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469. In other words, even assuming 8.4% as a "ceiling" for the IRR that the Claimants' PV plants could lawfully have achieved in the but-for scenario, some reparation must be awarded to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed"[593] had the Solar Levy not being enacted by the Respondent. Otherwise, the effect of the Solar Levy over the PV plants that had their IRRs reduced even below 8.4% would not be compensated.

592 Joint Expert Report, para. 4.7.

593 Reply, para. 317, *citing Case Concerning the Factory at Chorzów (Germany v. Poland)*, p. 47 (**Ex. CLA-118**).

470. Furthermore, it is worth noting that the analysis performed by the Commission did not conclude that the 6.3% to 8.4% range was the only acceptable range The decision regarding the amended RES scheme did not discard any and all IRRs above 8.4% as "unreasonable". Inasmuch as the Claimants' IRRs were "in line with levels of return of similar photovoltaic installations under similar conditions observed in other EU Member States",[594] the Claimants could still have reasonably expected such IRRs to be approved by the Commission, even if the RES scheme was submitted for review as State aid. That is so because "similar" does not mean "identical".

471. As a consequence, the plant-by-plant analysis to determine the Claimants' reparation must consider that there are specific factors that may affect each plant and distinguish them from those considered by the Commission's range. Such a range establishes a relevant reference, but not a strict limit. And, as shown by the numbers provided by Mr Edwards and Mr Peer, each plant had a different IRR, based on specific factors involving the design and operational efficiencies of each plant.

472. For example, in the present case, it is worth noting that the Commission's range was based on a sample of PV plants that included a service life of 15 to 20 years:

Table 1: Service life of renewable installations

Technology Type	Service life in years
Hydro	30
Photovoltaic	20[1]
Wind	20
Biogas	20[1]
Biomass	20
Geothermal	20

[1]15 years for installations commissioned by 31.12.2007 595

473. The Claimants' PV plants, on the other hand, had a service life ranging from 20 to 21 years,[596] thus rendering them not exactly similar (clearly not identical) to the plants on which the Commission's range was based. As a consequence, in the but-for scenario, it would be reasonable to assume that a higher IRR would have been acceptable in their specific cases, since a longer service life would probably have resulted in somewhat higher cash flows.

474. Consequently, the EU State aid rules as applied by the Commission are relevant and of significant weight, because the Commission specifically turned its mind to the Czech RES framework, but

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594 Decision, para. 117 (**Ex. R-367**).

595 Decision, Table 1 (**Ex. R-367**).

596 As shown by the number of years considered by Mr Edwards and Mr Peer in order to calculate the PV plants' cash flows. *See* Cash flow impacts of the Amending Measures, Cash flow impact of Measures (**Ex. JER-1**).

they would not have the effect of reducing the Claimants' damages to zero. Depending on the IRR that would have been reasonable in the but-for scenario, their only effect would be to reduce the reparation's quantum, under a reasonableness analysis considering the specific circumstances of each case, which will be discussed in Section VII.F below.

475. Finally, as to the Respondent's argument that the Final Award in itself could be qualified as unlawful State aid if damages were awarded to the Claimants, the Tribunal considers that this argument also presumes that the quantum of any reparation will be found to be incompatible with the EU common market. In the Tribunal's view, this should not be the case, as its assessment of such quantum has been conducted with the range of reasonability established by the European Commission in its decision regarding the modified RES scheme in mind, having regard to any relevant differences stemming from the specific characteristics of the Claimants' PV plants based on available information.

VI. CAUSATION

476. The Parties disagree on the question of whether causation is established. The Claimants argue that there is a link between the Respondent's unlawful conduct in the form of the Solar Levy and the Claimants' losses. For its part, the Respondent contends that the Claimants have failed to establish a causal link between the Solar Levy and the supposed losses in light of prior findings of the Tribunal in the Partial Award.

A. THE CLAIMANTS' POSITION

477. The Claimants submit that they have proven factual causation by establishing that the Solar Levy, which was held to be unlawful in the Partial Award, caused the claimed losses.[597] The Claimants maintain that the Solar Levy diminished the FiTs that were expected from the electricity produced by the PV plants and, therefore, negatively affected the Claimants' investments.[598]

478. Furthermore, the Claimants posit that they have established legal causation, which requires a link between the host State's unlawful act and the foreseeable loss.[599] In this respect, the Claimants

[597] Submission, para. 64.

[598] Submission, para. 64.

[599] Submission, para. 64.

emphasize that it is "obvious (not just foreseeable) that a reduction of the FiT causes a loss to the company that owns the PV plants, and therefore to the investor that invests in that company".[600]

479. Addressing the Respondent's reliance on certain findings in the Partial Award, the Claimants argue that the Tribunal did not inquire about questions pertaining to causation.[601] Rather, they take the view that the Tribunal's comments, in particular those contained in paragraph 428 of the Partial Award, could only be construed as concerning issues of regulatory risk.[602]

B. THE RESPONDENT'S POSITION

480. For the purpose of assessing damages, the Respondent submits that it is necessary for the Claimants to establish causation in accordance with Article 39 of the Articles on State Responsibility and in light of the findings in paragraph 428 of the Partial Award that the Respondent's act was at the same time both (i) a treaty violation, and (ii) a reasonable response to the solar boom to which the Claimants themselves had contributed.[603]

481. As explained in the context of its contributory fault defense,[604] the Respondent rejects the Claimants' assertion that the Respondent alone is to blame for the solar boom.[605] In particular, the Respondent maintains that the decision to delay the repeal of the 5% Limit was made at the request of the investors (which included the Claimants) and clarifies that the objective of the deferral was "to avoid the threat to the projects which [were] already under way or [were] sufficiently prepared", as announced by the Minister of Industry and Trade.[606]

482. Finally, the Respondent rejects the Claimants' argument that the question of causation was never raised by the Tribunal in the Partial Award and that paragraph 428 of the Partial Award could only be interpreted as an issue of regulatory risk.[607] In the Respondent's view, there can be numerous ways of interpreting the said paragraph, especially when the Claimants themselves have conceded that "the concepts of contributory fault and assumption of risk overlap".[608]

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600 Submission, para. 65.

601 Submission, para. 64.

602 Reply, paras. 4, 8, 78.

603 Rejoinder, paras. 35-36. *See also* 2022 Hearing Transcript, Day 1, pp. 113:21-114:8.

604 *See* Section V.E.1 above.

605 Rejoinder, para. 38. *See* Section V.E.1 above.

606 Rejoinder, para. 38, *citing* Press Conference Following the Government Session, 16 November 2009, p. 1 (**Ex. C-324**).

607 Rejoinder, para. 46.

608 Rejoinder, para. 46, *citing* Reply, para. 79.

C. THE TRIBUNAL'S ANALYSIS

483. The Tribunal considers that causation should be defined in line with the analysis of the Respondent's objections to the Claimants' entitlement to monetary relief, explained in Section V above.

484. As explained previously, the Claimants cannot be said to have caused the damages through their contribution to the solar boom. The Partial Award found that, based on the Respondent's conduct, the Claimants "could thus continue to rely on Section 6(1)(a)(2) [of the Act on RES Promotion] and to legitimately expect that the investments they would be making in 2009 and 2010 would be entitled to the level of RES support fixed by [the] ERO for these two years".[609] If such expectation was legitimate, they cannot be called to bear part of the cost of the Respondent's breach.

485. Nevertheless, this is without prejudice to the Tribunal's finding regarding the relevance of EU State aid rules as applied by the Commission, which in all probability would have limited the level of revenue of the Claimants' PV plants in the but-for scenario. The impact of this factor on quantum is explained in Section VII.F below.

VII. THE CLAIMANTS' DAMAGES

486. In the current phase of the proceedings, the Claimants rely on reports prepared by Mr Richard Edwards, who replaced Mr Geoffrey Senogles, the Claimants' original quantum expert.[610] While Mr Edwards employs the same but-for approach as Mr Senogles, he puts forward a different valuation methodology, namely, by (i) using the SPVs, not the PV plants, as the subject of the valuation; (ii) adopting two valuation dates to assess separately the impact of the Solar Levy and its prolongation on both the cash flows and the investors' perception of the risk of investing in the PV market; (iii) relying on contemporaneous forecasts that either were available or could have been available at the valuation dates; and (iv) using two different weighted average costs of capital (the "**WACC**") in calculating the fair market value (the "**FMV**") of the Claimants' investments in the Actual and Counterfactual Scenarios.[611]

609 Partial Award, para. 427.

610 The Claimants note that Mr Senogles left his firm Charles River Associates in March 2018 and thus could no longer serve as an expert in this matter. *See* Submission, para. 5.

611 Submission, paras. 94-95, 97, 99-100.

487. Further, Mr Edwards considers certain transactions entered into in relation to the Claimants' investments to be reliable evidence of the value of such investments in Energy 21, given that they took place at different points in time relevant for valuation purposes.[612]

488. The Respondent takes issue with the Claimants' "ever-evolving position" on the appropriate method of quantifying damages.[613] The Respondent also criticizes Mr Edwards' valuation methodology, in particular, the use of different discount rates in different scenarios and his reliance on an array of assumptions, which, in the Respondent's view, are unsupported by contemporaneous evidence and are inconsistent with the Partial Award.[614] Instead, the Respondent submits that its quantum expert, Mr Michael Peer, presents a "simple and intuitive" assessment by calculating the total impact of the Solar Levy on the PV plants' cash flows and discounting it to a single valuation date.[615] In any event, the Respondent maintains that the Claimants should not be awarded any compensation for failing to discharge their burden of proof.

A. VALUATION METHODOLOGY

1. The Claimants' Position

489. The Claimants assert that they and Mr Edwards employ the but-for approach to calculate the Claimants' damages in line with the practice adopted in investment treaty arbitration.[616] Accordingly, in assessing the diminution in the FMV of the Claimants' investments in Energy 21 as a result of the Solar Levy, Mr Edwards adopts the following methodology. First, he assesses the FMV that the Claimants' investments would have had on the valuation date, had the Respondent not introduced the Solar Levy (the "**Counterfactual Scenario**").[617] Second, he assesses the FMV of the Claimants' investments as at the valuation date, taking into account the Solar Levy (the "**Actual Scenario**").[618] Finally, he calculates the difference between the values in the two Scenarios, this being the quantum of damages awardable to the Claimants as an amount equivalent to the loss suffered by the Claimants' investments as a result of the Solar Levy.[619]

612 Submission, paras. 91-92.

613 Response, paras. 207-210.

614 Response, para. 204.

615 Response, para. 205.

616 Submission, paras. 70, 72.

617 Submission, para. 78; 2022 Hearing Transcript, Day 2, p. 11:12-19.

618 Submission, para. 78; 2022 Hearing Transcript, Day 2, p. 11:12-19.

619 Submission, paras. 74, 79; **CER-Edwards-1**, paras. 3.3, 3.12; 2022 Hearing Transcript, Day 2, pp. 11:24-12:2.

490. Considering that the Claimants' financial position "can be thought of as the FMV (fair market value) of their indirect investments in Energy 21 SPVs that owned and operated the PV plants", Mr Edwards takes the SPVs, which were fully owned by Energy 21, as the subject of the valuation, because the impact on each SPV's financial performance is "reflected (in full) in the value of Energy 21".[620] In other words, he calculates the diminution of the FMV of Energy 21 caused by the Solar Levy (i.e., the Claimants' direct investment) by assessing the difference in FMV of the SPVs (i.e., the Claimants' indirect investments).[621] This is appropriate, according to Mr Edwards, because it is the SPVs—the legal entities that own the assets and equipment that make up the plants—that received the FiT, not the PV plants themselves.[622]

491. Mr Edwards rejects the Respondent's argument that such calculations would include irrelevant items, including subsidiaries of Energy 21 other than the SPVs, given that the forecasts on which he relies as at the valuation dates refer only to the SPVs.[623]

492. Mr Edwards uses two valuation dates to account for the dates on which the Solar Levy affected the expectations as to the future cash flows of the PV plants:[624]

(a) 1 January 2011 for the effects on the FMV of the SPVs caused by the initial Solar Levy, which applied at a rate of 26% from 2011 to 2013 to PV plants commissioned in 2009 and 2010; and

(b) 1 January 2014 for the effects on the FMV of the SPVs caused by the prolongation of the Solar Levy, which applied at a rate of 10% from 2014 onwards to PV plants commissioned in 2010.[625]

493. For Mr Edwards, using two valuation dates reflects the fact that both the initial Solar Levy of 2011 and its prolongation of 2014 were brought about by "separate pieces of legislation that took effect at different times".[626]

494. Mr Edwards applies the discounted cash flow (the "**DCF**") approach, which consists of estimating the SPVs' cash flows as at both valuation dates and discounting them at a cost of

620 Submission, paras. 81-83, *citing* **CER-Edwards-1**, paras. 3.5, 3.7-3.8.

621 Submission, para. 82.

622 Reply, para. 418; **CER-Edwards-2**, para. 3.12.

623 Reply, para. 419; **CER-Edwards-2**, para. 3.11.

624 Submission, para. 85. *See also* 2022 Hearing Transcript, Day 1, p. 69:4-8; Day 2, p. 11:2-11.

625 Submission, para. 86; **CER-Edwards-1**, paras. 3.13-3.16.

626 2022 Hearing Transcript, Day 1, p. 69:8-10; Day 2, pp. 29 *et seq*.

capital (WACC).[627] Mr Edwards takes the position that the DCF method is also "particularly suitable" in the present circumstances, because its flexible nature allows account to be taken of the specific characteristics of each PV plant and because the inputs in the case of PV plants, including their cash flows and related costs, are relatively predictable.[628]

495. Based on the parameters identified above, Mr Edwards calculates the losses suffered by the Claimants as a result of the Solar Levy in the following three steps. First, he derives the SPV's cost of capital (WACC) in the Actual and Counterfactual Scenarios at both valuation dates. In respect of the 1 January 2011 date, Mr Edwards applies a different discount to each of the Actual and Counterfactual Scenarios, a decision which he justifies on the basis of needing to account for the increased regulatory risk brought about by the imposition of the Solar Levy.[629] He then estimates the SPV's cash flows in each Scenario and at both valuation dates and applies those WACCs to calculate the enterprise value of the SPVs. Finally, he assesses the Claimants' losses as the difference between the SPVs' enterprise value in the Counterfactual Scenario and their enterprise value in the Actual Scenario at each of the two valuation dates.[630]

496. Mr Edwards also takes into consideration the three transactions concerning Energy 21's shares: the 2010 Transaction, the 2011 Transaction, and the 2015 Transaction.[631] According to Mr Edwards, these arm's length transactions which took place on dates close to the two valuation dates "offer direct evidence of what independent parties were prepared to pay for the assets or shares in question".[632]

497. In the Claimants' view, the methodology adopted by Mr Edwards to calculate the Claimants' losses is "anything but complex", considering that (i) the Solar Levy changed over time; (ii) the Claimants' investments (the shareholdings in Energy 21) were the subject of the three

627 Submission, para. 87; Rejoinder, para. 371; **CER-Edwards-1**, para. 3.18. *See* 2022 Hearing Transcript, Day 1, pp. 68:19-69:2; Day 2, pp. 11:20-12:2, 35:9-36:1.

628 Submission, paras. 88-90, *citing* **CER-Edwards-1**, paras. 3.19-3.20.

629 2022 Hearing Transcript, Day 2, pp. 35:14-36:14.

630 Submission, para. 101.

631 Submission, para. 91; 2022 Hearing Transcript, Day 1, p. 71:14-18; Day 2, pp. 12:10-13:1, 25:16-24, 27:17-25.

632 Submission, para. 92, *citing* **CER-Edwards-1**, para. 3.23. *See also* 2022 Hearing Transcript, Day 1, pp. 72:25-73:18; Day 2, pp. 25:16-24, 27:17-28:9. The Respondent, by contrast, suggests that the 2011 Transaction "does not have the hallmarks of being an arm's length third-party transaction, and therefore it can't really be used as a marker for market value". *See* 2022 Hearing Transcript, Day 2, p. 132:10-17.

Transactions in the relevant period; and (iii) the damages related to 10 SPVs (and 31 PV plants).[633]

498. By contrast, the Claimants assert that the Respondent's attempt to compare "equity values at very different points in time is not straightforward because variables independent of the Measures in question can contribute to the changes in value over time".[634] Moreover, the Claimants point out that the "sales prices" that the Respondent uses to make its comparison ignore the shareholder loans in Energy 21 and therefore do not reflect the "real value" of the Transactions.[635]

499. In particular, Mr Edwards suggests that comparing the 2010 Transaction with the 2015 Transaction would be a complex exercise, because several factors changed over that period of time, namely (i) the risk that existed at the time of the 2010 Transaction that some plants could not be connected by the end of that year had disappeared by 2015; (ii) by the time of the 2015 Transaction, it was possible to forecast the performance of the PV plants with greater confidence in light of their historical performance; (iii) in 2015, the PV plants' right to receive the FiT was five years shorter than in 2010; and (iv) the cost of capital derived from first principles had fallen considerably between 2010 and 2015.[636]

500. Notwithstanding the fact that the fall in cost of capital and the higher-than-expected performance of the PV plants should have led to an increase in the equity value of Energy 21, the Claimants point out that the equity value implied in the 2015 Transaction in fact declined.[637] However, the Claimants note that the minor contraction in the equity value was "due to other factors independent of the Measures" and that the Respondent "can certainly not benefit from the effects of those external factors to avoid paying damages".[638]

2. The Respondent's Position

501. In the Respondent's view, the calculation of the impact of the Solar Levy on Energy 21's power plants should be "a fairly straightforward exercise", given that the effect of the Levy was to reduce the gross revenues of specific solar plants by 26% during the period 2011-2013 and 10%

633 Reply, paras. 368, 379.

634 Reply, paras. 428-429, *citing* **CER-Edwards-2**, para. 4.21.

635 Reply, para. 432.

636 Reply, para. 437; **CER-Edwards-2**, para. 4.21.

637 Reply, para. 438.

638 Reply, para. 438.

from 2014 onward.[639] As such, the Respondent criticizes the Claimants' use of what it calls a "convoluted" damages methodology, which involves multiple discount rates in different scenarios and an array of assumptions that are not supported by contemporaneous evidence.[640]

502. *First*, the Respondent takes issue with Mr Edwards' choice of identifying the value of Energy 21 (i.e., the value of the holding company), rather than the cash flows of the solar plants, as the subject of the valuation.[641] By valuing the holding company's value, the Respondent contends that Mr Edwards' calculations include entities owned by Energy 21 that were not affected by the Measures and require an assessment not only of the affected cash flows of the PV plants, but also of various other financial metrics of Energy 21.[642]

503. *Second*, the Respondent contests the key assumptions underlying the entirety of Mr Edwards' damages assessment, as set out in detail below in Section VII.B.2(a).

504. In the event that the Tribunal decides to award the Claimants some amount of compensation, the Respondent submits that it should rely on the simple quantification method present by Mr Peer.[643] According to Mr Peer, the financial impact of the Solar Levy on the Claimants' PV plants can be assessed by, first, calculating the total amount of the Solar Levy to be paid by each of the Claimants' 2009 and 2010 plants over the duration of the RES support scheme and, second, discounting the total amount to the valuation date of 1 January 2011 using a single discount rate.[644] The resulting figure, Mr Peer explains, represents the "theoretical maximum damages, before taking account of any of the [Respondent]'s legal arguments for why no damages should be due in the circumstances of this case".[645]

505. In support of Mr Peer's methodology, the Respondent submits that Mr Peer's assessment would allow the Tribunal easily to assess the impact of the Solar Levy on each individual solar plant.[646] Specifically, the Respondent asserts that Mr Peer's plant-specific calculations would allow the

639 Rejoinder, para. 113.

640 Rejoinder, para. 114; Response, paras. 211-212. *See also* 2022 Hearing Transcript, Day 1, pp. 161:14-163:14; Day 2, pp. 52:7 *et seq.*

641 Response, para. 215(e); Rejoinder, para. 124(e).

642 Response, para. 215(e); Rejoinder, para. 124(e).

643 Response, para. 233; Rejoinder, para. 126.

644 Response, para. 233.

645 Response, para. 236, *citing* **RER-Peer-4**, para. 5.1.1.

646 Response, para. 237. *See* **RER-Peer-4**, p. 42, Table 5.

Tribunal to deduct from the damages assessment any solar plants falling beyond a particular cut-off date.[647]

506. *Third*, the Respondent contends that the use of a single valuation date is consistent with the findings in the Partial Award, in which the Tribunal found that a single measure had contravened international law, namely, the introduction of the Solar Levy, which was defined as "[a] levy imposed on revenue of solar installations […] for a period of three years for installations commissioned in 2009 and 2010, *and extended*, in reduced form, for installations commissioned in 2010".[648] In any event, Mr Peer opines that his final damages figure would not significantly change even if he were to use two valuation dates.[649]

507. *Finally*, the Respondent objects to Mr Edwards' reliance on the 2011 Transaction, because, in its view, the 2011 Transaction "does not have the hallmarks of being an arm's length third-party transaction".[650] According to the Respondent, the sellers (GIGH and Natland Investment) and the buyer (Radiance) were already existing joint shareholders in Energy 21, and thus could not be considered entirely independent from each other.[651] In addition, Mr Peer observes that the manner in which the proceeds of the 2011 Transaction were distributed, as well as the "inappropriately low earn-out" agreement, are matters, which raise further doubts as to the reliability of the 2011 Transaction as a proxy for the value of Energy 21.[652]

B. QUANTIFICATION

1. The Claimants' Position

(a) WACCs in the Actual and Counterfactual Scenarios

508. Mr Edwards determines the SPVs' cost of capital (WACC) at each valuation date (i.e., 1 January 2011 and 1 January 2014) for both Actual Scenario and Counterfactual Scenario by taking into account two components:[653]

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647 Response, para. 238.

648 Rejoinder, para. 128, *citing* Partial Award, page vii (definition of "Solar Levy") [emphasis added by the Respondent].

649 **RER-Peer-5**, para. 6.2.4.

650 2022 Hearing Transcript, Day 2, p. 132:10-17. *See also* 2022 Hearing Transcript, Day 3, pp. 7:13 *et seq.*

651 Response, para. 215(b); Rejoinder, para. 124(b). *See* **RER-Peer 4**, paras. 3.4.10-3.4.13.

652 Rejoinder, para. 124(b), *citing* **RER-Peer-5**, paras. 3.4.14-3.4.15.

653 Submission, para. 103.

(a) WACC implicit in the 2010, 2011, and 2015 Transactions, which is 8.4%, 11.0% and 9.0% respectively;[654] and

(b) WACC derived from "first principles", based on the finance theory, on the dates of those Transactions, which is 6.3%, 6.3% and 4.5% respectively.[655]

509. According to the Claimants, the comparison of these WACC figures allows Mr Edwards to determine the impact of the Measures (i.e., collectively, the Solar Levy, the Income Tax Holiday, and the Original Depreciation Provisions) on the Claimants' investments and whether the change in the WACC would be attributable to the perception of regulatory risk due to the Measures.[656] Indeed, Mr Edwards finds that there is an observable uplift in the WACC after the 2010 Transaction in both the 2011 and 2015 Transactions,[657] which, in his view, confirms that the Solar Levy lowered investor confidence in the Czech Republic.[658]

510. With respect to the 2010 Transaction, Mr Edwards submits that the 2.1% uplift in the WACC (8.4%-6.3%) could be attributable to the technological risk associated with the fact that, in May 2010, it was unclear how PV plants would perform in the Czech Republic's weather conditions.[659] Conversely, he does not consider that the uplift reflects a risk perceived by the parties involved in the 2010 Transaction that the Czech Republic would introduce regulatory measures affecting the PV plants already connected to the grid and those to be connected by the end of 2010, as demonstrated in the presentations prepared by MEP.[660] According to the Claimants, Mr Edwards' position that no regulatory risk was perceived by the Claimants at the date of the 2010 Transaction is consistent with the findings in the Partial Award.[661]

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654 **CER-Edwards-1**, paras. 4.4-4.12; 2022 Hearing Transcript, Day 2, p. 14:2-4; 2022 Hearing, Claimants' Opening Presentation, slide 119.

655 **CER-Edwards-1**, para. 4.13. Unlike Mr Peer's theoretical WACCs, Mr Edwards does not include a size premium in his calculations, noting that smaller companies do not necessarily generate higher returns than larger companies. *Compare* **CER-Edwards-2**, paras. 4.49-4.52 *with* **RER-Peer-4**, paras. 3.5.1-3.5.12.

656 Submission, paras. 105, 110.

657 2022 Hearing Transcript, Day 1, p. 73:10-13; Day 2, pp. 14:15-18; 14:25-15:13; 2022 Hearing, Claimants' Opening Presentation, slide 119; 2022 Hearing, Mr Edwards' Presentation, slides 4-6.

658 2022 Hearing Transcript, Day 1, p. 73:14-18; 2022 Hearing, Claimants' Opening Presentation, slide 119.

659 Submission, para. 107; **CER-Edwards-1**, paras. 4.17-4.20.

660 Submission, para. 108; Reply, para. 414; **CER-Edwards-1**, paras. 4.21-4.22. The Claimants also highlight the findings of the Partial Award that no regulatory risk of retrospective changes could have been perceived at the time of the 2010 Transaction. *See* Submission, para. 109, *referring to* Partial Award, para. 426.

661 Reply, para. 424, *referring to* Partial Award, para. 426.

511. In response to the Respondent's argument that he failed to consider that the final price of the 2010 Transaction was adjusted to take into account the actual PV capacity that Energy 21 installed by the end of 2010, Mr Edwards clarifies that the 8.4% WACC implicit in the 2010 Transaction is based on the fact that MEP attributed a value of EUR 4.0 million to each MW of the PV plants that Energy 21 already had in operation.[662] Therefore, this value, Mr Edwards asserts, is unaffected by the price adjustment, which only related to the plants to be connected in 2010.[663]

512. With respect to the 2011 Transaction, Mr Edwards takes the view that the premium uplift of 2.6% in the WACC (11.0%-8.4%) "must be attributable to the Measures" based on the assumption that there was no decrease in perception of the technological risk.[664] Therefore, for the Claimants, the fact that the 2011 Transaction was concluded between existing joint shareholders in Energy 21 does not affect its being a reliable source of calculations.[665]

513. Similarly, Mr Edwards takes the position that the 2.4% premium applied in the 2015 Transaction is attributable to the Measures, explaining that, contrary to his expectation that the 2015 Transaction would be based on a WACC of 6.6% in view of the 1.8% decrease in the cost of capital in the first principles analysis (6.3%-4.5%), the WACC implicit in the 2015 Transaction was 9.0%.[666] The 0.2% decrease from 2011, Mr Edwards adds, was not due to a reduced perception of regulatory risk, but possibly to the decline in bond yields and interest rates.[667]

514. Based on these conclusions, Mr Edwards arrives at a WACC applicable in the Actual Scenario as at 1 January 2011 of 11.1%.[668] The figure is derived by adding 0.1% to the WACC implicit in the 2011 Transaction (11.0%) in view of the fact that the cost of capital based on first principles on this date is 6.4%, which is 0.1% higher than the cost of capital of 6.3% derived from finance theory as at the date of the 2011 Transaction (i.e., 4 August 2011).[669]

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662 Reply, para. 407; **CER-Edwards-1**, paras. 4.4-4.7; **CER-Edwards-2**, paras. 4.6-4.12.

663 Reply, para. 407; **CER-Edwards-2**, paras. 4.6-4.12.

664 Submission, para. 111; **CER-Edwards-1**, paras. 4.23-4.24; Hearing Transcript, Day 2, p. 14:15-24 (*e.g.*, "[w]hat we observe in the transactions is a pretty sharp increase in the cost of capital from 8.4% to 11% that coincides with the imposition of the First Solar Levy"). *See also* Partial Award, paras. 103-104.

665 Reply, para. 409.

666 9.0% - 6.6% = 2.4%. *See* Submission, paras. 112-113; **CER-Edwards-1**, para. 4.24.

667 Submission, paras. 113-114; Reply, para. 416; **CER-Edwards-1**, paras. 4.27-4.29.

668 Submission, para. 116; **CER-Edwards-1**, paras. 4.13, 4.30.

669 Submission, para. 116; **CER-Edwards-1**, para. 4.30.

515. Mr Edwards applies a similar approach to determine the WACC applicable in the Actual Scenario as at 1 January 2014 and derives 9.7% as its value.[670]

516. Finally, Mr Edwards calculates the WACC applicable in the Counterfactual Scenario by excluding the effects of the Solar Levy, but not those of the repeal of the Income Tax Holiday and of the modification of the Original Depreciation Provision, the two Measures that the Tribunal in the Partial Award held to be lawful.[671] Considering that (i) the overall value of the FiT is higher than the Income Tax Holiday and the Original Depreciation Provisions, and (ii) the introduction of the Solar Levy affected the cost of capital to a greater extent than the repeal of the two incentives, Mr Edwards finds that 75% of the 2.6% WACC uplift (i.e., 2.0%) is attributable to the introduction of the Solar Levy, whereas the remaining 25% (i.e., 0.6%) was the result of the two additional Measures.[672] As such, Mr Edwards subtracts 2.0% from the 11.1% that he adopts as the actual WACC as at 1 January 2011 and determines that the WACC applicable in the Counterfactual Scenario as at 1 January 2011 is 9.1%.[673]

517. As to the counterfactual WACC as at 1 January 2014, Mr Edwards considers that the risk perception did not materially change as a result of the prolongation of the Solar Levy and thus applies the same figure equivalent to the WACC applicable in the Actual Scenario on that date, which is 9.7%.[674]

(b) Response to the Respondent's criticisms regarding the use of a dual WACC

518. The Claimants justify Mr Edwards' use of a dual WACC, specifically, the use of a higher WACC in the Actual Scenario than in the Counterfactual Scenario, on the grounds that there is ample evidence that shows an increased perception of regulatory risk in the Actual Scenario caused by the Measures, especially the Solar Levy.[675] In this respect, the Claimants refer to the statements

670 Submission, para. 117; **CER-Edwards-1**, paras. 4.13, 4.31; 2022 Hearing Transcript, Day 2, p. 17:8-13; 2022 Hearing, Mr Edwards' Presentation, slide 8.

671 Submission, para. 118.

672 Submission, para. 119; **CER-Edwards-1**, paras. 4.35-4.38; Hearing Transcript, Day 2, p. 18:2-15.

673 Submission, para. 120.

674 Submission, paras. 121-122; **CER-Edwards-1**, paras. 4.40-4.42; Hearing Transcript, Day 2, pp. 18:19-19:9.

675 Reply, para. 384; 2022 Hearing Transcript, Day 2, p. 24:15-18; 2022 Hearing, Mr Edwards' Presentation, slide 7.

made by staff members of the Commission, as well as working papers prepared by it, which "express[ed] considerable concern" about the introduction of the Solar Levy.[676]

519. Mr Edwards rejects the Respondent's assertion that his approach is tantamount to "double-counting".[677] Mr Edwards explains that separate inputs informed his 2011 and 2014 calculations: for the 2011 calculations, he combined damages resulting from the Solar Levy and a 2% uplift in the WACC to correspond with perceived future regulatory risk; for the 2014 calculations, by contrast, that 2% uplift was not included.[678]

520. For the Claimants, the Respondent's claim that the Measures could actually have reduced the perception of regulatory risk is unsupported by evidence.[679] This is because, according to the Claimants, neither the Respondent, nor Mr Peer, cites any study or refers to any transaction in the Czech PV market in the relevant period that would demonstrate a reduction in the cost of capital after the Measures' implementation.[680]

521. The Claimants further reject the Respondent's assertion that the Czech PV market became more predictable after the Measures took effect on 1 January 2011.[681] According to the Claimants, the "erraticism" of the Czech policy in the RES sector is evidenced, in particular, by (i) the prolongation of the Solar Levy in 2014; (ii) the ERO's refusal in 2015 to fix the FiT for 2016 applicable to plants commissioned between 2006 and 2012; and (iii) the Czech Parliament's adoption of a bill in September 2021 that set a range of internal rates of return (the "**IRR**") between 8.4% and 10.6% for all RES investors and introduced, specifically for the PV sector, a new levy for 2009 plants at a rate of 10% and increased the existing levy for 2010 plants from 10% to 20%.[682] In the Claimants' view, the Respondent's position is also inconsistent with the

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676 Reply, para. 386, *citing* Letter from Ms Hedegaard and Mr Oettinger to Mr Kocourek, 11 January 2011 (**Ex. C-337**); "Country Report Czech Republic 2019" (European Commission Staff Working Document) accompanying the document "Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank and the Eurogroup" of 27 February 2019, p. 37 (**Ex. C-481**); "European Commission guidance for the design of renewables support schemes" (Commission Staff Working Document) accompanying the EC's Communication "Delivering the internal market in electricity and making the most of public intervention" of 5 November 2013, p. 4 (**Ex. C-334**); "Assessment of the final national energy and climate plan of Czechia" (Commission Staff Working Document) of 14 October 2020, pp. 10, 18 (**Ex. C-482**). *See* 2022 Hearing Transcript, Day 2, pp. 15:20-16:18; 2022 Hearing, Mr Edwards' Presentation, slide 7.

677 *See* paragraph 556 below.

678 2022 Hearing Transcript, Day 2, p. 21:16-19; 2022 Hearing, Mr Edwards' Presentation, slide 15.

679 Reply, para. 389.

680 Reply, para. 390.

681 Reply, para. 391.

682 Reply, para. 391.

findings in the Partial Award in that the paragraphs of the Partial Award referred to by Respondent did not mention the concept of regulatory risk, but "merely refer[red] to the fact that changes in the RES Scheme were impending, without taking any view on how the investors' risk perception changed".[683]

522. Unlike the implementation of the moratorium on new grid connections in February 2010 and the abolition of the 5% Limit in March 2010, which were "prospective changes", the Claimants assert that the Measures were "retrospective" and thus could not have reduced the fear of the investors; rather they caused a "shock" to the market.[684] In this respect, the Claimants stress that investment tribunals have held that Spain's retroactive measures in breach of the FET standard increased the investors' perception of risk and, as a result, applied the dual WACC methodology to calculate damages.[685] In any event, the Claimants note that any change in the cost of capital caused by the February 2010 moratorium and the repeal of the 5% Limit had already been captured in the WACC implicit in the 2010 Transaction, given that the two measures were introduced before the 2010 Transaction took place.[686]

523. Addressing the Respondent's criticism relating to 2010 and 2011 Transactions, the Claimants maintain that Mr Edwards' calculations based on these Transactions were justified as set out in paragraphs 511-512 above.[687]

524. As to the Respondent's argument that the uplift in the cost of capital would also have resulted from the Income Tax Holiday and the Original Depreciation Provisions, the Claimants submit that these measures have already been taken into account in Mr Edwards' calculation, reducing the uplift provoked by the Solar Levy from 2.6% to 2.0%.[688] For the Claimants, Mr Edwards' allocation of a smaller proportion to these measures in the 2.6% WACC uplift is "reasonable and

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683 Reply, para. 392, *citing* Partial Award, para. 428.

684 Reply, para. 392.

685 Reply, para. 402, *referring to Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 640-610 (**Ex. CLA-230**); *InfraRed Environmental Infrastructure GP Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019, paras. 577-585 (**Ex. CLA-234**); *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018, para. 832 (**Ex. CLA-259**); *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019, paras. 531-532 (**Ex. CLA-235**); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, para. 685 (**Ex. CLA-260**); *Foresight Luxembourg Solar 1 S.À.R.L. et al. v. The Kingdom of Spain*, SCC Case No. V2015/150, Final Award, 14 November 2018, paras. 523-552 (**CLA-237**).

686 Reply, para. 394.

687 *See* Reply, pars. 405-408.

688 Reply, para. 395. *See also* 2022 Hearing Transcript, Day 2, pp. 17:24-18:15.

proportionate", given that the overall value of the FiT is higher than the two taxation benefits that were repealed.[689] The Claimants, in this regard, point to contemporaneous documents which, according to the Claimants, suggest that the Solar Levy caused greater concern to the investors than those two measures.[690]

525. The Claimants further reject the Respondent's suggestion that the uplift in the cost of capital occurred, because solar investors operating in the Czech PV market "undoubtedly [took] into account" the regulatory changes that occurred in Germany and Spain.[691] Leaving aside that Germany did not adopt retroactive measures, the Claimants argue that it could not have been the case that these investors would perceive an increased yet unquantified risk because of the measures taken abroad, but did not perceive any risk associated with the retroactive changes that had just been enacted in the Czech Republic.[692]

(c) Cash flows

526. Having determined the four WACCs, Mr Edwards assesses the stream of cash flows for both Scenarios at each valuation date, which he then discounts using the relevant WACC.[693]

527. In estimating the cash flows in the Actual Scenario as at 1 January 2011, Mr Edwards relies on revenues and costs estimated by the management of Energy 21 for that date regarding the performance of the PV plants (the "**2011 Forecasts**").[694] According to Mr Edwards, the 2011 Forecasts assume that each PV plant operates for 20 years, contain adjustments to account for future developments, and calculate the impact of the Solar Levy by multiplying the revenue of the 2009 and 2010 plants by 26% for the years 2011, 2012, and 2013.[695]

689 Reply, para. 396, *citing* **CER-Edwards-1**, para. 4.36(2). *See also* **CER-Edwards-2**, para. 4.45(1).

690 Reply, para. 397, *referring to* Letter from Ms Hedegaard and Mr Oettinger to Mr Kocourek, 11 January 2011 (**C-337**); Memorandum from Patria to Igor Wollner, 25 May 2012, p. 2 (**Ex. FTI-17**).

691 Reply, para. 398.

692 Reply, para. 398.

693 Submission, para. 124.

694 Submission, paras. 125, 129, *referring to* Microsoft Excel spreadsheet containing the 2011 Forecasts (**Ex. FTI-9**); **CER-Edwards-1**, paras. 5.2, 5.9-5.10. Mr Peer, it should be noted, uses different forecasts which he derives independently, although these are "virtually identical" to those of Mr Edwards. *See* 2022 Hearing Transcript, Day 1, pp. 74:20-75:1; 2022 Hearing, Claimants' Opening Presentation, slide 122.

695 Submission, paras. 126-128; **CER-Edwards-1**, paras. 5.4-5.7. Mr Edwards notes that the levy was set at 26% of FiT revenue, applicable from 2011 to 2013. *See* **CER-Edwards-1**, para. 5.9, *referring to* Partial Award, para. 126.

528. After deriving a total undiscounted cash flow of CZK 10,029.3 million for the Actual Scenario at 1 January 2011 based on the estimates provided in the 2011 Forecasts,[696] Mr Edwards applies the 11.1% WACC and obtains CZK 4.053.2 million as the enterprise value of the SPVs for the Actual Scenario as at 1 January 2011.[697] Mr Edwards highlights that this value is only CZK 239.7 million lower than the value at which Energy 21 was actually sold *via* the 2011 Transaction, only a few months later in the same year.[698]

529. To assess the enterprise value in the Counterfactual Scenario as at 1 January 2011, Mr Edwards assumes a hypothetical situation in which the initial Solar Levy was not introduced, but the Income Tax Holiday was repealed and the Original Depreciation Provisions were modified.[699] In doing so, he relies on the same 2011 Forecasts, but increases the revenues for the PV plants put into operation in 2009 and 2010 by an amount equal to the Solar Levy subtracted in the Actual Scenario.[700]

530. Based on these inputs, Mr Edwards obtains a total undiscounted cash flow of CZK 10,419.2 million, to which he applies the 9.1% WACC and reaches CZK 4,976.9 million as the enterprise value of the SPVs for the Counterfactual Scenario as at 1 January 2011.[701]

531. As for the enterprise value as at 1 January 2014, Mr Edwards conducts a similar exercise by relying on (i) a technical due diligence report prepared by OST Energy for Energy 21 in May 2014 (the "**OST Due Diligence Report**"), which contains, *inter alia*, the electricity generation forecast of Energy 21's PV plants to estimate revenues; and (ii) a spreadsheet containing the cash flow forecasts of the same PV plants from September 2015 onward (the "**E21 Business Model**") to estimate costs expected as at 1 January 2014.[702]

696 **CER-Edwards-1**, para. 5.23.

697 Submission, para. 131; **CER-Edwards-1**, para. 5.24.

698 **CER-Edwards-1**, paras. 5.26-5.29.

699 Submission, para. 133; **CER-Edwards-1**, para. 6.1.

700 Submission, para. 134; **CER-Edwards-1**, para. 6.3.

701 Submission, paras. 135-136; **CER-Edwards-1**, paras. 6.4-6.5.

702 Submission, paras. 137-141, *referring to* Due diligence report prepared by OST Energy in May 2014 (**Ex. FTI-4**); Microsoft Excel spreadsheet containing the E21 Business Model (**Ex. FTI-10**). *See* 2022 Hearing Transcript, Day 1, p. 75:13-19.

532. Mr Edwards then calculates the impact of the prolongation of the Solar Levy by multiplying the revenues of the 2010 plants by 10% from 1 January 2014 and until the expiry of their relevant FiT agreement and reducing this amount from the gross revenues.[703]

533. Accordingly, Mr Edwards obtains a total undiscounted cash flow of CZK 9.876.4 million, to which he applies the 9.7% WACC and reaches CZK 4,904.2 million as the enterprise value of the SPVs for the Actual Scenario as at 1 January 2014.[704] Mr Edwards submits that this value in the Actual Scenario as at 1 January 2014 is consistent with the value at which Energy 21 was sold at the end of 2015 *via* the 2015 Transaction.[705]

534. Finally, to estimate the enterprise value of the SPVs in the Counterfactual Scenario as at 1 January 2014, Mr Edwards adjusts the cash flows calculated for the Actual Scenario, excluding the effect of the prolongation of the Solar Levy.[706] This is done by increasing the revenues by an amount equal to that subtracted for the Solar Levy in the Actual Scenario.[707] Mr Edwards obtains a total undiscounted cash flow of CZK 10,528.2 million, to which he applies the 9.7% WACC and reaches CZK 5,223.7 million as the enterprise value of the SPVs for the Counterfactual Scenario as at 1 January 2014.[708]

535. The enterprise values of the SPVs calculated by Mr Edwards in each Scenario and at both valuation dates are summarized below:[709]

Valuation Date / **Scenario**	**1 January 2011**	**1 January 2014**
Actual Scenario	CZK 4,053.2 million	CZK 4,904.2 million
Counterfactual Scenario	CZK 4,4976.9 million	CZK 5,223.7 million

703 Submission, para. 140; **CER-Edwards-1**, para. 7.4.

704 Submission, para. 143; **CER-Edwards-1**, paras. 7.25-7.26.

705 Submission, para. 144; **CER-Edwards-1**, paras. 7.27-7.31.

706 Submission, para. 145.

707 *See* **CER-Edwards-1**, paras. 7.14-7.15.

708 Submission, para. 147; **CER-Edwards-1**, para. 8.4.

709 Submission, para. 158; Reply, para. 376.

(d) The Claimants' total losses

536. Having obtained the above figures, Mr Edwards deducts the enterprise value in the Actual Scenario from the enterprise value in the Counterfactual Scenario at each of the two valuation dates, the result of which demonstrates the impact of the Solar Levy on the SPVs.[710]

537. As at 1 January 2011, the Claimants submit that the diminution in the SPVs' enterprise value caused by the Solar Levy is CZK 923.6 million.[711] To arrive at the losses effectively suffered by the Claimants, Mr Edwards multiplies this amount by 95%, i.e., the percentage of the Claimants' shareholding in Energy 21 as at 1 January 2011, and obtains CZK 877.5 million.[712] According to Mr Edwards, the Claimants' losses at this valuation date are caused by two factors: (i) the impact of the Solar Levy on the PV plants' cash flows; and (ii) a higher perception of risk associated with the Czech PV market as a result of the Solar Levy.[713]

538. As at 1 January 2014, the Claimants submit that the diminution in the SPVs' enterprise value caused by the prolongation of the Solar Levy is CZK 319.6 million.[714] When this amount is multiplied by 94.3825%, i.e., the Claimants' shareholding in Energy 21 as at 1 January 2014, the effective loss suffered by the Claimants, the Claimants assert, is equivalent to CZK 301.6 million.[715] As opposed to the losses caused at the first valuation date, the Claimants contend that the losses suffered at this second valuation date "depend[] exclusively on the impact of the prolonged Solar Levy on the PV plants cash flows".[716] This is because, as observed by Mr Edwards, the risk perception in the Czech PV market was not altered by the prolongation of the Solar Levy and, as a result, the WACC in the Actual and Counterfactual Scenarios at this valuation date remained identical.[717]

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710 Submission, para. 149.

711 Submission, para. 149. CZK 923.6 million = CZK 4,976.9 million – CZK 4,053.2 million.

712 Submission, para. 150; **CER-Edwards-1**, para. 9.3.

713 **CER-Edwards-1**, paras. 9.4-9.5. Mr Edwards notes that this assessment is conservative as he adopts an assumption that the technological risk remained stable until the 2015 Transaction. Had he had not done so, the increase in WACC attributable to the Solar Levy would have increased, and so would have the Claimants' damages. *See* **CER-Edwards-1**, paras. 4.17-4.20, 9.3.

714 Submission, para. 152.

715 Submission, para. 152; **CER-Edwards-1**, para. 9.6.

716 Submission, para. 152.

717 Submission, para. 152; **CER-Edwards-2**, para. 9.8.

539. In light of the foregoing, the Claimants submit that the total losses suffered by them on both valuation dates amount to CZK 1,179.1 million.[718]

(e) Allocation of the damages among the Claimants

540. As the final step, Mr Edwards allocates the total losses on a *pro rata* basis according to the shareholding of each Claimant as at each valuation date.[719]

541. In this respect, the Claimants recall that, as at 1 January 2011, the Claimants had (i) 52.42% shareholding in Radiance; (ii) 22.50% shareholding in GIHG; and (iii) 20.08% shareholding in Natland Investment (now NIG) and, indirectly, Natland Group (now Capamera).[720] As at 1 January 2014, the only Claimant owning a shareholding in Energy 21 was Radiance which, as a result of the 2011 Transaction, came to own 95% of the shares (to be reduced to 94.3825% due to the option exercised by DCEMF Mezzanine).[721]

542. Accordingly, Mr Edwards allocates the losses as follows:[722]

Table 9-5: My assessment of losses by Claimant (CZK millions)

	1 Jan 2011	1 Jan 2014	Total
GIHG	207.8	-	207.8
Natland	185.5	-	185.5
Radiance	484.2	301.6	785.8
Total	**877.5**	**301.6**	**1,179.1**

Source: Appendix 10 and Appendix 11.

543. Addressing the Respondent's argument that Radiance should not be awarded damages in connection with the shares in Energy 21 in the context of the 2011 Transaction, the Claimants submit that Radiance's decision to acquire an additional 42.6% of Energy 21 was a "sound business decision which also allowed to mitigate the damages deriving from the Respondent's unlawful measures".[723] According to the Claimants, there was only a remote risk of the implementation of further retrospective measures at the relevant time.[724] Additionally, the

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718 Submission, para. 153. CZK 1,179.1 million = CZK 877.5 million + CZK 301.6 million.

719 **CER-Edwards-1**, para. 9.10.

720 Submission, para. 155.

721 Submission, para. 155.

722 **CER-Edwards-1**, para. 9.10, Table 9-4.

723 Reply, para. 340.

724 MEP Presentation, 25 July 2011, slide 5 (**Ex. FTI-12**). *See* 2022 Hearing Transcript, Day 1, p. 63:4-15; 2022 Hearing, Claimants' Presentation, slide 101. *See also* 2022 Hearing Transcript, Day 1, p. 64:4-6.

Claimants explain that, Radiance, as the only shareholder with significant financial resources, was prompted to acquire the shares of Natland Energy Investment and GIHG to cope with the financial situation stemming from the introduction of the Solar Levy and the consequent reduction of the cash flow, which put at risk the repayment of the loans and the solvency of Energy 21.[725]

544. In any event, the Claimants reiterate that the Respondent's argument in relation to Radiance's assumption of risks fails as a matter of law as the Claimants should not bear the risk of the Respondent's unlawful acts.[726]

(f) Reduction in damages

545. Should the Tribunal opt for the PV plant-specific approach as suggested by the Respondent, Mr Edwards provides calculations that allocate the damages he estimates to each of the Claimants' PV plants using the 9 November 2010 cut-off date, which allows the Tribunal to make the adjustments it may deem necessary.[727]

546. In the Claimants' view, the reduction of damages for the PV plants falling beyond the cut-off date "will necessarily have to be determined by the Tribunal on an equitable basis", because it is "intrinsically complex" to determine, with a reasonable degree of certainty, the perception of risk at the time in which each of the Claimants' 31 PV plants reached the relevant moment.[728]

547. If the Tribunal were to agree with the Claimants that the date of commencement of construction works is the relevant moment, the Claimants submit that no plants would fall beyond the cut-off date as shown in paragraph 351 above, which means that no reduction of damages would be required.[729]

548. By contrast, if the Tribunal were to choose an earlier cut-off date, but still accept the date of commencement of construction works as the relevant moment, the Claimants submit that the reduction of damages for the PV plants that commenced the construction works after that cut-off date should be equitably determined based on the following criteria:

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725 Reply, para. 339; 2022 Hearing Transcript, Day 1, pp. 63:16-64:10; 2022 Hearing, Claimants' Presentation, slide 102¸ *referring to* **CWS-Baudon 1**, para. 43; MEP Presentation, 25 July 2011, slide 5 (**Ex. FTI-12**).

726 Reply, para. 337.

727 Reply, para. 425. *See* Reply, para. 184.

728 Reply, para. 182.

729 Reply, para. 184.

(a) no reduction in damages for the 2009 PV plants, because the initial rumors that the 5% Limit would be repealed never referred to them;

(b) the reduction in damages for the PV plants that commenced construction works before 9 November 2010, but after the cut-off date, "should be very low and calculated at most as a single-digit percentage point of the losses allocated to those PV plants". This is because the regulatory risk perceived by the Claimants with respect to their PV plants before 9 November 2009 was "at most, extremely limited"; and

(c) not a single PV plant commenced construction works after 9 November 2010, which would require a reduction in damages that is higher than that indicated in point (b) above.[730]

549. If the Tribunal were to determine that the relevant moment coincided with the date on which a PV plant obtained the ERO License, the Claimants submit that the reduction in damages for the PV plants that obtained the ERO License after the cut-off date should be equitably determined based on the following guidelines:

(a) no reduction in damages for the 2009 PV plants for the reason explained in paragraph 548 (a) above;

(b) a very low reduction for the 2010 PV plants that obtained ERO License after the cut-off date chosen by the Tribunal, but before 9 November 2010, for the reasons explained in paragraph 548 (b) above;

(c) a small reduction of the losses allocated to the 2010 PV plants that obtained an ERO License between 9 November and 14 December 2010, because until Act No. 402/2010 was enacted on 14 December 2010, the Claimants "had no certainty that such risk [of regulatory changes affecting their PV plants] would materialize"; and

(d) a higher reduction in damages for the PV plants that obtained an ERO License between 15 December and 31 December 2010.[731]

550. As to the Respondent's contention that damages should be reduced due to the Claimants' legal violations in constructing and commissioning PV plants, the Claimants recall that, in the first phase of the proceedings, the Respondent abandoned the illegality objection with respect to the

730 Reply, para. 185.

731 Reply, para. 186 [emphasis added by the Claimants].

plants and never claimed a reduction in damages arising from the purported illegalities.[732] Therefore, the Claimants argue that the Respondent's illegality claim should be dismissed in this phase of the proceedings.[733] In any event, the Claimants contend that the Respondent's illegality argument lacks merit, given that the Czech authorities never questioned the plants' entitlement to FiT and the validity of the relevant ERO licenses.[734]

2. The Respondent's Position

(a) Flaws in the Claimants' damages analysis

551. The Respondent challenges Mr Edwards' damages quantification approach on the grounds that the key assumption underlying his use of the dual WACC, namely that investors' perception of regulatory risk increased following the introduction of the Solar Levy and resulted in a higher cost of capital, is unsupported by evidence.[735] According to the Respondent, the supposed increase in the perception of regulatory risk comprising a "regulatory risk premium"—a proportion of which Mr Edwards adds to the Actual WACC—is speculative, and inflates the Claimants' damages by CZK 560.1 million.[736]

552. *First*, the Respondent maintains its challenge that the "regulatory risk" theory advanced by Mr Edwards is not based on any contemporaneous evidence.[737] Addressing the Claimants' reliance on certain contemporaneous documents to argue otherwise, the Respondent points out that those documents either do not discuss the observed increase in the cost of capital of solar plants in the Czech Republic (let alone of the Claimants' solar plants specifically) due to greater regulatory risk or cannot be considered as objective evidence, given that they were prepared by an interested party in this arbitration or were prepared with the intention of being used in this arbitration.[738]

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732 Reply, paras. 328-330. *See also* Rejoinder of 6 September 2016, paras. 184, 187.

733 Reply, paras. 332-335.

734 Reply, para. 334.

735 Response, para. 218; Rejoinder, para. 116. *See also* 2022 Hearing Transcript, Day 1, pp. 163:15-164:3; Day 2, pp. 66:20 *et seq.*,123:10-20.

736 Response, para. 220, *citing* **CER-Edwards-1**, paras. 4.24, 4.35-4.39.

737 Response, para. 218; Rejoinder, paras. 116, 120. *See* 2022 Hearing Transcript, Day 1, pp. 163:15-164:3.

738 Rejoinder, para. 119(a), *referring to* Letter from Ms Hedegaard and Mr Oettinger to Mr Kocourek, 11 January 2011 (**Ex. C-337**); "European Commission guidance for the design of renewables support schemes" (Commission Staff Working Document), accompanying the Commission's Communication "Delivering the internal market in electricity and making the most of public intervention", 5 November 2013 (**Ex. C-334**); "Assessment of the final national energy and climate plan of Czechia" (Commission

553. The Respondent further points out that Mr Edwards' assumption that no relevant regulatory risk existed prior to the introduction of the Solar Levy is inconsistent with the Partial Award.[739]

554. *Second*, the Respondent argues that the uplift in the cost of capital calculated by Mr Edwards could be attributable to other factors unrelated to the Solar Levy, including the measures that were not challenged in this arbitration or that the Tribunal deemed lawful.[740] In addition, the Respondent asserts that investors in the Czech Republic were "undoubtedly taking account" of the changes that were being made to the support schemes for solar installations in several other countries, such as Spain and Germany.[741]

555. Likewise, the Respondent challenges Mr Edwards' assumption of the existence of a technological risk premium in 2010 on the basis that it contradicts the Claimants' contemporaneous statements that the performance of Energy 21's operating plant was in fact not unpredictable.[742] As is the case with the regulatory risk premium, the Respondent posits that the 2.1% uplift could be due to other factors, including the risk that Energy 21's management would not be able to match its ambitious plans to connect numerous new plants by the end of 2010.[743]

556. *Third*, the Respondent argues that the use of dual WACC essentially leads to "double-counting", particularly in respect of the 2010 plants.[744] This is because, according to the Respondent, Mr Edwards calculates damages to the 2010 plants borne from the Solar Levy, together with the risk of future regulatory action, but then also calculates damages from the extension of the Solar Levy in 2014.[745] By these calculations, the Respondent notes, Mr Edwards seeks to compensate the Claimants "both for the risk of something happening and then for the actual impact of that thing happening", which ultimately leads to an overstatement of damages.[746]

Staff Working Document) of 14 October 2020 (**Ex. C-482**); **CWS-Baudon-1**, para. 42; Patria memorandum comparing the valuation of GIHG's shareholding, 25 May 2012, p. 2 (**Ex. FTI-7**).

739 Rejoinder, para. 125, *referring to* Partial Award, paras. 426, 428, 459; 2022 Hearing Transcript, Day 1, p. 167:4-7. *See also* **RER-Peer-5**, para. 3.3.3.

740 Response, para. 221. *See also* 2022 Hearing Transcript, Day 1, pp. 164:4-15, 165:22-25.

741 Response, para. 221.

742 Response, para. 223, *referring to* M. Petříček, "Solar boom is slightly excessive", Hospodářské Noviny, 13 August 2009 (**Ex. R-143**).

743 Response, para. 224; 2022 Hearing Transcript, Day 2, pp. 126:2-127:1.

744 Rejoinder, para. 117(b), *citing* **RER-Peer-5**, para. 3.3.11. *See* 2022 Hearing Transcript, Day 1, p. 166:1-10, *referring to* 2022 Hearing, Respondent's Opening Presentation, slide 136; 2022 Hearing Transcript, Day 2, pp. 58:2 *et seq*, pp. 128 *et seq;* 2022 Hearing, Mr Peer's Presentation, slide 11.

745 **RER-Peer-5**, para. 3.3.11.

746 2022 Hearing Transcript, Day 1, p. 166:5-7.

557. *Fourth*, the Respondent contends that the adoption of the Solar Levy may have in fact decreased, rather than increased, the perception of regulatory risk.[747] Such inference, the Respondent asserts, is consistent with the findings of the Partial Award, because the Tribunal observed that by mid-2009, investors in the Czech Republic had been aware of the risk of regulatory changes.[748] Therefore, following the introduction of the Measures, the Respondent submits that "the fear of the unknown should have been removed" and that investors would have perceived lesser risk of further regulatory changes.[749] If a dual WACC approach were to be used, Mr Peer opines that it would, in turn, reduce the damages, because the Counterfactual Scenario would have a higher WACC than the Actual Scenario.[750]

558. *Lastly*, the Respondent posits that Mr Edwards' calculations using the WACC figures contain mistakes, including the following:

(a) given that the Claimants' PV plants represent a small business, Mr Edwards has failed to apply size premia in the theoretical WACC figures which he used to derive the discount values in the Actual and Counterfactual Scenarios.[751] The failure to apply size premia increases, according to the Respondent, results in Mr Edwards' theoretical WACCs being understated by approximately 2%;[752] and

(b) Mr Edwards has failed to consider the impact of the decrease in the uplift (i.e., the difference between the implied WACC and the theoretical cost of capital) that he himself has calculated in relation to the prolongation of the Solar Levy in 2014.[753] Mr Peer opines that this failure results in an overstatement of damages by more than CZK 40 million.[754]

(b) Respondent's calculation of the Claimants' damages

559. As stated above, the Respondent submits that Mr Peer presents a "simpler, or more intuitive" methodology to calculate the maximum theoretical damages suffered by the Claimants as a result of the Solar Levy: Mr Peer (i) calculates the total amount of the Solar Levy to be paid by each of

747 Response, para. 226; 2022 Hearing Transcript, Day 1, p. 165:7-13.

748 Response, para. 226, *referring to* Partial Award, paras. 428, 429.

749 Response, para. 226.

750 **RER-Peer-4**, para. 3.3.12.

751 Response, para. 215(c); **RER-Peer-4**, paras. 3.5.1-3.5.9.

752 Rejoinder, para. 124(c); **RER-Peer-5**, para. 3.5.4. *See also* **RER-Peer-4**, para. 3.5.12.

753 Response, para. 215(d); Rejoinder, para. 124(d).

754 Rejoinder, para. 124(d); **RER-Peer-4**, para. 3.4.9.

the Claimants' 2009 and 2010 plants over the duration of the RES support scheme; and (ii) discounts the total amount to the valuation date of 1 January 2011, using a single discount rate.[755]

560. Using a discount rate of 8.1%, which is lower than the rates employed by Mr Edwards in his Actual and Counterfactual Scenarios, Mr Peer derives CZK 540.1 million as at 1 January 2022, which represents the reduction in the Claimants' 2009 and 2010 solar plants due to the Solar Levy.[756]

561. According to the Respondent, Mr Peer's maximum damages figure is equivalent to approximately 8.6% of the plants' overall FiT revenues, calculated from 2011 until the end of the PV plants' expected economic lifetime.[757] As Mr Peer notes, such reduction has only a small impact on the overall IRR of the Claimants' PV plants because, following the introduction of the Solar Levy, the IRR decreased from an average of 11.6% to 9.7%.[758]

(c) Reduction in damages

562. As discussed above in Section V.D.2, the Respondent submits that the Claimants are not entitled to damages in connection with the investments that they undertook at a time when they knew that it was likely that the Czech Government would enact measures that would have an impact on their plans to commission new solar installations.[759]

563. Accordingly, in order to calculate the appropriate reduction in the amount of damages, the Respondent proposes to (i) use 25 August 2009 as the cut-off date, i.e., the date as of which the Claimants are deemed to have had sufficient knowledge of the Czech Government's desire to put a stop to the solar boom; and (ii) calculate the impact of excluding from the damages assessment the plants with respect to which the Claimants are deemed to have assumed the risk of regulatory change.[760] In this respect, the Respondent rejects the Claimants' suggestion that damages should be reduced in proportion to the Claimants' perception of the risk of regulatory changes, which varied over time.[761] Rather, it is the Respondent's view that any plants that fall beyond the cut-

755 Response, para. 233.

756 Response, para. 234; **RER-Peer-4**, para. 5.2.7.

757 Response, para. 235.

758 Response, para. 235; **RER-Peer-4**, para. 5.3.2. *See* 2022 Hearing Transcript, Day 1, p. 95:7-8.

759 Response, para. 250.

760 Rejoinder, para. 129.

761 Rejoinder, para. 136.

off date should be excluded altogether from the damages assessment.[762] The Respondent adds that a PV plant that obtained an ERO License or, alternatively, began the construction works after the cut-off date, should be excluded altogether from the damages assessment.[763]

564. Rejecting the Claimants' assertion that the Tribunal should reduce damages upon "equitable" principles, the Respondent argues that the applicable provisions of the UNCITRAL Rules expressly bar *ex aequo et bono* determinations by the Tribunal, absent an express agreement of the Parties.[764]

565. Using the 25 August 2009 cut-off date, Mr Peer calculates that the Claimants' maximum theoretical damages are CZK 2,359,030.[765] Mr Peer's calculations regarding the impact on quantum of excluding the plants that fall outside the cut-off date are as follows:[766]

Total cash flow impact of Solar Levy			
		Plants excluded on basis of ERO license dates	**Plants excluded on basis of earliest possible construction commencement dates**
24 August 2009 (Ministry's press release)		**-CZK 2,359,030**	-CZK 70,604,526
Alternative cut-off dates	17 March 2010	-CZK 122,139,224	-CZK 137,414,357
	27 August 2010	-CZK 137,414,357	-CZK 293,115,167
	9 November 2010	-CZK 205,914,181	-CZK 540,143,770

566. As the above figures illustrate, the Respondent stresses that, depending on the cut-off date used and the method of determining the relevant solar plants, the impact of the Solar Levy on the cash flows of the Claimants' solar plants ranges from a reduction of CZK 2.4 million to CZK 540.1 million.[767]

567. Additionally, the Respondent avers that plants affected by legal violations which Claimants committed during the construction and commission process should be excluded from the

762 Rejoinder, para. 136.

763 Respondent's Response, paras. 251(c), 278.

764 Rejoinder, para. 13(n).

765 Response, para. 278. *See also* **CER-Edwards-2**, para. 5.4, Table 6.

766 Response, para. 279, Figure 10.

767 Response, para. 280.

damages calculations.[768] In particular, the Respondent notes that some of the violations appear to have occurred at the very end of 2010, after the Solar Levy was announced.[769]

(d) Radiance is not entitled to any compensation

568. Notwithstanding its primary position that no damages should be awarded to the Claimants, the Respondent submits that there are additional reasons to reject Radiance's claims for compensation in relation to the 42.6% shareholding in Energy 21 that it acquired *via* the 2011 Transaction.[770]

569. The Respondent submits that Radiance knowingly assumed the risk that the increase in its shareholding in Energy 21 would be affected by both the Solar Levy and the anticipated extension of the Solar Levy.[771] In this respect, the Respondent points out that Radiance's acquisition in August 2011 occurred (i) after the Solar Levy had been enacted; (ii) after Radiance had already lodged a notice of dispute with the Czech Republic; and (iii) at a time when Radiance's principals "plainly expected further measures, including the extension of the Solar Levy".[772] According to the Respondent, Radiance's own deal documents show that such acquisition was not necessary to keep the company operating.[773] The Respondent subsequently takes the view that Radiance acquired additional shares in Energy 21 "not because it had to, but because it expected significant potential upside from doing so".[774]

570. Furthermore, the Respondent contends that Radiance did not suffer any injury to its increased shareholding as a result of the introduction of the Solar Levy or its extension because, according to Radiance's internal documents, Radiance purchased the shares at a discounted valuation, specifically at a 48% discount.[775] In particular, with respect to the 2011 Transaction, the Respondent notes that Energy 21 shares were worth only approximately EUR 900,000 more—and not approximately EUR 15.4 million more—than the sum that Radiance paid to the sellers.[776]

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768 Response, para. 281. *See also* Statement of Defense, para. 200.

769 Response, para. 282.

770 Response, para. 285.

771 Rejoinder, para. 150.

772 Rejoinder, para. 149. *See also* Response, paras. 286-288.

773 Rejoinder, para. 152, *referring to* **CWS-Baudon-1**, Annex VI, Minutes of IAC Meeting, 14 June 2011, p. 2.

774 Rejoinder, para. 152.

775 Response, para. 168, *referring to* MEP Presentation, 25 July 2011, slide 6 (**Ex. FTI-12**); Rejoinder, para. 153, *See also* **CWS-Baudon-1**, para. 43.

776 Response, para. 169.

It follows therefrom, the Respondent argues, that the discounted valuation at which Radiance acquired its additional shares reflected the cost of the Solar Levy and its prolongation.[777]

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571. In light of the foregoing, the Respondent submits that the Claimants' damages claim should be dismissed in its entirety, because the Claimants have failed to discharge their burden of proof.[778] In support thereof, the Respondent argues that the Claimants' claim fails for the same reasons for which investment tribunals have declined to award any damages to a claimant, notwithstanding a respondent's unlawful measures,[779] namely that:

a. Claimants have failed to identify any compensable injury that was caused by the Solar Levy;

b. Claimants and their expert have presented an unsound damages methodology;

c. the key assumption underlying Claimants' damages model (namely, that the Solar Levy created a perception of regulatory risk, which in turn increased Claimants' cost of capital) is unsubstantiated;

d. Claimants' damages model does not take proper account of the Tribunal's findings in the Partial Award; and

e. Claimants have not excluded from their valuation the financial impact of decisions of their own, which are not attributable to the Czech Republic (such as Claimants' assumption of risk, and Radiance's decision to acquire additional Energy 21 shares in August 2011).[780]

C. JOINT EXPERT REPORT

572. The Joint Expert Report sets out the Parties' quantum experts' joint comments, as well as any outstanding areas of disagreements, concerning (i) the allocation of the disputed regulatory risk

777 Rejoinder, para. 153.

778 Rejoinder, para. 165.

779 Rejoinder, paras. 166-170, *referring to Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 485, 518, 779, 787, 789-791 (**Ex. CLA-46**); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, paras. 288, 299(d) (**Ex. CLA-105**); *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Final Award, 8 June 2010, paras. 68, 96, 99 (**Ex. CLA-127**); *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Award, 5 April 2019, paras. 1121-1122 (**Ex. RLA-346**); *Víctor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 13 September 2016, paras. 199, 232-234 (**Ex. RLA-299**); *Nordzucker AG v. Republic of Poland*, UNCITRAL, Third Partial and Final Award, 23 November 2009, para. 49 (**Ex. RLA-350**).

780 Rejoinder, para. 172.

uplift between the Solar Levy and the other amendments that, together with the Solar Levy, constitute the Measures;[781] and (ii) the calculation of IRRs for individual PV plants.[782]

1. Allocation of the regulatory risk uplift

573. In respect of the allocation of regulatory risk uplift resulting from the Solar Levy, Mr Peer and Mr Edwards concur that "the impact of the First Solar Levy is less than 2% larger than the impact of the other Measures", if Mr Edwards' quantification of the valuation impact of the Solar Levy *vis-à-vis* the other of the Measures (the "**NPV Impact Calculation**") were to be used.[783] Mr Peer and Mr Edwards, however, continue to disagree whether any allocation of the regulatory risk premium is warranted.[784]

(a) Mr Edwards' position

574. Mr Edwards rejects Mr Peer's characterization of his conclusions regarding the regulatory risk premium as arbitrary and unsubstantiated, noting that, whilst Mr Peer has proposed alternative valuation methodologies, he has not performed any.[785] In reference to Mr Peer's proposed "event study", Mr Edwards notes that neither he, nor Mr Peer has been able to conduct such an exercise, principally because there were no Czech PV plant operators with shares traded on exchanges in 2010 and 2011.[786] Mr Edwards similarly rejects Mr Peer's proposal of surveying industry participants as an approach that would lack precision.[787]

575. Mr Edwards acknowledges that the figures he shared with Mr Peer do suggest that the cash flow impact of the Solar Levy was equivalent to that of the other Measures.[788] However, Mr Edwards argues that a 50:50 allocation would not properly reflect investors' perceptions of risk, because,

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781 Joint Expert Report, pp. 3-4. The Joint Expert Report uses the term 'First Solar Levy', which refers to the levy brought into effect by way of Act No. 402/2010, and not its extension that was effected by Act 310/2013.

782 Joint Expert Report, p. 4.

783 Joint Expert Report, para. 2.3. The experts use the term "First Solar Levy" to refer to the levy brought into effect by way of Act No. 402/2010, and not its extension that was effected by Act 310/2013.

784 *See* Joint Expert Report, paras. 2.4-2.5.

785 Joint Expert Report, Appendix B, paras. 5.1-5.2.

786 Joint Expert Report, Appendix B, para. 5.4. *See also* 2022 Hearing Transcript, Day 3, pp. 37:22-39:1.

787 Joint Expert Report, Appendix B, para. 5.6.

788 Joint Expert Report, Appendix B, para. 5.9.

in his view, the imposition of the Solar Levy undermined confidence in the Czech Republic's regulatory regime to a greater extent than, for instance, the repeal of the Income Tax Holiday.[789]

576. Consequently, considering that the appropriate allocation would be "somewhere between 50:50 and 100:0 (in favor of the Solar Levy)", Mr Edwards opines that the 75:25 allocation (i.e., 75% to the Solar Levy and 25% to the Other Measures) is appropriate in the circumstances.[790]

(b) Mr Peer's position

577. Mr Peer objects to Mr Edwards' approach of estimating a regulatory risk premium and therefore finds any allocation of any such uplift between the Solar Levy and the other Measures inappropriate.[791] Mr Peer maintains that Mr Edwards' calculation of the uplift at 2.6% is unsubstantiated, particularly due to "inaccurately" derived implied discount rates from both the 2010 Transaction and the 2011 Transaction.[792]

578. In any event, should the Tribunal decide that a change in the regulatory risk must be reflected in the damages assessment, Mr Peer recommends use of an "event study", which empirically analyzes the impact of the occurrence of an event on the value of an asset based on the assumption that "markets are rational and the effects of events are immediately reflected in the resulting pricing".[793] Contrary to Mr Edwards' contention, Mr Peer opines that, in circumstances where no publicly listed companies exist, an event study can still be conducted by using industry surveys and/or references to a number of market transactions.[794] Such a "focused approach", Mr Peer continues, would allow one to infer statistically how share values reacted to an event, in this case, the imposition of the Solar Levy.[795]

579. In Mr Peer's view, an analysis based on an event study would address the accompanying effects of the public debate regarding the need for legislative changes that would gradually have been reflected in the market values.[796] The analysis, Mr Peer adds, would show that the actual implementation of the Solar Levy would not be the decisive factor, nor would it have been an

789 Joint Expert Report, para. 2.5.

790 Joint Expert Report, Appendix B, para. 5.10.

791 Joint Expert Report, para. 2.4, Appendix A, para. 4.1.

792 Joint Expert Report, Appendix A, para. 4.1, *referring to* **RER-Peer-4**, paras. 2.2.2(a), 2.2.6-2.2.7.

793 Joint Expert Report, Appendix A, para. 4.2. *See also* 2022 Hearing Transcript, Day 3, pp. 35:1-36:19.

794 Joint Expert Report, Appendix A, para. 4.2.

795 Joint Expert Report, Appendix A, paras. 4.2-4.3.

796 Joint Expert Report, Appendix A, para. 4.3.

isolated factor, and it would thus address Mr Edwards' flawed assumption that regulatory risk did not emerge until 1 January 2011 with the imposition of the Solar Levy.[797]

580. Even if the Tribunal were to allocate the purported regulatory risk uplift based on Mr Edwards' NPV Impact Calculation, Mr Peer maintains that the 75:25 allocation (i.e., 2.0 and 0.6) proposed by Mr Edwards is arbitrary.[798] Instead, Mr Peer recommends that the Tribunal uses the 50:50 allocation, which would reduce the damages by CZK 210 million.[799]

(c) The Claimants' position

581. In the Claimants' view, Mr Peer has failed to engage constructively with the barriers that Mr Edwards cited as precluding the possibility of an event study.[800] The Claimants further argue that Mr Peer has failed to indicate how, in practical terms, an event study would be conducted.[801]

582. The Claimants contest Mr Peer's 50:50 allocation of the risk uplift, asserting that he did not properly engage with the factors surrounding the imposition of the Solar Levy.[802] By way of example, the Claimants note that Mr Peer failed to consider that the FiT was the "primary reason" for which investors made investments in the Respondent's RES sector, that the Solar Levy directly affected the FiT, and that the Solar Levy, as a result, had a "particularly destabilising" impact on investor confidence.[803]

583. Accordingly, the Claimants recommend that the Tribunal accept Mr Edwards' allocation of 75% of the regulatory risk uplift, which, they say, is consistent with contemporaneous evidence and "reflects the investors' true perception of the uplift to regulatory risk at the relevant time".[804]

(d) The Respondent's position

584. The Respondent echoes Mr Peer's suggestion that an event study would be an appropriate mechanism by which to assess the impact of the Solar Levy on the perception of regulatory risk

797 Joint Expert Report, Appendix A, para. 4.3.

798 Joint Expert Report, Appendix A, para. 4.4.

799 Joint Expert Report, Appendix A, para. 4.5.

800 Claimants' Submission on the Joint Expert Report, paras. 12-15.

801 Claimants' Submission on the Joint Expert Report, paras. 14-15.

802 Claimants' Submission on the Joint Expert Report, paras. 16-18.

803 Claimants' Submission on the Joint Expert Report, para. 17.

804 Claimants' Submission on the Joint Expert Report, paras.18-19.

in the Czech Republic.[805] In the Respondent's view, the fact that Mr Edwards has raised no methodological or substantive objection to conducting an event study would suggest that Mr Edwards accepts, in principle, that an event study is an appropriate approach.[806] The Respondent, however, acknowledges that there is a dearth of evidence on the record in this arbitration by reference to which any such study could be conducted.[807]

585. In terms of the actual allocation of risk uplift, the Respondent states that regard should be had to the NPV Impact Calculation, deeming it the "one piece of quantitative impact analysis" presented by Mr Edwards.[808] The Respondent invokes the Joint Expert Report's finding that, as per the NPV Impact Calculation, the impact of the Solar Levy was less than 2% larger than that of the other Measures.[809] As such, it agrees with Mr Peer's suggestion that he would, *arguendo*, allocate the risk uplift between the Solar Levy and the other Measures on a 50:50 basis.[810]

2. IRR calculations

586. As requested by the Tribunal, Mr Edwards has calculated the IRRs for the Claimants' PV plants in three scenarios: (i) the scenario in which none of the Measures was implemented (the "**No Measures Scenario**"); (ii) the scenario involving only the repeal of the Income Tax Holiday and the modification of the Original Depreciation Provisions, and not the imposition of the Solar Levy (the "**Other Measures Scenario**"); (iii) the scenario in which all Measures were implemented (the "**All Measures Scenario**").[811] Mr Peer, in turn, provides a set of IRR calculations for the Other Measures Scenario, the only scenario which had not been included in his prior reports.[812]

587. The IRR calculations by each expert for each Scenario are as follows:[813]

	Mr Peer	**Mr Edwards**
	Range: 9.9% to 17.9%	Range: 8.2% to 17.3%

805 Respondent's Submission on the Joint Expert Report, paras. 17-18.

806 Respondent's Submission on the Joint Expert Report, para. 19.

807 Respondent's Submission on the Joint Expert Report, para. 18.

808 Respondent's Submission on the Joint Expert Report, para. 21.

809 Respondent's Submission on the Joint Expert Report, para. 21, *referring to* Joint Expert Report, para. 2.3.

810 Respondent's Submission on the Joint Expert Report, para. 22.

811 Joint Expert Report, para. 3.1.

812 Joint Expert Report, para. 1.3(a). *See* **RER-Peer-1**, para. 4.8.3, Table 5; **RER-Peer-2**, para. 2.2.10, Table 2; **RER-Peer-4**, para. 5.4.11, Table 7; Joint Expert Report, Appendix A, para. 4.6.

813 Joint Expert Report, para. 3.2.

No Measures Scenario	Collective: 12.7%	Collective: 12%
Other Measures Scenario	Range: 9.0% to 15.9%	Range: 7.4% to 15.1%
	Collective: 11.5%	Collective: 10.7%
All Measures Scenario	Range: 7.0% to 13.8%	Range: 6.3% to 12.7%
	Collective: 9.8%	Collective: 9.1%

588. The outstanding disagreements regarding the experts' IRR calculations principally relate to (i) the experts' respective inclusion and exclusion of certain costs from their IRR calculations; (ii) the differing forecasts on which the experts rely in making their calculations; and (iii) the consistency in approaches to damages and IRR calculations.

(a) Mr Edwards's position

589. According to Mr Edwards, the difference between his and Mr Peer's IRR calculations results from three factors: (i) the inclusion of land purchase costs and estimated resale proceeds in his calculations, and Mr Peer's correlative exclusion of them; (ii) his use of the 2011 Forecasts and Mr Peer's use of his own forecasts; and (iii) the inclusion of forecasted maintenance capital expenditure in his calculations, while Mr Peer has excluded such expenditure.[814]

590. *First*, Mr Edwards argues that, in terms of their cost, PV plants cannot be divorced from the land on which they are situated,[815] since cash flows are necessary either to purchase or lease land that is ultimately used for the operation of the PV plants.[816] Although this is the approach taken by the ERO, Mr Edwards opines that excluding land costs is tantamount to excluding other elements of investment or operational costs, leading to an overstatement of the financial returns attached to any given PV plant.[817]

591. *Second*, Mr Edwards justifies the use of the 2011 Forecasts, subject to a number of small adjustments, because they were made closest in time to the construction of the PV plants.[818] These

814 Joint Expert Report, Appendix B, para. 5.11.

815 Joint Expert Report, Appendix B, paras. 5.13, 5.16.

816 Joint Expert Report, Appendix B, paras. 5.13, 5.16.

817 Joint Expert Report, Appendix B, para. 5.16.

818 Joint Expert Report, Appendix B, paras. 5.17-5.22.

early forecasts, Mr Edwards argues, best reflect attitudes at the commencement of the projects' lives and they provide a comparator with the PV plants' subsequent performance.[819]

592. *Finally*, Mr Edwards justifies his inclusion of forecasted maintenance expenditure on account of the fact that Energy 21, unlike other PV plant operators, withholds maintenance costs from operating costs.[820] In Mr Edwards' view, without specifically factoring it in, forecasted maintenance expenditure — a "real cash cost" — would not be included in any given PV plant's financial performance calculations.[821] Mr Edwards therefore concludes that Mr Peer's exclusion of maintenance costs from his own calculations has resulted in a slight overstatement of his IRRs.[822]

(b) Mr Peer's position

593. Mr Peer highlights his finding that in each of the three Scenarios, the Claimants' plants achieved an IRR of at least 7% and, therefore, fell within the range approved by the Commission.[823]

594. To the extent that his IRR calculations differ from those of Mr Edwards, Mr Peer notes that Mr Edwards' methodology departs from that of the ERO.[824] Specifically, he disagrees with Mr Edwards' inclusion of the costs associated with land for each PV plant.[825] Likewise, Mr Peer states that Mr Edwards includes forecast maintenance capital as a separate item in his calculations, which does not feature in the ERO's own methodology.[826]

595. Separately, Mr Peer finds that Mr Edwards' approaches to IRR calculations and the calculation of damages are inconsistent.[827] For instance, he states that Mr Edwards employs a different set of inputs for both his IRR and damages calculations, resulting in a lower IRR and higher damages calculation.[828] In a similar vein, Mr Peer notes that Mr Edwards' damages calculations relied

819 Joint Expert Report, Appendix B, para. 5.17.

820 Joint Expert Report, Appendix B, para. 5.22.

821 Joint Expert Report, Appendix B, para. 5.22.

822 Joint Expert Report, Appendix B, para. 5.22.

823 Joint Expert Report, Appendix A, para. 4.6.

824 Joint Expert Report, Appendix A, paras. 4.8-4.9.

825 Joint Expert Report, Appendix A, paras. 4.8-4.9, *referring to* **RER-Peer-4**, para. 4.5.2.

826 Joint Expert Report, Appendix A, para. 4.10.

827 Joint Expert Report, Appendix A, paras. 4.11, 4.13.

828 Joint Expert Report, Appendix A, para. 4.11.

upon various sales forecasts, whereas his IRR calculations did not, thus in turn lowering the IRR figures that he proffers.[829]

596. Lastly, Mr Peer asserts that there is a number of other general discrepancies between his and Mr Edwards' approaches, such as a difference in their forecasts of the timing of the initial capital expenditure and of the timing for the cash flows each year.[830]

(c) The Claimants' position

597. The Claimants submit that an IRR analysis is irrelevant both for the purposes of a damages assessment and in relation to any outstanding State aid issues.[831]

598. In terms of damages, the Claimants argue that an IRR analysis is irrelevant in light of the Tribunal's findings in the Partial Award.[832] Unlike in a number of earlier cases involving RES and IRR analyses, the Claimants assert that this Tribunal found that investors were entitled to stable subsidies.[833] The Claimants further note that the Partial Award did not contain instructions to the Parties to produce an IRR analysis for the purposes of this phase of proceedings.[834]

599. In terms of State aid issues, the Claimants reject the Respondent's argument that an IRR analysis leaves the Claimants with zero damages under EU State aid.[835] In particular, the Claimants consider that the Respondent's argument is predicated on the wrongful assumption that EU law is part of the legal framework in this case.[836]

600. The Claimants criticize Mr Peer's decision to exclude both land purchase costs and maintenance capital expenditure from his results, because, according to the Claimants, they are costs that are "intrinsic to the investment", without which, "no sensible return on investment can be calculated".[837]

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829 Joint Expert Report, Appendix A, para. 4.13.

830 Joint Expert Report, Appendix A, para. 4.15.

831 Claimants' Submission on the Joint Expert Report, paras. 23-30.

832 Claimants' Submission on the Joint Expert Report, para. 25.

833 Claimants' Submission on the Joint Expert Report, para. 25.

834 Claimants' Submission on the Joint Expert Report, para. 25.

835 Claimants' Submission on the Joint Expert Report, para. 26.

836 Claimants' Submission on the Joint Expert Report, para. 27. *See* paragraphs 407-411 above.

837 Claimants' Submission on the Joint Expert Report, paras. 36-37, 40, 50.

601. In respect of land purchase costs, the Claimants assert that the ERO's modeling was intentionally notional and, therefore, excluded plant-specific information, such as land costs, to set FiTs for PV plants across the whole Czech Republic.[838] This, the Claimants contends, does not need to be mirrored when considering actual, operational plants, such as those that form part of Energy 21's portfolio.[839] The Claimants echo Mr Edwards' position that land is an "unavoidable" part of an investment into a PV plant which must be included in a true IRR calculations.[840] As such, the Claimants take the view that it is appropriate to reflect both land costs and land receipts in the IRR calculations.[841]

602. Further, the Claimants argue that Mr Peer is not consistent or coherent in applying the ERO's approach.[842] In particular, the Claimants note that whilst Mr Peer excludes land purchase costs from his calculations, he includes land leasing costs, even though there is no rational basis to distinguish between the two.[843]

603. As to Mr Peer's exclusion of maintenance capital expenditure from his calculations, the Claimants reiterate that the ERO's notional approach, upon which Mr Peer bases his decision, is not necessarily appropriate in these circumstances.[844] In addition, the Claimants outline that the ERO, in any case, included maintenance capital expenditure in a separate category of operational costs, whereas Mr Peer excludes this cost altogether from his calculations.[845]

604. Noting that the 2011 Forecasts were "actual contemporaneous forecasts used by investors at the relevant time", the Claimants argue that the 2011 Forecasts provide the "best evidence" of predicted performance as at the date when the Measures came into effect.[846] The Claimants also dismiss the materiality of any inconsistency between the forecasts Mr Edwards used for damages calculations and the 2011 Forecasts, suggesting that a damage valuation is a different exercise to an IRR calculation and that, in any case, the differences cited by Mr Peer are minimal.[847]

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838 Claimants' Submission on the Joint Expert Report, para. 39.

839 Claimants' Submission on the Joint Expert Report, para. 39.

840 Claimants' Submission on the Joint Expert Report, para. 39.

841 Claimants' Submission on the Joint Expert Report, para. 39.

842 Claimants' Submission on the Joint Expert Report, para. 39.

843 Claimants' Submission on the Joint Expert Report, para. 39.

844 Claimants' Submission on the Joint Expert Report, para. 40.

845 Claimants' Submission on the Joint Expert Report, para. 40.

846 Claimants' Submission on the Joint Expert Report, para. 41.

847 Claimants' Submission on the Joint Expert Report, para. 42, *referring to* Joint Expert Report, Appendix A, paras. 4.11-4.12.

605. In response to Mr Peer's criticism that Mr Edwards uses different sales forecasts for his IRR and damages calculations,[848] the Claimants posit, *inter alia*, that forecasts made during the projects' infancy should be used, because any performance thereafter was at the investor's risk[849] and that, from an economic perspective, attributing impact to the Solar Levy and the other Measures requires the use of forecasts made close to their imposition.[850] In fact, the Claimants aver that Mr Peer incorrectly presents Mr Edwards' approach, neglecting the fact that he uses sales forecasts only when calculating damages from the Solar Levy's prolongation, and not those associated with its initial introduction.[851]

606. Analyzing both sets of IRRs, the Claimants conclude that some of Mr Peer's figures do not support the Respondent's broader contentions.[852] For instance, Mr Peer places the IRR of PV plants in 2010 in the No Measures Scenario at 12.7%, a figure lower than the IRR for several individual plants after the implementation of the Measures.[853] According to the Claimants, this runs contrary to the Respondent's narrative that the Measures generally shifted IRRs for PV plants from an unacceptable to an acceptable level.[854]

(d) The Respondent's position

607. The Respondent maintains that the IRR calculations are relevant in this arbitration, invoking, *inter alia*, the Commission's decision to approve the Subsidies on the condition that the solar plants' returns fell within a specified range of acceptable rates of 6.3% to 8.4%.[855]

608. The Respondent points out that a significant level of consensus exists between the figures of the two experts.[856] For instance, it highlights both experts' agreement that in the All Measures Scenario, Claimants' PV plants achieve returns of 6.3%, which is within the range of returns approved by the Commission.[857] Similarly, it points to the experts' estimates of the Solar Levy's

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848 *See* paragraph 595 above.

849 Claimants' Submission on the Joint Expert Report, para. 43(i).

850 Claimants' Submission on the Joint Expert Report, para. 43(ii).

851 Claimants' Submission on the Joint Expert Report, para. 43(iv).

852 Claimants' Submission on the Joint Expert Report, para. 47.

853 Claimants' Submission on the Joint Expert Report, para. 47.

854 Claimants' Submission on the Joint Expert Report, para. 47.

855 Respondent's Submission on the Joint Expert Report, para. 6(e), *referring to* Decision (**Ex. R-367**).

856 Respondent's Submission on the Joint Expert Report, para. 9.

857 Respondent's Submission on the Joint Expert Report, para. 9(a), *referring to* Joint Expert Report, Appendix A, 4.16.

impact on the plants' IRRs, noting that for the 2009 PV plants, both experts forward identical estimates of 1.00%, whereas for 2010 PV plants, the experts propose near-identical figures of 2.4% and 2.5%.[858]

609. The Respondent attributes the differences between the experts' IRR calculations to Mr Edwards' decision to include both land purchase costs and forecast maintenance capital expenditure in his calculations, which, it notes, is inconsistent with the ERO's methodology.[859] Likewise, the Respondent echoes Mr Peer's finding that Mr Edwards' IRR calculations rely on different inputs to those which were used in his damages calculations.[860] The Respondent queries Mr Edwards' decision not to present updated damages calculations using the new inputs; had that been done, it would have reduced his estimates of loss.[861]

D. TAX GROSS-UP

610. As indicated above, Natland Investment and Natland Group seek compensation collectively for the amount of damages in this arbitration in respect of their 20.08% interest in Energy 21.[862] In the event the compensation for the losses that Natland Investment and Natland Group are claiming collectively is paid to Natland Investment, the Claimants submit that Natland Investment would suffer a further significant head of damages represented by the adverse tax consequences pursuant to Dutch law. Accordingly, such additional head of damages, the Claimants argue, must be compensated in accordance with the principle of full reparation.

611. The Respondent disagrees, arguing that international law does not support the award of tax gross-ups and that any alleged adverse tax consequences are speculative and would arise from Natland Investment's own choices and, therefore, they are not attributable to the Respondent.

1. The Claimants' Position

612. The Claimants submit that an award of damages issued in Natland Investment's favor would be subject to Dutch corporate income tax pursuant to Section 22 of the Dutch Corporate Income Tax Act (the "**CITA**"): the amount awarded in this arbitration up to EUR 245,000 would be taxed at

858 Respondent's Submission on the Joint Expert Report, para. 9(b). Mr Peer places the impact at 2.4%, whereas Mr Edwards calculates it at 2.5%.

859 Respondent's Submission on the Joint Expert Report, para. 10.

860 Respondent's Submission on the Joint Expert Report, para. 11, *referring to* Joint Expert Report, Appendix A, para. 4.11.

861 Respondent's Submission on the Joint Expert Report, para. 12.

862 *See* Section V.B above.

15%, while any sum over and above that amount would be taxed at 25%.[863] This is because, according to the Claimants, the arbitral award in Natland's favor would not qualify for the exemption laid down in Section 13(1) of CITA, which provides that "benefits arising from a participation […] relating to the acquisition or disposal of that participation" are tax-exempt insofar as a causal link exists between those benefits and the participation.[864] As explained by Mr Opmeer, this participation exemption aims to avoid the risk of double taxation of the same profit within a corporate structure by "exempting from taxation the profit deriving from the parent company's participation in the subsidiary at the parent company level" such that "the profit is tax only at the subsidiary level".[865]

613. Absent the Solar Levy, the Claimants assert that the dividends and the proceeds derived from the sale of the shares in Energy 21, which Natland Investment would have received, would have been exempt from Dutch corporate income tax, because "a causal link would have undoubtedly existed between them and Natland Investment's participation in Energy 21".[866] Conversely, the Claimants contend that a compensation award in favor of Natland Investment would not be covered by the participation exemption in Section 13(1) of CITA for the following reasons:

(a) there is "no risk of double taxation", because Natland Investment is the only entity to receive compensation;[867] and

(b) the causality requirement between the benefit and the parent company's shareholding in the subsidiary is not met, because the compensation awarded to Natland Investment is not derived from Natland Investment's shareholding in Energy 21, but rather it is "a direct consequence of the Czech Republic's breach of its international law obligations".[868]

614. As such, the Claimants take the view that the loss of the favorable tax treatment in the Netherlands is one of the consequences that the Claimants suffered from the introduction of the Solar Levy, for which the Respondent must compensate Natland Investment under international law.[869]

863 Submission, para. 165; **CER-Opmeer-1**, p. 4. *See* 2022 Hearing Transcript, Day 1, p. 78:11-20.

864 Submission, para. 160; **CER-Opmeer-1**, p. 5.

865 Reply, para. 458; **CER-Opmeer-2**, para. 5.

866 Submission, para. 161.

867 Reply, para. 461, *citing* **CER-Opmeer-2**, para. 24.

868 Submission, para. 163; Reply, para. 461, *citing* **CER-Opmeer-2**, para. 25. See also Reply, paras. 459-460.

869 Submission, para. 166.

615. Even if Natland Investment and E21 Holding could have concluded a price adjustment agreement at the time of the sale of Natland Investment's shareholding in Energy 21 in order to shield a possible arbitral award from negative tax consequences in the Netherlands,[870] such an agreement, the Claimants posit, would have merely shifted the adverse tax consequences to which the compensation award would be subject in the Netherlands from Natland Investment to Radiance, given that Radiance wholly owns E21 Holding.[871] Therefore, for the Claimants, the hypothetical price adjustment agreement does not change the fact that, absent the Solar Levy, no adverse tax consequences would have existed for either Natland Investment or Radiance.[872]

616. According to the Claimants, contrary to the cases relied upon by the Respondent in which the tribunals dismissed an award of tax gross-ups, they have discharged their burden of establishing that an arbitral award in Natland Investment's favor would necessarily be taxed in the Netherlands, as well as the tax rate applicable to the compensation award pursuant to Dutch law.[873]

617. In light of the foregoing, the Claimants request that the losses of Natland Investment and Natland Group which they are claiming collectively and would be payable to Natland Investment be grossed-up by:

> multiplying the portion of the losses up to EUR 245,000 by 100/85 and the sum exceeding EUR 245,000 (*i.e.*, EUR 6.81 million) by 100/75. This will lead to an amount (before pre-award interest) of EUR 9.36 million, which corresponds to CZK 246.3 million.[874]

618. Notwithstanding, recognizing the uncertainties and complexities in tax obligations, the Claimants submit that they are "willing to limit their request, asking the Tribunal to order that any damages that might be awarded to Natland Investment shall be grossed [up] by a sum corresponding to the amount of taxes that will be charged to those damages in the Netherlands".[875]

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870 The Claimants note that, in the absence of any indication as to the type of agreement Natland Investment and Energy 21 could have concluded, as well as its terms and its effects on the tax regime applicable to the compensation award, the Respondent cannot escape its international law obligation to make the Claimants "whole" based on a "completely hypothetical scenario". *See* Reply, para. 451.

871 Reply, paras. 453-454.

872 Reply, para. 455.

873 Reply, paras. 443-448, *referring to Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 485 (**Ex. RLA-17**) (hereinafter "***Mobil v. Canada***"); *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004, para. 367 (**Ex. RLA-363**) (hereinafter "***CSOB v. Slovakia***").

874 Submission, para. 167.

875 Reply, para. 464.

2. The Respondent's Position

619. The Respondent rejects the Claimants' assertion that Natland Investment is entitled to a tax gross-up under international law.[876] Pointing out that the Claimants have failed to identify a single investor-State tribunal that has made such an award, the Respondent asserts that tribunals have rejected tax gross-up requests as a matter of law and international arbitration practice, rather than because a claimant had failed to carry its burden of proof.[877]

620. In any event, the Respondent submits that the Claimants have failed to establish that the Solar Levy was the actual cause of any adverse tax consequences that may accrue to Natland Investment in the Netherlands.[878] In this respect, the Respondent highlights the concession made by the Claimants and Mr Opmeer that Natland Investment could have entered into a price adjustment agreement with E21 Holding that would have removed completely the possibility of negative tax consequences in the Netherlands.[879] Considering the timing of the Notice of Arbitration, the Respondent avers that "[Natland Investment] should have been fully aware of the possibility that a tribunal could eventually issue an award of damages in its favor, relating to its shareholding in Energy 21".[880] As such, any allegedly adverse tax consequences that may accrue to Natland Investment in the Netherlands, the Respondent argues, would be attributable to Natland Investment's "own choices and (in)actions", not to any conduct by the Respondent.[881]

621. For the Respondent, the request for a tax gross-up is speculative, because "the Dutch tax authority could plausibly find that an award [in favor of Natland Investment], in fact, qualifies as 'benefits arising from a participation', and therefore is exempt from taxes in the Netherlands".[882] This would be more likely, the Respondent continues, if the award expressly stated that the damages had been calculated on the basis of the loss in the value of Natland Investment's shareholding in Energy 21.[883] In fact, the Respondent notes that Dutch case law and practice suggest that an award

876 Response, para. 289. *See generally* 2022 Hearing Transcript, Day 1, pp. 152:19-156:13.

877 Rejoinder, para. 160.

878 Response, para. 293; 2022 Hearing Transcript, Day 1, pp. 155:18-156:5.

879 Response, para. 293. Given this concession, the Respondent rejects the Claimants' assertion that it bears the burden of establishing the type of agreement that Natland Investment could have concluded to avoid such consequences. *See* Rejoinder, para. 162. *See also* 2022 Hearing Transcript, Day 1, p. 155:18-24.

880 Response, para. 293.

881 Response, para. 293; Rejoinder, para. 155(b).

882 Response, paras. 294, 296. *See also* 2022 Hearing Transcript, Day 1, p. 154:17-23.

883 Response, para. 296.

of compensation would be exempt from taxes in the Netherlands pursuant to the participation exemption in Section 13(1) of CITA.[884]

622. As to the Claimants' request that the Tribunal order the Respondent to pay an unquantified amount in light of the uncertainties and complexities in tax obligations, the Respondent considers that such proposal would be unworkable, because:

(a) it would render the specific amounts in the award indeterminate and thus likely unenforceable;

(b) it would disincentivize Natland Investment from seeking potentially applicable offsets that could minimize its tax liability in the Netherlands; and

(c) there would be no mechanism for the Czech Republic to ensure whether Natland Investment has availed itself of all of its rights under Dutch law to limit the amount of its tax liability (if any).[885]

623. According to the Respondent, any tax liability by a claimant in its home jurisdiction would not be a proximate consequence of any act or omission by the respondent State.[886] In this respect, the Respondent contends that tribunals have consistently declined to order tax gross-ups in relation to taxes payable in a jurisdiction other than the respondent State.[887] Therefore, the Respondent maintains that there is no basis in international law for the Tribunal to order the Respondent to offset the cost of Natland Investment's potential tax bill to another sovereign.[888]

E. INTEREST

624. Should damages be awarded, the Parties agree that the pre-award interest should be calculated as of 1 January 2011 and 1 January 2014, i.e., the dates on which the Respondent respectively introduced the Solar Levy. The Parties disagree, however, on the applicable interest rates and whether an enhanced post-award interest rate is warranted.

1. The Claimants' Position

625. The Claimants submit that, in accordance with Article 26(8) of the ECT, they are entitled to (i) pre-award interest accrued from each of the Valuation Dates until the date of the final award

884 Rejoinder, para. 161; Expert Report of Professor Stef van Weeghel, 20 April 2022 (hereinafter "**RER-van Weeghel**"), paras. 17(a), 18, 26-33, 43.

885 Rejoinder, para. 157.

886 Rejoinder, para. 163.

887 Response, para. 292, *referring to Mobil v. Canada*, para. 485 (**Ex. RLA-17**); *CSOB. v. Slovakia*, para. 367 (**Ex. RLA-363**); Rejoinder, para. 159. *See also* 2022 Hearing Transcript, Day 1, p. 154:1-8.

888 Response, para. 292.

and (ii) post-award interest accrued from the date of the final award until the date of the full payment of the amounts indicated therein.[889]

(a) Pre-award interest

626. The Claimants propose that the pre-award interest rate be based on the yield on a zero-coupon bond issued by the Czech Republic at each of the two Valuation Dates (3.975% and 2.266%, respectively) in line with the recent arbitral decisions in RES cases in which tribunals adopted the yield of the host State government's bonds or an interbank rate with a premium as the basis of the calculation of the interest.[890]

627. For the Claimants, compensating a claimant for its financial disadvantage caused by the Respondent is not the exclusive function of interest.[891] Rather, as recognized by investment tribunals, the "prevention of the debtor's unjust enrichment" should additionally be considered.[892] Therefore, an interest based on the rate of the host State's bonds would help "to avoid a situation where the withholding of money is more advantageous for the State than the prompt payment".[893]

628. Observing Article 13(1) of the ECT, which provides interest to be set at "a commercial rate established on a market basis", to be instructive,[894] the Claimants note that an interest rate based on the yield on a respondent's government bonds had been held by tribunals in RES cases to fall within the meaning of Article 13(1) of the ECT.[895] By contrast, the Claimants consider that Article 5(1) of the Cyprus-Czech Republic BIT does not offer relevant guidance in the present case, because (i) the BIT does not apply to all four Claimants; (ii) the interest rate provided therein (i.e., six-month London Interbank Offered Rate "**LIBOR**") applies only in cases of lawful

889 Submission, paras. 170, 184.

890 Submission, paras. 173-175, *referring to Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 665 (**Ex. CLA-230**) (hereinafter "***Masdar v. Spain***"); *Antin v. Spain*, para. 733 (**Ex. CLA-189**); *SolEs v. Spain*, para. 558 (**Ex. CLA-235**); *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Award, 18 December 2020, para. 133 (**Ex. CLA-245**) (hereinafter "***RWE v. Spain***"); Reply, para. 476. *See also* 2022 Hearing Transcript, Day 1, p. 76:20-22.

891 Reply, paras. 471-472.

892 Reply, para. 472, *citing* I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, (2017), para. 6.10 (**Ex. CLA-243**); Reply, para. 473, *referring to Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, para. 101 (**Ex. RLA-334**) (hereinafter "***CDSE v. Costa Rica***").

893 Reply, para. 475, *citing* I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, (2017), para. 6.132 (**Ex. CLA-243**).

894 Reply, para. 480.

895 Reply, para. 481.

expropriation as opposed to treaty violations, which are in fact much "more egregious"; and (iii) LIBOR was discontinued at the end of 2021 and no longer applies.[896]

629. As to the "fairness" of the interest rates,[897] the Claimants reject the Respondent's assertion that the Claimants' proposed rates are substantially inflated, explaining that the Euro six-month LIBOR[898] with a 2% or 4% premium (as applied by ECT tribunals in other solar cases) is "close to or even higher" than the 3.975% proposed by the Claimants.[899] The Claimants further observe that their proposed rates are much lower than the default interest rates under Czech law (i.e., 7.75% as at 1 January 2011 and 8.05% as at 1 January 2014).[900]

630. The Claimants contest the Respondent's proposal to apply the Prague Interbank Offered Rate (the "**PRIBOR**").[901] In their view, PRIBOR does not reflect either of the Parties' cost of funding; rather, PRIBOR only demonstrates "the very low rates at which banks extend overnight lending to one another".[902]

(b) Post-award interest

631. Rejecting the Respondent's assertion that the "usual practice" or "norm" is for tribunals to order post-award interest at the same rate as pre-award interest, the Claimants contend that a rise in the rate of post-award interest has been endorsed by tribunals in recent RES cases, the ICJ, and legal scholars.[903] Accordingly, the Claimants seek post-award interest from the date of the final award

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896 Reply, paras. 479-480, 486.

897 *See* Reply, paras. 482-483.

898 The Claimants consider that the Euro six-month LIBOR, instead of the US Dollar six-month LIBOR, is more appropriate in this case because of the relationship between Cyprus and the Czech Republic. *See* Reply, para. 487.

899 Reply, para. 487.

900 Reply, para. 488.

901 Reply, para. 479.

902 2022 Hearing Transcript, Day 1, pp. 76:24-77:3; 2022 Hearing, Claimants' Opening Presentation, slide 129.

903 Submission, paras. 188-191, 195, *referring to Eiser Infrastructure Limited and Energía Solar Luxembourg S.À.R.L. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 478 (**Ex. CLA-238**) (hereinafter "***Eiser v. Spain***"); *Masdar v. Spain*, para. 665 (**Ex. CLA-230**); *Foresight Luxembourg Solar 1 S.Á.R.L., et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018, para. 546 (**Ex. CLA-237**) (hereinafter "***Foresight v. Spain***"); *Watkins Holdings S.à r.l. et al. v. The Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, paras. 746-747 (**Ex. CLA-233**) (hereinafter "***Watkins v. Spain***"); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment, 2 February 2018, I.C.J. Reports 2018, paras. 153-155 (**Ex. CLA-254**) (hereinafter "***Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)***"); I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, (2017), para. 6.262 (**Ex.**

until full payment of the amounts determined therein at the rate of pre-award interest plus 2%, compounded annually, or alternatively, the ten-year yield of the Czech zero-coupon bond on the date of the final award.[904]

632. The Claimants submit that an award of enhanced post-award interest is appropriate and justified in this case, because there is a "concrete risk" that the Respondent might refuse to comply with any damages award issued in the Claimants' favor.[905] By way of example, the Claimants note that the Respondent brought an unsuccessful challenge to the jurisdictional findings of the Partial Award before the Swiss Federal Tribunal and it is likely to solicit the Commission's intervention invoking Article 107 of TFEU.[906] Consequently, the Claimants maintain their request for a higher post-award interest in order to encourage the Respondent's prompt compliance with the final award, rather than to serve a punitive function.[907]

633. In response to the Respondent's argument that Article 26(8) of the ECT does not authorize an award of higher post-award interest, the Claimants clarify that the provision prescribes a tribunal's power to award interest to the damaged party in addition to compensation, but it does not prohibit "multiple awards of interest".[908] The Claimants add that this is confirmed by tribunals who have awarded pre- and post-award interest rates separately under the ECT.[909]

2. The Respondent's Position

634. At the outset, the Respondent submits that no interest is warranted, because the Claimants are not entitled to any damages in this arbitration.[910] Even if the Tribunal were to award damages, the Respondent argues that interest should not be awarded on the terms proposed by the Claimants.[911]

CLA-243); Reply, para. 493, *referring to* S. Ripinsky and K. Williams, *Damages in International Investment Law*, (2016), pp. 388-389 (**Ex. CLA-244**); Reply, paras. 492-493.

904 Submission, para. 196; Reply, para. 502; 2022 Hearing Transcript, Day 1, p. 77:10-19.

905 Reply, para. 496.4; 2022 Hearing Transcript, Day 1, p. 77:15-19.

906 Submission, para. 193; Reply, para. 498.

907 Submission, para. 186; Reply, para. 495.

908 Reply, paras. 499-500.

909 Reply, para. 501.

910 Response, para. 298.

911 Response, para. 298.

(a) Pre-award interest

635. In the Respondent's view, the appropriate pre-award interest rate should be calculated based on the six-month PRIBOR, i.e., an average rate at which banks are willing to lend Czech Koruna to other banks, for the following reasons.[912]

636. *First*, the Respondent submits that the appropriate interest should be "risk-free", because interest is not intended to compensate a claimant for a risk that it did not bear.[913] Considering that the yield on the Czech zero-coupon bond includes a premium over the risk-free rate to compensate for the *ex ante* risk of sovereign default and that the Claimants have not borne such a risk in connection with the damages they seek in this arbitration, the Respondent argues that the interest-rate benchmark proposed by the Claimants would be inappropriate.[914]

637. *Second*, the Respondent contends that the six-month PRIBOR rate aligns with the guidance offered by the ECT and the Cyprus-Czech Republic BIT.[915] Noting that the Cyprus-Czech Republic BIT directs the States to pay interest based on the six-month LIBOR in cases of expropriation, the Respondent observes that such a rate is instructive, because it reflects a considered view that an established interbank offered rate is an appropriate "risk-free" interest rate for damages arising from certain treaty violations by the host State under the BIT.[916]

638. In view of the fact that the Claimants are requesting damages denominated in Czech Koruna and that the Claimants intended to be, and were, short-term investors, the Respondent submits that an interest rate based on the six-month PRIBOR fixed as of the date of the applicable treaty violation (i.e., 1.56% in January 2011 and 0.48% in January 2014) would be reasonable.[917] In support of its contention, the Respondent points out that investment tribunals have often adopted interbank offered rates, including six-month rates, as the appropriate interest rate.[918]

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912 Response, para. 300.

913 Response, para. 302.

914 Response, para. 302.

915 Response, para. 303.

916 Response, paras. 303-304, *referring to* Cyprus-Czech Republic BIT, Art. 5.1 (**Ex. C-2**); Rejoinder, para. 142.

917 Response, para. 305.

918 Response, para. 304, *referring to BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Award, 25 January 2021, paras. 62, 76 **(Ex. RLA-340)** (hereinafter "***BayWa v. Spain***"); *Cube Infrastructure v. Spain*, paras. 536-539 (**Ex. CLA-263**).

639. *Third*, the Respondent asserts, "considerations of fairness" must be applied when the Tribunal exercises its judgment in setting interest rates based on the circumstances of the case.[919] Therefore, in the Respondent's view, it would not be fair to apply the inflated interest rate proposed by the Claimants (i.e., nearly nine times the relevant six-month LIBOR) in circumstances in which a significantly lower rate would have applied if the Respondent had engaged in expropriation, which is "a more egregious act" than the regulatory FET violation found in this case.[920]

640. *Lastly*, the Respondent denies that it was enriched by the Solar Levy, given that the Solar Levy "*reduce*[d] revenue outflow as opposed to raising revenue for the State" as found by the Tribunal in the Partial Award.[921] Even assuming *arguendo* that the reduction in the revenue could be characterized as enrichment, such reduction, according to the Respondent, was "a reasonable, proportionate, and justified measure to mitigate the serious consequence of the solar boom, and to reduce the burden of such boom on electricity consumers".[922] Conversely, the Respondent takes the view that the Claimants would be unjustly enriched if they were to be granted an award of damages with an inflated interest rate that reflects a risk that they did not bear.[923]

641. According to the Respondent, the fact that other tribunals in RES cases found it appropriate to award interest based on the host-State's sovereign bond rate (or an interbank rate plus a premium) does not indicate that the Tribunal in this arbitration must follow the same approach, where doing so would not be appropriate in the circumstances of this particular case.[924]

(b) Post-award interest

642. The Respondent argues that post-award interest should be calculated based on the same rate as the pre-award interest rate.[925] This is because "interest has [a] purely compensatory, not punitive function".[926]

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919 Response, para. 301(ii)-(iii), *citing CDSE v. Costa Rica*, para. 103 (**Ex. RLA-334**).

920 Response, para. 306; Rejoinder, para. 143.

921 Rejoinder, paras. 139-140, *citing* Partial Award, para. 257 [emphasis in original].

922 Rejoinder, para. 140.

923 Rejoinder, para. 141.

924 Response, para. 301(ii); Rejoinder, fn. 494.

925 Response, para. 310.

926 Response, para. 309, *citing* S. Ripinsky and K Williams, *Damages in International Investment Law*, *Interest*, (2016), p. 363 (**Ex. CLA-244**).

643. According to the Respondent, the Claimants have failed to substantiate why the Tribunal should deviate from the "norm" in investor-State arbitration of awarding a single rate for pre- and post-award interest.[927] In this respect, the Respondent submits that the post-award interest at the same rate as pre-award interest would serve as sufficient incentive for the Respondent to comply promptly with any award of damages.[928] A party's anticipated pursuit of lawful post-award relief, the Respondent further asserts, does not constitute a valid basis for penalizing that party through an award of enhanced post-award interest.[929]

644. The Respondent adds that an enhanced post-award interest rate would be inconsistent with Article 26(8) of the ECT, which provides only that an arbitral award "may include an award of interest", not multiple awards of interest.[930]

F. THE TRIBUNAL'S ANALYSIS ON QUANTUM

1. Valuation Methodology, Quantification, and Damage Allocation

645. As explained in paragraph 318, both Parties agree, as is widely accepted in international law, that damages resulting from the breach found by the Partial Award should be determined based on the principle of full reparation.[931] Using the terms of the PCIJ in the *Factory at Chorzów* case, this means that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[932]

646. This means that, in order to establish the quantum of any compensation for the Respondent's breach of the fair and equitable treatment standard, the Tribunal must first assess the situation which would have existed "in all probability", had the Solar Levy not been enacted. In doing so, the Tribunal must also consider the lawful measures that could have affected the minimum level of revenue that the Respondent undertook to guarantee.

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927 Response, para. 309; Rejoinder, paras. 145, 148.

928 Response, para. 310; Rejoinder, para. 146.

929 Response, para. 310; Rejoinder, para. 147.

930 Response, para. 311 [emphasis added by the Respondent].

931 Submission, para. 67; Response, para. 65.

932 *Case Concerning the Factory at Chorzów (Germany v. Poland)*, p. 47 (**Ex. CLA-118**).

647. In Section V.F.3, the Tribunal has explained that this specifically refers to the "review and control under EU State aid rules applied by the Commission"[933] that could still have happened in the but-for scenario. In this regard, the Tribunal has concluded that (i) in the but-for scenario, the Commission would have "in all probability" considered the original RES scheme as State aid and (ii) the Claimants, as EU investors, could and should have known this.

648. The Tribunal had already held that this conclusion did not imply that the Claimants should be awarded zero damages.[934] The evidence on the record suggests otherwise, since (i) the Commission, while reviewing the amended RES scheme, concluded that it was compatible State aid under the consideration that an IRR provided to the investors ranging from 6.3% to 8.4% was reasonable;[935] (ii) the Solar Levy had the effect of reducing the IRR of certain PV plants even below 8.4%; and (iii) the Commission could have deemed, for example, a higher IRR as reasonable, considering the longer service life of the PV plants.

649. Both Parties agree, up to a certain point, that the but-for approach is an appropriate methodology to establish the quantum of the compensation that the Claimants should be awarded. However, neither has included in its calculation the impact of the Commission's review and control under State aid rules that, in the Tribunal's view, was more likely than not to have occurred, had the Solar Levy not been imposed.

650. As a consequence, using the Tribunal's discretion to determine the quantum of the damages under the widely accepted full reparation principle, the Tribunal will calculate the amount of the compensation considering the data provided by the Parties and the Commission's review and control that would, "in all probability", have occurred in the but-for scenario.

651. The Tribunal's discretion when quantifying damages is illustrated in the *Factory at Chorzów* case itself, where the Court was faced with the difficult task of an intricate valuation of complex facts:

> The Court does not fail to appreciate the difficulties presented by these two questions, difficulties which are however inherent in the special case under consideration, and closely connected with the time that elapsed between the dispossession and the demand for compensation, and with the transformations of the factory and the progress made in the industry with which the factory is concerned. **In view of these difficulties, the Court considers it preferable to endeavor to ascertain the value to be estimated by several methods, in order to permit a comparison and if necessary, of completing the results of the one by those of the others. The Court, therefore, reserves every right to review the valuations referred to in the different formulae; basing itself on the results of the said valuations and of facts and documents submitted to it**, it will then proceed to determine

933 Partial Award, para. 419.

934 *See* Section V.F.3.

935 Decision (**Ex. R-367**).

> the sum to be awarded to the German Government, in conformity with the legal principles set out above.[936]

652. The approach adopted in *Factory at Chorzów* has been reaffirmed by several tribunals over the years. For example, the *Burlington v. Ecuador* tribunal made express reference to the case:

> 329. The *Chorzów* case settled thereafter, with the result that we do not know how the Court would have determined the amount of damages. However, three fundamental conclusions can be drawn from the Court's ruling: (i) under the full reparation principle, damages should be a substitute for restitution that has become impossible; (ii) because damages must replace restitution, they should be valued on the date on which compensation is awarded; and (iii) **tribunals have full discretion to assess the valuations for purposes of determining the amount to be awarded**.
>
> […]
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> 453. In addition, it is well established that, once the existence of damage is established, the Tribunal has wide discretion to determine its quantum. The Tribunal is satisfied that using the current functionalities contained in the Updated Model allows it to quantify Burlington's losses with reasonable certainty, even if it defers the starting date of new drilling to September 2009. Specifically, the Tribunal has considered that the deferral of the start of new drilling shifts the cash flows resulting from new wells forward approximately 1.5 years (from January 2008 to September 2009).[937]

653. Another example is found in *Masdar v. Spain*, a case also involving a breach of the FET standard under Article 10(1) of the ECT, where the tribunal held:

> 578. In this regard, the Tribunal disagrees with Respondent's criticism of Brattle's two-step income-based calculation involving reliance on actual data and assumptions for the measurement of the (undiscounted) Lost Historical Cash Flows and the Lost Future Cash Flows. As discussed above, the full reparation standard is intended to put the injured party in the position in which it would have found itself, but for the wrongful act. **As other tribunals have found**, and as Claimant submitted in its Memorial, **to fulfil that aim, tribunals enjoy a wide margin of discretion as to which valuation method they adopt to quantify the compensation due to the injured party**. In the view of the Tribunal, Brattle's approach of using ex post information to calculate Lost Historical Cash Flows and ex ante information to calculate Lost Future Cash Flows is appropriate […].[938]

654. This Tribunal's discretion does not extend to permit the award of something other than full compensation based on "equitable" principles. In *ESPF v. Italy*, the tribunal expressly denied this possibility:

> 858. […] The Tribunal understands the Respondent's position to be that since the measures did not completely wipe out the value of the Claimants' Investments and, in fact, the Investments continued to be profitable after the measures, which were passed for a public purpose, the Tribunal should award the Claimants something less than full compensation. This is contrary to the fundamental customary international principle of full compensation for wrongful acts. **The Tribunal's discretion in estimating the**

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936 *Case Concerning the Factory at Chorzów (Germany v. Poland)*, pp. 53-54 (**Ex. CLA-118**) [emphasis added].

937 *Burlington v. Ecuador*, paras. 329, 453 (**Ex. CLA-229**) [emphases added].

938 *Masdar v. Spain*, para. 578 (**Ex. CLA-230**) [emphases added].

> **amount of damages needed to provide full compensation does not extend to awarding damages that amount to less than full compensation**.[939]

655. The Tribunal thus agrees with the Respondent's assertion that it cannot engage in an *ex aequo et bono* determination.[940] The use of discretion does not mean an exercise of judgement without rational foundations and analysis.

656. In order to establish the quantum of the compensation considering the "review and control" that would have happened "in all probability" in the but-for scenario, the Tribunal will apply the following steps:

(a) determination of an IRR that, on average, and under the specific circumstances of the case, would "in all probability" have been deemed reasonable under State aid rules;

(b) identification of those PV plants which had a lower IRR than that determined in the previous step (a) as a consequence of the Solar Levy;

(c) estimation of the cash flows that would have guaranteed the PV plants an IRR without the impact of the Solar Levy, but considering the IRR determined in the first step as a "ceiling" (Counterfactual Scenario);

(d) estimation of the difference between the cash flows determined in the previous step (c) and the projected cash flows with the application of the Measures (Factual Scenario) for each period; and

(e) estimation of the present value of the difference previously calculated, considering the applicable cost of capital at each Valuation Date.

657. For the *first step*, as explained in Section V.F.3, the Tribunal considers that in the but-for scenario, having regard to the specific circumstances of the Claimants' PV plants, it would be reasonable to assume that a somewhat higher average IRR would have been acceptable to the European Commission, so far as those PV plants were concerned.

658. The Commission's decision on the amended RES scheme considered that an IRR ranging between 6.3% and 8.4% was reasonable, because it was "in line with similar photovoltaic

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939 *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020, para. 858 (**Ex. CLA-232**) [emphasis added].

940 Rejoinder, para. 13(n).

installations under similar conditions observed in other EU Member States".[941] In the particular case of PV plants, as previously observed, the Commission considered several plants with a service life of 15 years, as noted in the footnote to Table 1:[942]

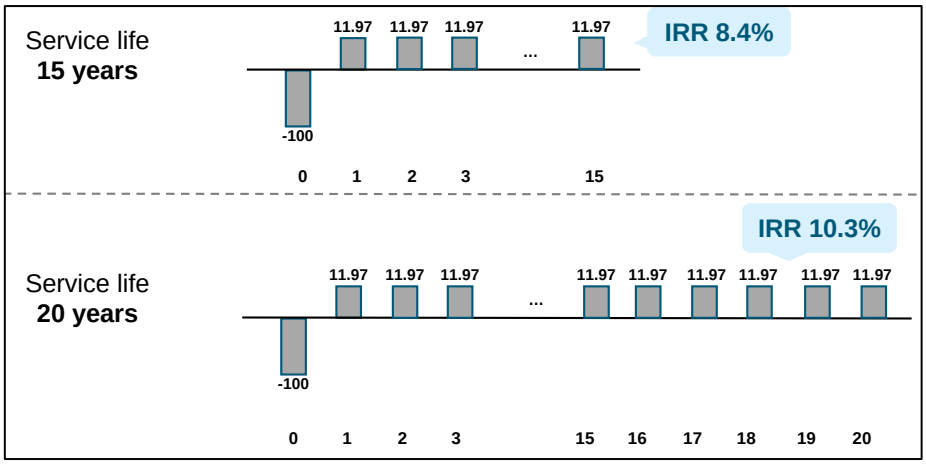
Table 1: Service life of renewable installations

Technology Type	Service life in years
Hydro	30
Photovoltaic	20[1]
Wind	20
Biogas	20[1]
Biomass	20
Geothermal	20

[1]15 years for installations commissioned by 31.12.2007

659. The Claimants' PV plants, however, had a service life ranging from 20 to 21 years.[943] As such, following the economic principle that projects with a longer service life tend to enjoy a higher profitability, the Tribunal considers that a higher IRR range would have been deemed reasonable by the Commission in the but-for scenario.

660. In order to estimate this range, the Tribunal takes into consideration how much an IRR can increase when comparing a 15-year project to a 20-year project. The following example shows how much this IRR can vary:



Note 1: IRR estimate assumes the following: (i) project will continue to receive the same cash flow during the following years; (ii) project receives constant annual payments proportional to the investment and the expected IRR of the initial project; and, (iii) investment levels remain constant given the change in service life.
Note 2: Conclusions remain constant despite some change in the level of initial investment in both service life scenarios.

941 Decision, para. 117 (**Ex. R-367**).

942 Decision, Table 1 (**Ex. R-367**).

943 As shown by the number of years considered by Mr Edwards and Mr Peer in order to calculate the PV plants' cash flows. *See* Cash flow impacts of the Amending Measures, Cash flow impact of Measures (**Ex. JER-1**).

661. In the Tribunal's view, this does not mean that this example of a 10.3% IRR would have necessarily been considered reasonable by the Commission under State aid rules. The Tribunal prefers to take a conservative approach for the following reasons: (i) the Commission's decision on the amended RES scheme also analyzed some RES installations with a service life of 20 years; (ii) the Commission's decision considered some exceptions that exceeded the range; and (iii) the but-for analysis is an "in all probability" one.

662. Consequently, the Tribunal considers that an IRR of 9.4% for the Claimants' PV plants is a reasonable and conservative parameter for the but-for scenario.

663. For the *second step*, the Tribunal will primarily rely on the conclusions submitted by Mr Edwards and Mr Peer in their Joint Expert Report, which the Tribunal found to be of considerable assistance on this key issue. The following table drawn from their report summarizes the IRR calculations presented for each individual PV plant requested by the Tribunal and their respective cash flows:[944]

	Mr Peer	**Mr Edwards**
No Measures Scenario	Range: 9.9% to 17.9%	Range: 8.2% to 17.3%
	Collective: 12.7%	Collective: 12%
Other Measures Scenario	Range: 9.0% to 15.9%	Range: 7.4% to 15.1%
	Collective: 11.5%	Collective: 10.7%
All Measures Scenario	Range: 7.0% to 13.8%	Range: 6.3% to 12.7%
	Collective: 9.8%	Collective: 9.1%

664. Regarding the experts' disagreements, the Tribunal considers that Mr Edwards' approach is more reliable, insofar as (i) it includes relevant expenses such as the "land purchase costs" and "maintenance capital expenditure", which preclude an overestimation of financial returns, and (ii) it is based on evidence produced at the time of the events (the 2011 Forecasts).[945]

665. Accordingly, the Tribunal identifies the following sixteen PV plants as those that had their IRRs drop below 9.4% due to the Measures:

944 Joint Expert Report, para. 3.2.

945 Joint Expert Report, Annex B, paras. 5.11-5.22.

Plants	IRR
Držovice	6.33%
České Velenice	6.70%
Jarošov	7.14%
Rozvadov II A	7.21%
Tasov	7.66%
Velká nad Veličkou	7.76%
Určice IV	7.86%
Protivín	7.96%
Určice	8.13%
Pravčice	8.32%
Litenčice	8.51%
Hrušovany	8.64%
Bojkovice	8.72%
Dřínov	8.87%
Štítary	9.03%
Jaroslavice II	9.27%
Chropyně	10.01%
Stráž	10.04%
Divcice	10.26%
Milovice II	10.38%

IRR<9.4%

Note: IRR values correspond to the estimated IRR in the All amending measures scenario shown in Exhibit JER-002[946]

666. Had the Solar Levy not been enacted (the so-called "Other Measures Only Scenario")[947], their corresponding IRRs would have been higher:

PV Plant	Factual IRR (All amending measures)	Counterfactual IRR (9.4% or Other measures only)
39_Držovice	6.3%	8.3%
8_České Velenice	6.7%	7.4%
42_Jarošov	7.1%	9.3%
82_Rozvadov_II_A	7.2%	9.2%
5_Tasov	7.7%	9.4%
4_Velká nad Veličkou	7.8%	8.7%
38_Určice_IV	7.9%	9.4%
3_Protivín	8.0%	8.9%
26_Určice	8.1%	9.1%
74_Pravčice	8.3%	9.4%
10_Litenčice	8.5%	9.4%
11_Hrušovany	8.6%	9.4%
40_Bojkovice	8.7%	9.4%
20_Dřínov	8.9%	9.4%
28_Štítary	9.0%	9.4%
7_Jaroslavice_II	9.3%	9.4%

946 Calculations of IRRs, All amending measures (**Ex. JER-002**).

947 To ensure the individualization of the impact of the Solar Levy, the Tribunal has considered the IRRs calculated for the Other Measures Only Scenario.

667. For the *third step*, the Tribunal has estimated the cash flows that would have allowed the PV plants identified in the previous step to attain an IRR that excluded the impact of the Solar Levy. In this part of the analysis, the Tribunal considers a 9.4% IRR to be a reasonable "ceiling", as explained in the *first step*. As a consequence, if any PV plant would have had an IRR higher than 9.4% in the Other Measures Only Scenario, the Tribunal treats it as if it were 9.4% (as shown on the following chart):

PV Plant	Factual IRR (All amending measures)	Counterfactual IRR (9.4% or Other measures only)
39_Držovice	6.3%	8.3%
8_České Velenice	6.7%	7.4%
42_Jarošov	7.1%	9.3%
82_Rozvadov_II_A	7.2%	9.2%
5_Tasov	7.7%	9.4%
4_Velká nad Veličkou	7.8%	8.7%
38_Určice_IV	7.9%	9.4%
3_Protivín	8.0%	8.9%
26_Určice	8.1%	9.1%
74_Pravčice	8.3%	9.4%
10_Litenčice	8.5%	9.4%
11_Hrušovany	8.6%	9.4%
40_Bojkovice	8.7%	9.4%
20_Dřínov	8.9%	9.4%
28_Štítary	9.0%	9.4%
7_Jaroslavice_II	9.3%	9.4%

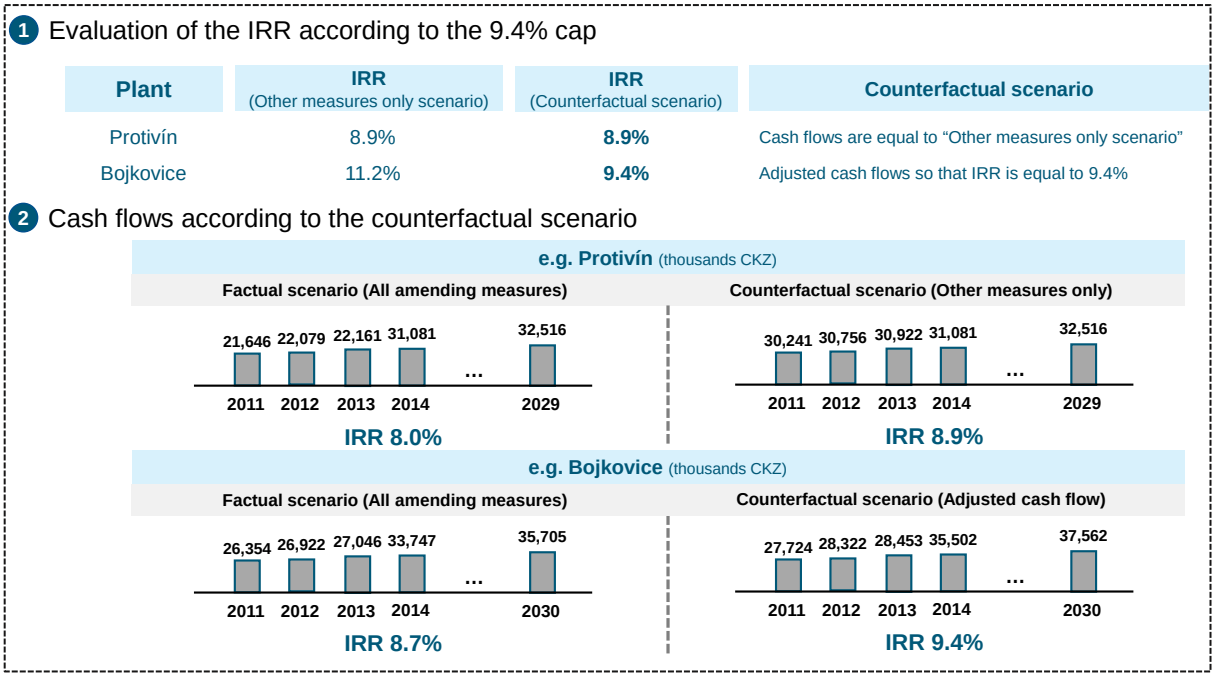
Note: Also shown in the sheet labeled as "Table 1" in the Final Award's Appendix

668. In order to estimate the amounts for this Counterfactual Scenario, as explained below in para. 670, the Tribunal has made its calculations based on the data provided by Mr Edwards.[948] Specifically, the Tribunal has adjusted the cash flows shown in Mr Edwards' spreadsheet, so that the resulting IRR for each PV plant corresponds to the IRR portrayed in the previous chart.[949]

669. The following chart provides an example of how this method was applied to each of the sixteen PV plants:

948 Calculations of IRRs (**Ex. JER-002**).

949 To estimate the adjusted cash flow, the Tribunal has multiplied all the cash flows from the "All measures scenario" with a numerical factor necessary for the IRR to result in 9.4%. This numerical factor was estimated using Microsoft Excel's Goal Seek function.



Note: This method was applied to each of the PV plants listed in the *second step*. The results are shown in the sheet labeled as "Damage Estimation" in the Final Award's Appendix.

670. The Tribunal's calculations of the counterfactual scenario of each plant are summarized in the following table (by aggregating the cash flows for the periods contained in each Valuation Date, expressed in CZK million):

PV Plant	1st Valuation Date (2011-2013)	2nd Valuation Date (2014-end)
3_Protivín	91.92	499.59
8_České Velenice	39.42	216.52
26_Určice	27.84	152.17
82_Rozvadov_II_A	19.04	111.18
4_Velká nad Veličkou	9.85	51.10
5_Tasov	70.88	512.22
74_Pravčice	66.32	478.76
38_Určice_IV	68.00	489.21
39_Držovice	81.50	480.22
42_Jarošov	46.65	274.18
10_Litenčice	18.21	138.35
11_Hrušovany	51.58	386.46
40_Bojkovice	84.50	606.97
20_Dřínov	50.38	363.09
28_Štítary	57.35	414.49
7_Jaroslavice_II	10.93	82.65

Note 1: Amounts shown are the simple sum of the cash flows within each scenario. They do not consider the time value of money.
Note 2: Values are shown in the sheet labeled as "Table 2" in the Final Award's Appendix.

671. For the *fourth step*, the Tribunal calculates the difference of cash flows in the Factual Scenario and the Counterfactual Scenario for each Valuation Date. The following table summarizes these calculations (expressed in CZK million):

PV Plant	1st Valuation Date (2011-2013)			2nd Valuation Date (2014-end)		
	Counterfactual	Factual	Difference	Counterfactual	Factual	Difference
3_Protivín	91.92	65.89	26.03	499.59	499.59	0.00
8_České Velenice	39.42	28.58	10.84	216.52	216.52	0.00
26_Určice	27.84	20.24	7.60	152.17	152.17	0.00
82_Rozvadov_II_A	19.04	13.50	5.54	111.18	97.98	13.20
4_Velká nad Veličkou	9.85	6.92	2.92	51.10	51.10	0.00
5_Tasov	70.88	61.95	8.93	512.22	447.66	64.56
74_Pravčice	66.32	61.15	5.16	478.76	441.48	37.28
38_Určice_IV	68.00	60.53	7.46	489.21	435.52	53.69
39_Držovice	81.50	59.11	22.39	480.22	426.83	53.39
42_Jarošov	46.65	33.65	13.00	274.18	243.18	31.00
10_Litenčice	18.21	16.89	1.32	138.35	128.32	10.03
11_Hrušovany	51.58	48.32	3.26	386.46	362.06	24.40
40_Bojkovice	84.50	80.32	4.18	606.97	576.97	30.00
20_Dřínov	50.38	48.34	2.04	363.09	348.40	14.69
28_Štítary	57.35	55.80	1.56	414.49	403.26	11.24
7_Jaroslavice_II	10.93	10.82	0.12	82.65	81.77	0.88

Note 1: Amounts shown are the simple sum of the cash flows within each scenario. They do not consider the time value of money. Amounts do not sum due to rounding.
Note 2: Values are shown in the sheet labeled as "Table 3" in the Final Award's Appendix.

672. Finally, for the *fifth step*, in order to estimate the present value of the difference previously calculated, the Tribunal conservatively applies the discount rate (WACC) proposed by Mr Edwards for each Valuation Date (11.1% for the First Valuation Date and 9.7% for the Second Valuation Date)[950]:

PV Plant	1st Valuation Date (2011-2013)	2nd Valuation Date (2014-end)
3_Protivín	21.15	0.00
8_České Velenice	8.81	0.00
26_Určice	6.17	0.00
82_Rozvadov_II_A	4.50	6.23
4_Velká nad Veličkou	2.38	0.00
5_Tasov	7.25	30.73
74_Pravčice	4.19	17.76
38_Určice_IV	6.06	25.62
39_Držovice	18.20	25.21

950 **CER-Edwards-1**, para. 2.15, Table 2-1.

42_Jarošov	10.57	14.64
10_Litenčice	1.07	4.95
11_Hrušovany	2.65	12.03
40_Bojkovice	3.39	14.30
20_Dřínov	1.66	6.99
28_Štítary	1.26	5.35
7_Jaroslavice_II	0.09	0.43
Total	**99.41**	**164.24**

Note 1: Amounts updated as of the first day of each Valuation Date.
Note 2: Values are shown in the sheet "Table 4" in the Final Award's Appendix.

673. In conclusion, the Tribunal determines that, had the Solar Levy not been enacted, in all probability under the EU's State aid regime, the PV plants would have obtained a higher IRR amounting to CZK 263.65 million. This is the result of adding the differentiated cash flows for each Valuation Date (CZK 99.41 million plus CZK 164.24 million).

674. The method followed by the Tribunal renders most of the remaining disagreements between the Parties on methodology without any effect on the quantum. However, the Tribunal considers that it is still important to refer to three points of discussion: (i) the reduction of damages; (ii) the use of two Valuation Dates; and (iii) the use of a different WACC between the factual and counterfactual scenarios.

675. As to the Respondent's argument that the Claimants are not entitled to damages in connection with the investments that they undertook at a time when they knew that it was likely that the Czech Government would enact measures that would have an impact on their plans to commission new solar installations, the Tribunal has already explained in Sections V.D.3 and V.E.3 that the Claimants cannot be deprived of compensation under the "assumption of risk" and "contributory negligence" argument.

676. Regarding the use of two Valuation Dates, the Tribunal notes that the Partial Award defined the Solar Levy as the "levy imposed on revenue of solar installations, introduced by Act No. 402/2010 Coll. for a period of three years for installations commissioned in 2009 and 2010, and extended, in reduced form, for installations commissioned in 2010 by Act No. 310/2013".[951]

677. Considering this definition, the Partial Award then established that "the imposition of the Solar Levy constituted a breach of the Respondent's FET obligation in Article 10 of the ECT";[952] "the imposition of the Solar Levy is in breach of the Respondent's obligation under Article 2(2) of the

951 Partial Award, p. vii.

952 Partial Award, para. 428.

Cyprus-Czech Republic BIT to accord Natland Group fair and equitable treatment";[953] and "the imposition of the Solar Levy constitutes a breach of the Respondent's obligation under Article 3(1) of the Netherlands-Czech Republic BIT to accord Natland Investment fair and equitable treatment".[954]

678. In other words, the Partial Award concluded that both the introduction of the Solar Levy by Act No. 402/2010 and its extension by Act No. 310/2013 constituted breaches of the Respondent's international obligations. As such, in the Tribunal's view, in order to establish a full reparation, it is necessary to assess how each of these acts has, independently, affected the Claimants' investments.

679. The Tribunal notes that Mr Peer accepted that "the first and second solar levies were two separate pieces of legislation and that they covered time periods that were mutually exclusive".[955] Consequently, as it was expressed during the Hearing, "if there are two breaches, there will be two separate calculations".[956]

680. Accordingly, the Tribunal concludes that it is necessary to establish the quantum of the compensation considering the effects on each Valuation Date, as it has done *supra*.

681. Nonetheless, in relation to the use of a different WACC between the Factual Scenario and the Counterfactual Scenario, the Tribunal notes that there is also a risk of double counting.

682. The Claimants have argued that it is necessary to consider a different WACC for each scenario at the first Valuation Date, because that is the only way to consider the impact of the variation of the perception of risk, which would also be a consequence of the Respondent's breach. However, the Claimants have failed to assess the perception of risk regarding the Commission's control and review that would have "in all probability" happened in the but-for scenario.

683. In consequence, the Tribunal cannot establish a concrete difference in the perception of risk on each scenario and, if it exists, how much of it can be attributed to the Respondent's breach. Therefore, the Tribunal does not apply a different WACC between the Factual and Counterfactual scenarios.

684. Finally, as to the damage allocation, following the Claimants' view, the Tribunal should consider (i) the Claimants' effective shareholding in Energy 21 at the relevant periods of time, and (ii)

953 Partial Award, para. 432.

954 Partial Award, para. 437.

955 2022 Hearing Transcript, Day 2, p. 166:16-23.

956 2022 Hearing Transcript, Day 2, p. 169:9-10.

that, in all probability, the PV plants would have obtained a higher IRR amounting to CZK 263.65 million (this is the result of adding the differentiated cash flows for each Valuation Date, CZK 99.41 million for the First Valuation Date plus CZK 164.24 million for the Second Valuation Date).

685. On this basis, the Tribunal allocates the amount calculated for the period 2011-2013 to Radiance (52.42%), GIGH (22.50%) and Capamera (20.08%) *pro rata*. For the period after 2014, considering its 94.3825% shareholding in Energy 21, compensation is allocated to Radiance :

Present value of difference (CZK millions)	
2011-2013	
Radiance	52.11
GIHG	22.37
Capamera	19.96
2014-end	
Radiance	155.02

Note: Values are shown in the sheet labeled as "Table 5" in the Final Award's Appendix.

686. This leads to a total, considering the compensation to the three Claimants for the two Valuation Dates, of CZK 249.46 million.

2. Tax Gross-up

687. The Tribunal notes that Claimants have not identified a single case in which tax gross-up was awarded, whereas the Respondent has identified at least three cases in which the tribunal specifically denied such an award.

688. In *Mobil Investments v. Canada*, the tribunal denied the tax gross-up request, because "it was not aware of a requirement under international law to gross up compensation as a result of tax considerations".[957]

689. In *CSOB v. Slovakia*, the tribunal also denied the tax gross-up request, explaining that "[i]ncome taxes are an act of government ('*fait du prince*') that are unrelated to the obligation of one party to fully compensate the other party for the harm done".[958] A similar approach was taken by the tribunal in *Rusoro Mining v. Venezuela*.[959]

957 Response, para. 292, *citing Mobil v. Canada*, para. 485 (**Ex. RLA-17**).

958 Response, para. 292, *citing CSOB v. Slovakia*, para. 367 (**Ex. RLA-363**).

959 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 854 (**Ex. RLA-364**).

690. Additionally, the Tribunal finds that, even if a tax gross-up could be recognized as part of the damages, Natland Investment's actions could have avoided the tax implications by including this factor in the sale of its shareholding on 4 August 2011. As the Claimants acknowledge, "[t]he situation could have been different […] if at the time of the sale of Natland Investment's participation in Energy 21 a price adjustment had been agreed with the buyer (E21 Holding) concerning potential prospective claims".[960]

691. Furthermore, the Tribunal agrees with the Respondent's view that the Claimants have not established with sufficient certainty that a damages award in favor of Natland Investment (now NIG) would, in fact, be taxed in the Netherlands, considering that there is also the possibility for it to be exempted under Section 13(1) of CITA.[961]

692. The Tribunal, therefore, finds that the Claimants have failed to meet their burden of proof and, as a consequence, it denies the tax gross-up request. This conclusion, however, does not change the fact that the Tribunal has established that the compensation awarded must only be paid to Capamera, as explained in paragraphs 304 and 305.

3. Interest

693. The Tribunal begins by noting that the Respondent has not questioned the Claimants' assertions that interest should be compounded on an annual basis. The Tribunal thus understands that both Parties agree on this matter, which is aligned with international practice.[962]

694. The Parties, however, disagree on (i) the applicable interest rate and (ii) whether the Tribunal should award higher post-award interest.

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960 Submission, para. 164, *referring to* **CER-Opmeer**, pp. 5-6.

961 Rejoinder, para. 161; **RER-van Weeghel**, paras. 17(a), 18, 26-33, 43.

962 *See Gemplus, S.A., SLP, S.A. et al. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, para. 16.26 (**Ex. CLA-129**); *Foresight v. Spain*, para. 544, (**Ex. CLA-237**); *Masdar v. Spain*, para. 665 (**Ex. CLA-230**); *Antin v. Spain*, paras. 733-734 (**Ex. CLA-189**); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, para. 949 (**Ex. CLA-246**); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award, 27 November 2013, para. 249 (**Ex. RLA-249**); *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, paras. 523-524 (**Ex. CLA-115**); *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina Sociedad Anónima v. The Republic of Argentina*, ICSID Case No. ARB/04/16, Award, 25 February 2016, para. 289 (**Ex. CLA-247**); *Burlington v. Ecuador*, paras. 539-540 (**Ex. CLA-229**); *Valores Mundiales, S.L. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, para. 822 (**Ex. CLA-248**); *Caratube v. Kazakhstan*, para. 1226 (**Ex. RLA-320**).

695. The Claimants argue that the pre-award interest rate should be based on the yield of a zero-coupon bond issued by the Czech Republic at each of the two Valuation Dates proposed.[963] Specifically, the Claimants posit that the Tribunal should consider the 12-year yield for the first Valuation Date (1 January 2011) and the 9-year yield for the second Valuation Date (1 January 2014), because that is the approximate period of time that would have elapsed between each Valuation Date and the final Award. In practical terms, this means a 3.975% interest rate as at 1 January 2011 and a 2.266% interest as at 1 January 2014.

696. In support of this argument, the Claimants have referred in particular to recent arbitral decisions in RES cases which adopted this approach: (i) *Masdar v. Spain*, where the tribunal applied a pre-award interest rate of 0.906% based on the yield on 3-year Spanish government bonds;[964] (ii) *Antin v. Spain*, where the tribunal applied an interest rate of 2.07% based on the yield on 10-year Spanish bonds;[965] (iii) *SolEs v. Spain*, where the tribunal applied an interest rate of 1.74% corresponding to the mean average of the yields on Spanish 10-year Treasury Bills;[966] (iv) *RWE v. Spain*, where the tribunal applied an interest rate of 2.07% based on the return on Spanish 10-year bonds;[967] and several more.[968]

697. Complementarily, the Claimants also rely on recent cases where the tribunal adopted an interbank rate increased by a premium: (i) *ESPF v. Italy*, where the tribunal applied the 12-month Euribor rate, plus 4.0%; (ii) *CEF Energia BV. V. Italy*, where the tribunal applied the annual LIBOR rate, plus 2%; and (iii) *Greentech v. Italy*, where the tribunal applied the annual LIBOR, plus 2%.

698. The Respondent, however, posits that the Tribunal should adopt interbank offered rates, as the tribunals did in *BayWa v. Spain* and *Cube Infrastructure v. Spain*.[969] Specifically, according to the Respondent, the interest rate should be based on the 6-month PRIBOR fixed as at each Valuation Date (i.e., 1.56% in January 2011 and 0.48% in January 2014).[970]

963 Submission, paras. 173-175.

964 *Masdar v. Spain*, para. 665 (**Ex. CLA-230**).

965 *Antin v. Spain*, para. 733 (**Ex. CLA-189**).

966 *SolEs v. Spain*, para. 558 (**Ex. CLA-235**).

967 *RWE v. Spain*, para. 133 (**Ex. CLA-245**).

968 Reply, para. 476. *See also* 2022 Hearing Transcript, Day 1, p. 76:20-22.

969 Response, para. 304, *referring to BayWa v. Spain*, paras. 62, 76 **(Ex. RLA-340)**; *Cube Infrastructure v. Spain*, paras. 536-539 (**Ex. CLA-263**).

970 Response, para. 305.

699. In the Tribunal's view, the Claimants have established that the current approach followed by tribunals in similar cases is to apply pre-award interest in a rate varying from 0.9% to more than 4%, either by applying the yield on the host State's bonds or an interbank rate with a premium.

700. Under this premise, the Tribunal finds it most appropriate to apply an interest rate similar to the yield of the Czech Republic's bonds. In particular, considering that almost 13 years have passed since 1 January 2011 (First Valuation Date), and that almost 10 years have passed since 1 January 2014 (Second Valuation Date), the Tribunal grants pre-award interest at the rates proposed by the Claimants on each Valuation Date. That is 3.975% for the First Valuation Date, to be compounded annually, and 2.266% for the Second Valuation Date, also to be compounded annually. As of 15 December 2023, an application of these interest rates on the difference previously calculated in Section VII.F.1, translates into the following compensation for each of the Claimants:

Present value of difference		Interests	Total amount (in CZK MM)
2011-2013			
Radiance	52.1089	34.2470	86.3559
GIHG	22.3665	14.6997	37.0662
Capamera	19.9608	13.1187	33.0795
2014-end			
Radiance	155.0242	38.6254	193.6496

Note: Values are shown in the sheet labeled as "Table 6" in the Final Award's Appendix.

701. This leads to a total, considering the compensation to the three Claimants, including pre-award interest, of CZK 350.1512 million.

702. Regarding post-award interest, the Claimants acknowledge that tribunals do not always award a higher post-award interest rate and that "there is no usual practice among investor-State tribunals".[971]

703. Nevertheless, the Claimants cite several recent cases where the tribunals increased the rate for post-award interest: (i) *Eiser v. Spain* where the tribunal increased the interest rate from 2.07% to 2.50%, (ii) *Masdar v. Spain* where the tribunal increased the interest rate from 0.906% to 1.6%; (iii) *Foresight v. Spain* where the tribunal increased the interest rate from 1.4% to 3.5%; (iv) *Watkins v. Spain* where the tribunal increased the interest rate from 1.16% to 2.16%; (v) *Costa*

971 Submission, paras. 191-194; Reply, para. 492.

Rica v. Nicaragua, where the tribunal increased the interest rate from 4% to 6%.[972] Additionally, the Claimants cite scholarly support for this approach.[973]

704. In summary, in the cases cited by the Claimants, the tribunals have increased the post-award interest rate in a range varying from 0.43% to 2.1%. Accordingly, the Claimants request a post-award interest augmented by 2%.

705. According to the Respondent, however, a higher post-award interest would constitute a punitive action that is not permitted under the full reparation principle.

706. In the Tribunal's view, that contention is not entirely correct. As stated by the tribunal in *Watkins v. Spain*, "awarding post-award interest serves the purpose of incentivizing compliance with the *terms* of the Award as expediently as possible".[974]

707. The Tribunal agrees with this approach. It considers that the circumstances of this case justify the application of an increased rate of post-award interest. In particular, the Tribunal observes that more than 12 years have passed since the Claimants filed for arbitration. It is in the interests of both Parties that this lengthy proceeding be brought to an end.

708. Nonetheless, the Tribunal considers that an increase of 2% over the pre-award interest rate would be excessive. The Tribunal grants an increase of 1.5% over the pre-award interest rate as post-award interest, which will also be compounded annually since the issuance of this Award.

VIII. COSTS

A. THE CLAIMANTS' POSITION

709. The Claimants submit that their recoverable costs in this arbitration are EUR 9,042,753.18 and USD 820,000.00 detailed as follows:[975]

I. MERITS PHASE

[972] Submission, paras. 188-189, *referring to Eiser v. Spain*, para. 478 (**Ex. CLA-238**); *Masdar v. Spain*, para. 665 (**Ex. CLA-230**); *Foresight v. Spain*, para. 546 (**Ex. CLA-237**); *Watkins v. Spain*, paras. 746-747 (**Ex. CLA-233**); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, paras. 153-155 (**Ex. CLA-254**); Reply, paras. 492-493.

[973] Submission, para. 190, *citing* I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, (2017), para. 6.262 (**Ex. CLA-243**); Reply, para. 493, *referring to* S. Ripinsky and K. Williams, *Damages in International Investment Law*, (2016), pp. 388-389 (**Ex. CLA-244**).

[974] *Watkins v. Spain*, paras. 746-747 (**Ex. CLA-233**).

[975] Claimants' Schedule of Costs, 16 December 2022.

A. ADVANCE ON FEES AND EXPENSES OF THE TRIBUNAL AND PCA	
Total (Advance on Fees and Expenses of the Tribunal and PCA)	**USD 440,000.00**
B. EXPERTS' FEES AND EXPENSES	
Charles River Associates	EUR 1,441,884.00
Compass Lexecon	EUR 530,541.83
Ernst & Young – Prague	EUR 289,984.25
Mr Conor Quigley, KC	EUR 32,484.04
PricewaterhouseCoopers – Prague	EUR 52,312.52
Total (Experts' fees and expenses)	**EUR 2,347,206.64**
C. COUNSEL LEGAL FEES AND EXPENSES	
ArbLit (including fees of Bonelli Erede Pappalardo until September 2013)	EUR 1,755,972.50
Fountain Court Chambers	EUR 79,327.15
bpv Braun Partners	EUR 1,508,180.21
Noerr s.r.o	EUR 61,149.40
Freshfields Bruckhaus Deringer	EUR 429,912.58
Glatzová & Co. s.r.o.	EUR 222,119.56
Total (Counsel Legal Fees and Expenses)	**EUR 4,056,661.40**
D. OTHER COSTS	
IPVIC's internal costs (including expenses of Messrs. Kunz, Raška, Wollner, Baudon, and Maleček as witnesses).	EUR 882,826.16
Translation services	EUR 151,236.57
Hearing services	EUR 3,727.02
Total (Other Costs)	**EUR 1,037,789.75**
TOTAL COSTS (MERITS PHASE)	**EUR 7,441,657.79** **USD 440,000.00**

II. QUANTUM PHASE	
A. ADVANCE ON FEES AND EXPENSES OF THE TRIBUNAL AND PCA	
Total (Advance on Fees and Expenses of the Tribunal and PCA)	**USD 380,000.00**
B. EXPERTS' FEES AND EXPENSES	
Mr Marcos Dracos	EUR 29,255.00
FSV Belastingadviseurs	EUR 41,139.17
FTI Consulting	EUR 784,280.72
Total (Experts' fees and expenses)	**EUR 854,674.89**
C. COUNSEL LEGAL FEES AND EXPENSES	
ArbLit	EUR 502,071.52
Of which relating to Respondent's challenge of Mr Beechey	*EUR 17,829.97*
Of which relating to Respondent's Achmea *Objection*	*EUR 50,000.00*
Of which relating to Respondent's applications concerning the Funding Agreement	*EUR 7,000.00*
Of which relating to Respondent's objection on the "Capamera issue"	*EUR 25,000.00*
Fountain Court Chambers	EUR 107,947.17
Rowan Legal	EUR 104,541.00
Total (Counsel Legal Fees and Expenses)	**EUR 714,559.69**
D. OTHER COSTS	
IPVIC's internal costs.	EUR 7,000.00
Hearing services	EUR 24,860.81
Total (Other Costs)	**EUR 31,860.81**
TOTAL COSTS (QUANTUM PHASE)	**EUR 1,601,095.39**
TOTAL COSTS	**EUR 9,042,753.18** **USD 820,000.00**

710. The Claimants argue that they are entitled to (i) the full costs of the merits phase; (ii) the full costs of the quantum phase; and in any case (iii) the costs of the Respondent's (a) challenge of

Mr Beechey, (b) *Achmea* Objection, (c) applications concerning the Funding Agreement, and (d) objection giving rise to the "Capamera issue".[976]

711. The Claimants cite Article 38 of the UNCITRAL Rules. They submit that "costs" includes the fees and expenses of the Tribunal, the PCA and the experts, as well as the Parties' costs of legal representation and assistance.[977] Article 40(1) of the UNCITRAL Rules then provides that the default rule for non-legal costs, which excludes the cost of legal representation and assistance, is that they are borne by the unsuccessful party, but the Tribunal is permitted to adopt a different approach if it considers it reasonable based on the "circumstances" of the case.[978] For legal costs, under Article 40(2) the Tribunal is granted broader discretion to apportion them in a reasonable manner having regard to the circumstances of the case.[979]

(a) The Claimants' entitlement to all costs of the *merits* phase

712. The Claimants submit that, on the merits, they prevailed on the most damaging of the challenged measures, namely, the imposition of the Solar Levy.[980] Therefore, the Claimants must be deemed to be the successful party under Article 40(1).[981]

713. Furthermore, the Claimants argue that the "circumstances" of the case, including (a) the Parties' conduct throughout the proceedings and (b) the complexity of the matter, warrant the application of the "costs follow the event" principle to both non-legal and legal costs.[982]

714. As to the Parties' conduct, the Claimants submit that all of their claims have been *bona fide*, that they endeavored to obtain an expeditious and cost-effective adjudication of the dispute, and that they adopted a proactive and cooperative approach towards the Respondent and the Tribunal.[983] In contrast, the Respondent has attempted to delay and hinder the adjudication, such as through: (i) demanding bifurcation of the proceedings; (ii) deliberately provoking the European

976 Claimants' Submission on Costs, paras. 2-3.

977 Claimants' Submission on Costs, para. 5.

978 Claimants' Submission on Costs, para. 6.

979 Claimants' Submission on Costs, para. 7.

980 Claimants' Submission on Costs, para. 11.

981 Claimants' Submission on Costs, para. 11.

982 Claimants' Submission on Costs, para. 12, *citing Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017 (**Ex. CLA-169**); *Nova Scotia Power Incorporated (NSPI) v. Bolivarian Republic of Venezuela*, Cost Order, 30 August 2010 (**Ex. CLA-170**). *See also* D. Caron, L. Caplan and M. Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (2006), pp. 951-954 (**Ex. CLA-167**).

983 Claimants' Submission on Costs, para. 13.

Commission's investigation into the Incentive Regime, resulting in both Parties having to devote considerable time and expense to State aid law, after which, and before the hearing of the merits, the European Commission's Decision debunked the Respondent's position and required the Parties to submit further *ad hoc* briefs; and (iii) failing to make one of its experts, Mr Radek Halíček available for the hearing on the merits, thus requiring his report to be struck from the record.[984]

715. As to the complexity of the matter, the Claimants argue that the factual and legal issues disputed by the Parties in the merits phase were novel and complex and that the Respondent was better placed to address them, because (i) the Claimants bore the burden of proof on most issues; and (ii) certain matters potentially raised issues of Czech law.[985]

716. With respect to the Respondent's argument that the Claimants should be denied recovery of their costs due to the cost-sharing provisions of the Funding Agreement, the Claimants note that: (i) they are claiming exclusively the costs incurred in connection with this arbitration; (ii) what they will do with any proceeds of the award is irrelevant to the issue of the Tribunal's determination of the allocation of costs.[986]

(b) The Claimants' entitlement to all costs of the *quantum* phase

717. The Claimants submit that, on the basis that the Tribunal will agree with their position on quantum, they should be awarded all costs of the *quantum* phase in accordance with the "costs follow the event" rule.[987]

718. If the Tribunal were to award damages significantly lower than the sums claimed, the Claimants argue that they should nonetheless be awarded *all* costs incurred in the quantum phase, based on the Parties' conduct. As to their own conduct, the Claimants note that they submitted *bona fide* claims, and strictly complied with the Tribunal's directions.[988]

719. In contrast, the Claimants allege that the Respondent attempted to use the *quantum* phase to re-argue issues conclusively decided in the Partial Award.[989] In particular, the Claimants argue that

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984 Claimants' Submissions on Costs, paras. 14-16.

985 Claimants' Submissions on Costs, para. 17.

986 Claimants' Submission on Costs, para. 33.

987 Claimants' Submission on Costs, para. 18.

988 Claimants' Submission on Costs, para. 20.

989 Claimants' Submission on Costs, para. 21.

the Respondent (i) raised the *Achmea* Objection as an attempt to reverse the Tribunal's findings on jurisdiction in the Partial Award, resuscitating arguments it had abandoned in the merits phase;[990] (ii) disregarded the finality of the Partial Award by ignoring various of the Tribunal's findings, suggesting cut-off dates, applicable laws and arguments that had previously been dismissed by the Tribunal;[991] and (iii) raised frivolous objections, such as concerning the Funding Agreement, repeatedly dismissed by the Tribunal,[992] and the "Capamera issue", objecting to the Claimants' request to amend the caption of the case, an objection which the Claimants argue was wrong in law and devoid of practical significance.[993]

(c) The Claimants' entitlement to certain other costs

720. If the Tribunal decides not to award Claimants at all, or only in part, the Claimants submit they should nonetheless be awarded the following legal costs:

(i) EUR 17,829.97 relating to the Respondent's challenge of Mr Beechey, dismissed by the Stockholm Chamber of Commerce.[994]

(ii) At least EUR 50,000.00 relating to the Respondent's *Achmea* Objection, declared inadmissible by this Tribunal.[995]

(iii) At least EUR 7,000.00 relating to the Respondent's applications concerning the Funding Agreement, which the Claimants allege were dismissed twice as irrelevant.[996]

(iv) At least EUR 25,000.00 relating to the Respondent's objection on the "Capamera issue", on the basis that it has no practical impact on the Claimants' claims.[997]

721. In addition, the Claimants argue that for items (ii), (iii) and (iv) above, they should also be awarded the corresponding non-legal costs, which would mean reimbursing the Claimants a portion (not lower than 20%) of the advances they paid to the PCA for the quantum phase.[998]

990 Claimants' Submission on Costs, para. 22.

991 Claimants' Submission on Costs, para. 23.

992 Claimants' Submission on Costs, para. 24, *citing* Procedural Order No. 12, 30 June 2022, paras. 3.14-3.19, Procedural Order No. 13, 25 October 2022.

993 Claimants' Submission on Costs, para. 25.

994 Claimants' Submission on Costs, para. 28, *citing* p. 3 of Claimants' Schedule of Costs, Stockholm Chamber of Commerce's letters to the Parties of 26 October 2018 and 9 November, 2018.

995 Claimants' Submission on Costs, para. 28, *citing* Decision on the admissibility of the Achmea Objection of 22 July 2021, para. 85.

996 Claimants' Submission on Costs, para. 28, *citing* Procedural Order No. 12, 30 June 2022, paras. 3.14-3-19, Procedural Order No. 13, 25 October 2022.

997 Claimants' Submission on Costs, para. 28.

998 Claimants' Submission on Costs, para. 29.

B. THE RESPONDENT'S POSITION

722. The Respondent seeks full recovery of all its costs and expenses incurred in this arbitration, amounting to **USD 8,270,148.48,** broken down as follows:[999]

A. ADVANCE ON FEES AND EXPENSES OF THE TRIBUNAL AND PCA	
PCA Advances on Costs through 16 June 2017	USD 440,000.00
PCA Advances on Costs June 2017 to August 2023	USD 380,000.00
Total (Advance on Fees and Expenses of the Tribunal and PCA)	**USD 820,000.00**
B. EXPERTS' FEES AND EXPENSES	
Ms Kelyn Bacon, KC	USD 27,325.00
Mr Wynne Jones, Frontier Economics	USD 112,045.00
Mr Michael Peer, KPMG	USD 111,802.34
Mr Radek Halíček, KPMG	USD 14,655.00
Mr Petr Kotáb, Dentons	USD 42,859.00
Mr Jirí Urban, KPMG	USD 120,235.37
Mr Kypros Ioannides, Deloitte	USD 36,759.04
Mr Michael Peer, Control Risks	USD 73,088.13
Prof. Stef van Weeghel, PWC	USD 44,669.92
Total (Experts' fees and expenses)	**USD 583,438.80**
C. COUNSEL LEGAL FEES AND EXPENSES	
1. COUNSEL FEES	
Arnold & Porter Kaye Scholer LLP through 16 June 2017	USD 1,750,382.00

[999] Respondent's Submission on Costs, Annex 1.

Arnold & Porter Kaye Scholer LLP, 16 June 2017 to October 2022	USD 2,948,648.99
Weil Gotshal & Manges, August 2011 to September 2015	USD 1,065,720.10
Weil Gotshal & Manges, September 2015 to May 2017	USD 317,982.00
Weil Gotshal & Manges, / Skils s.r.o. advokátní kancelář (formerly Weil Gotshal & Manges) June 2017 to October 2022	USD 283,547.47
Squire Patton Boggs LLP	USD 252,748.00
Mr Zachary Douglas	USD 18,055.79
Total (Counsel Legal Fees)	**USD 6,637,084.35**
2. COUNSEL EXPENSES	
Arnold & Porter Kaye Scholer LLP through 16 June 2017	USD 113,311.00
Arnold & Porter Kaye Scholer LLP, 16 June 2017 to 16 December 2022	USD 44,867.37
Weil Gotshal & Manges, August 2011 to September 2015	USD 37,849.27
Weil Gotshal & Manges, September 2015 to May 2017	USD 14,433.00
Weil Gotshal & Manges, / Skils s.r.o. advokátní kancelář (formerly Weil Gotshal & Manges) June 2017 to 16 December 2022	USD 2,959.59
Squire Patton Boggs LLP	USD 9,565.00
Total (Counsel Legal Fees)	**USD 222,985.23**
D. CLIENT AND WITNESS EXPENSES	
Client and Witness travel/testimony expenses through 16 June 2017	USD 3,954.18
Client and Witness travel expenses May 2022	USD 2,685.92
Total (Client and Witness Expenses)	**USD 6,640.10**
TOTAL COSTS	**USD 8,270,148.48**

723. The Respondent submits that when apportioning costs, the Tribunal should take account of the fact that, whilst the Claimants succeeded in some of their claims in the jurisdictional phase, in the merits phase, the vast majority of their claims were unsuccessful.[1000]

724. In addition, the Respondent submits that the Tribunal should bear in mind that the Claimants needlessly increased the cost of the proceedings through:[1001]

(a) failing to notify the Tribunal or the Respondent for four years that one of the Claimants had been dissolved; and actively obscuring the fact that the Claimants had formally relinquished their right to manage and control their claims, and a percentage of any proceeds therefrom;[1002]

(b) creating unnecessary issues by their attempt to introduce a new claimant party into the arbitration in 2021;[1003]

(c) withholding key materials despite being under an order to produce such materials;[1004]

(d) failing to be clear as to the amount of damages claimed, and on what basis, as well as making speculative and fanciful claims;[1005] and

(e) pursuing claims under the Netherlands BIT for nine years, only to contend in their final written pleading that such claims have "no practical significance" for the case, as well as repeating "in full" factual assertions in the second phase of the arbitration without being clear as to those which the Partial Award had rejected.[1006]

725. The Respondent also disputes the Claimants' allegations that the Respondent exacerbated the dispute and unduly increased costs.[1007] First, the Respondent argues that it was reasonable and appropriate to separate the single multi-party arbitration into six different proceedings, noting what it says was the PCA's suggested endorsement of the separation.[1008] Furthermore, the

1000 Respondent's Submission on Costs, paras. 3-4.

1001 Respondent's Submission on Costs, para. 6.

1002 Respondent's Submission on Costs, para. 6(a), (f), (g), (h).

1003 Respondent's Submission on Costs, para. 6(h), (i), (j).

1004 Respondent's Submission on Costs, para. 6(b), (k).

1005 Respondent's Submission on Costs, para. 6(c)-(d), (l), (n).

1006 Respondent's Submission on Costs, para. 6(e), (m).

1007 Respondent's Submission on Costs, para. 7.

1008 Respondent's Submission on Costs, para. 7.

Respondent notes that the Claimants continued to share resources and information between the arbitrations, splitting costs even after their cases were separated.[1009] Second, the Respondent submits that it was not unreasonable for the Czech Republic to pursue a set-aside of the Partial Award, and that in any event, the Parties' costs in those proceedings have already been the subject of a separate costs order issued by a Swiss Court.[1010] Lastly, the Respondent contends that it was legally bound under EU law to advance the *Achmea* Objection, and did so as soon as possible after the *Achmea* Judgment was rendered.[1011]

726. In addition, the Respondent argues that the fact that the Claimants have split the costs of the present arbitration with certain non-parties creates a difficulty for the Tribunal under Article 38 of the UNCITRAL Rules, which states that a Tribunal may award costs only to a successful party.[1012] The Respondent says that the practical effect of any costs award in the form sought by the Claimants, would be to grant sums to entities that are non-parties and who were unsuccessful in their own arbitral claims.[1013] This includes two entities, which themselves have failed to pay costs awards issued in favor of the Czech Republic.[1014]

727. In contrast, the Respondent submits that the Czech Republic has at all times sought to conduct itself in a manner that would facilitate an efficient resolution of the dispute, including by coordinating its submissions across this and other parallel proceedings, with the State being represented by the same counsel team.[1015]

C. THE TRIBUNAL'S ANALYSIS

728. The Tribunal's authority to decide the allocation of costs between the Parties is established in Articles 38 and 40 of the UNCITRAL Rules:

> Article 38
>
> The arbitral tribunal shall fix the costs of arbitration in its award. The terms "costs" includes only:
>
> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

1009 Respondent's Submission on Costs, para. 7.

1010 Respondent's Submission on Costs, para. 7.

1011 Respondent's Submission on Costs, para. 7.

1012 Respondent's Submission on Costs, para. 8.

1013 Respondent's Submission on Costs, para. 9.

1014 Respondent's Submission on Costs, para. 9.

1015 Respondent's Submission on Costs, para. 11.

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

729. Pursuant to Article 38(1) of the UNCITRAL Rules, the Tribunal shall fix the costs of arbitration in its award. Both Parties have advanced USD 820,000.00 for a total of EUR 1,640,000.00.

730. As to Articles 38(a), (b), and (c), according to paragraph 11 of the Terms of Appointment, each member of the Tribunal shall be remunerated at the rate of USD 650 per hour for all work carried out in connection with the arbitration, and shall be reimbursed for all disbursements and charges reasonably incurred in connection with the arbitration, including but not limited to travel expenses, telephone, fax, delivery, printing, and other expenses. Based on these rates, the fees of the members of the Tribunal are as follows: USD 104,162.50 for Mr John Beechey, USD 293,150.00 for Mr J. Christopher Thomas KC, and USD 296,920.00 for Professor Alfredo Bullard. The fees of the former members of the Tribunal are as follows: USD 125,970.00 for Mr Gary Born and USD 289,685.50 for Dr Veijo Heiskanen. The travel and other expenses of the Tribunal amount to USD 34,258.48. The PCA's fees and expenses for registry services, which were paid in accordance with the PCA's Schedule of Fees, amount to USD 220,000.00, and the PCA's expenses amount to USD 3,783.12. Other costs incurred (including costs of court

reporting, IT/AV support, catering, courier services, hearing venue services, office supplies and printing, telecommunications, and banking services) amount to USD 192,161.07

731. Accordingly, the costs of the arbitration (excluding the legal and other costs incurred by the Parties under Articles 38(d) and (e)) amount to USD 1,560,090.67, which leaves an unused balance of USD 79,909.33. The PCA shall reimburse the unexpended balance of the deposit to the Parties in equal shares of USD 39,954.66 and will provide the Parties with a statement of account in due course after the issuance of this Final Award.

732. Article 40(1) of the UNCITRAL Rules establishes that "the cost of the arbitration shall in principle be borne by the unsuccessful party." Article 40(2) of the UNCITRAL Rules provides that "the tribunal shall be free to determine which party shall bear such costs".

733. As a preliminary matter, pursuant to Article 38(e) of the UNCITRAL Rules, the Tribunal determines that the amount of costs for legal representation and assistance claimed by the Parties is reasonable.

734. After careful consideration, the Tribunal considers that the Respondent shall bear all the costs and expenses it incurred for its defense, as well as its share of the costs of the arbitration proceeding. The Tribunal also considers that Respondent shall reimburse to the Claimants 75% of Claimants' legal costs (75% of EUR 9,042,753.18, i.e., EUR 6,782,064.88) – an amount which the Tribunal views as reasonable and proportionate considering the complexity of the dispute – and 100% of the Claimants' share of the arbitration costs (i.e., USD 780,045.34).

735. Although the Claimants' Submission on Costs includes a request that Respondent reimburse the costs resulting from specific phases of the arbitration, the Tribunal considers it appropriate to allocate costs based on the global amount of legal and arbitration costs incurred by the Parties. In consequence, there is no need to decide costs on a phase-by-phase basis.

736. The Tribunal's decision is based on the fact that the Claimants were successful in establishing (i) the Tribunal's jurisdiction to hear the case (and in so doing, they succeeded in the face of several different objections); (ii) breaches of the BIT's fair and equitable treatment standards; and (iii) their entitlement to an award of damages. Furthermore, the Tribunal agrees with the Claimants that several procedural incidents caused by the Respondent (such as the challenge of Mr Beechey, the *Achmea* Objection, and the requests regarding the Claimants' financial agreement – including the request to reconsider the Tribunal's decision on the matter taken in Procedural Order No. 12, purporting to relitigate the question with substantially the same arguments) proved ultimately to be unfounded or immaterial for the decision to be adopted in the Final Award. They increased the complexity of the dispute and the resources it demanded.

737. However, the Tribunal has also borne in mind that the Claimants have not been entirely successful. Some of their claims were dismissed by the Partial Award (on either jurisdictional grounds or on the merits), and the quantum of reparation established by the Tribunal has fallen below that which the Claimants had requested. As noted in paragraph 269 above, the Tribunal considers that it would be inappropriate to award the Claimants all of their legal costs due to the lack of transparency regarding the merger of Natland Group into Capamera and its impact on the proceeding.

738. The Tribunal considers that the Respondent's objection regarding the fact that the Claimants have agreed to split the costs of the arbitration with certain non-parties has no relevance for its decision on cost allocation. Inasmuch as the Claimants are only being awarded the reimbursement of the costs incurred by them in this proceeding and not, for instance, the costs of other arbitrations, the present decision on cost allocation is in line with Articles 38 and 40 of the UNCITRAL Rules.

IX. DISPOSITIF

739. For the reasons set out above, the Tribunal decides as follows:

(a) The Claimants' request to amend the case caption to reflect the new name of Natland Group (Capamera) resulting from a merger is granted.

(b) The Respondent's objections to NIG's and Capamera's grounds for their claims deferred to this phase of the proceedings are dismissed.

(c) The Respondent is ordered to pay compensation to the Claimants for the losses caused to them as a result of the breach declared by the Partial Award, in an amount of CZK 350.1512 million (inclusive of pre-award interest), apportioned among the Claimants as follows:

(i) CZK 37.0662 million to GIGH.

(ii) CZK 33.0795 million to Capamera.

(iii) CZK 280.0055 million to Radiance.

(d) The Respondent is ordered to pay to the Claimants post-award interest on the compensation awarded under (c) above, from the date of the Final Award until the payment of the amounts awarded, which shall accrue at 1.5% above the relevant pre-award interest rate, compounded annually, that is:

(i) 5.475% on CZK 37.0662 million awarded to GIGH.

(ii) 5.475% on CZK 33.0795 million awarded to Capamera.

(iii) 5.475% on CZK 86.3559 million awarded to Radiance for the period from 1 January 2011 (First Valuation Date) to 31 December 2013.

(iv) 3.766% on CZK 193.6496 million awarded to Radiance for the period from 1 January 2014 (Second Valuation Date) to the issuance of the Final Award.

(e) The Respondent is ordered to reimburse the Claimants EUR 6,782,064.88 for the costs and expenses incurred in the prosecution of their claims in this proceeding, as well as USD 780,045.34 for the costs of the arbitration.

(f) All other claims for relief of both Parties are dismissed.

Place of Arbitration: Geneva

Signed, this 15th day of December 2023,

Mr John Beechey C.B.E.

Mr J. Christopher Thomas, K.C.

Professor Alfredo Bullard
Presiding Arbitrator