AD HOC ARBITRATION UNDER THE 1976 UNCITRAL RULES

PCA CASE NO. 2013-35

- between -

NATLAND INVESTMENT GROUP N.V. (NETHERLANDS) (1),
NATLAND GROUP LIMITED (CYPRUS) (2),
G.I.H.G. LIMITED (CYPRUS) (3), AND
RADIANCE ENERGY HOLDING S.A.R.L. (LUXEMBOURG) (4)

(the "Claimants")

- and -

THE CZECH REPUBLIC

(the "Respondent")

PARTIAL AWARD

ARBITRAL TRIBUNAL:
Dr Veijo Heiskanen (Presiding Arbitrator)
Mr Gary Born
Mr J. Christopher Thomas, QC

REGISTRY:
Permanent Court of Arbitration
Ms Judith Levine (Tribunal Secretary)

20 December 2017

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GLOSSARY OF DEFINED TERMS

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
5% Limit	A limit placed on the ERO by Article 6(4) of the Act on RES Promotion whereby the ERO could not reduce the tariff by more than 5% in comparison to the current year when setting the tariff applicable to installations commissioned in the following year
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 330/2010	Act amending the Act on RES Promotion to end subsidies for larger solar installations commissioned after 1 March 2011
Act 346/2010	Act amending the Act on Income Tax by, *inter alia*, abolishing the Income Tax Holiday for the first 5 years of operation of RES plants and amending tax depreciation rules
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 165/2012	Act repealing the Act on RES Promotion
Act 310/2013	Act amending Act 165/2012 and certain other acts, by amending, *inter alia*, the rules on the Solar Levy
Act on Income Tax	Act No. 586/1992 on income tax
Act on RES Promotion	Act No. 180/2005 on the promotion of electricity production from renewable energy sources and amending certain acts
Bifurcation Request	Respondent's Request for Bifurcation of Proceedings, dated 20 April 2015
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
Blando	Blando Investments S.A., an entity which entered into a EUR 15,300,000 Mezzanine Term Loan Facility Agreement with Energy 21 on 30 June 2009
CJEU	Court of Justice of the European Union
Claimants	Natland Investment, Natland Group, GIHG, and Radiance
Claimants' Rejoinder	Claimants' Rejoinder on Jurisdiction, dated 28 October 2016
Claimants' Reply	Claimants' Reply on the Merits and Quantum and Answer to Objections to Jurisdiction, dated 4 May 2016
Claimants' State Aid Comments	Claimants' comments on the Decision, dated 15 February 2017

Commission	European Commission
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
DCEMF Mezzanine	DCEMF Mezzanine Holdings B.V., a minority shareholder of Energy 21. It is not a claimant in this arbitration.
DCF	Discounted cash flow
Decision	Commission decision in case SA.40171 (2015/NN) – Czech Republic on the conformity of the incentives granted by the Act on RES Promotion to photovoltaic power installation commissioned before January 2013
E21 Holding	E21 Holding B.V., a company incorporated in the Netherlands and Radiance's wholly-owned subsidiary
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., a Czech joint stock company in which the Claimants held direct and indirect shareholding interests respectively, and which was the company which held the interest in various Czech special purpose vehicles which held interests in solar plants located in the Czech Republic
Energy Act	Act No. 458/2000 on Business Conditions and Public Administration in the Energy Sectors
ERO	Czech Energy Regulatory Office
EU	European Union
Eurosolar	The non-profit European Association for Renewable Energy
FET	Fair and Equitable Treatment
First EU RES Directive	EU Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market
FiT	Feed-in Tariff, a subsidized tariff paid to RES electricity producers for each unit of electricity sold to their respective grid operator or designated offtaker
FPS	Full Protection and Security
Fund	Mid Europa Fund III LP, a company incorporated in the Channel Islands, and the fund holding 100% of Radiance
German-Czech Republic BIT	Agreement between the Czech and Slovak Federal Republic and the Federal Republic of Germany over the Encouragement and Reciprocal Protection of Investments, signed on 2 October 1990, entered into force on 2 August 1992
GIHG	G.I.H.G. Limited, a company incorporated in Cyprus, and one of the four Claimants in this arbitration
Green Bonus	A subsidized tariff paid as a supplement to RES electricity producers for each unit of electricity sold by the producer on the market

GWh	Gigawatt hour, a unit of energy per hour
ILC Draft Articles	The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts
Income Tax Holiday	A five-year exemption from corporate income tax for income from operation of RES (prior to amendment of the Income Tax Act by Act 346/2010)
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.
kWh	Kilowatt hour, a unit of energy per hour
kWp	Kilowatt peak
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
May 2012 Constitutional Court Judgment	Decision of the Constitutional Court in the Name of the Republic, Collection of Laws No. 220/2012, 15 May 2012, File No. Pl. ÚS 17/11, para. 1 (**Ex. R-29**)
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
MFN clause	Most Favored Nation clause
Natland	A Czech investment group, whose investments include Claimants Natland Group and Natland Investment, and a number of other companies
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 on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991, entered into force on 1 October 1992
New Claims	Claimants' claims related to the regulation of the Solar Levy as from 1 January 2014 under Act No. 310/2013
New RES Act	Act No. 165/2012 Coll., on promotion of sources of energy and amending certain acts, replacing the Act on RES Promotion
Notice of Arbitration	Notice of Arbitration, dated 8 May 2013
Original Depreciation Provisions	The right to depreciate particular components of photovoltaic plants provided for by the Act on Income Tax
Parties	The Claimants and the Respondent

PCA	The Permanent Court of Arbitration
Petitioners	The group of Czech senators seeking annulment of the Measures before the Czech Constitutional Court
Pricing Regulation	ERO Regulation No. 140/2009, dated 25 May 2009
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
Respondent	The Czech Republic
Respondent's Rejoinder	Respondent's Rejoinder on the Merits and Quantum and Reply to Jurisdiction, dated 6 September 2016
Respondent's State Aid Comments	Respondent's comments on the Decision, dated 15 February 2017
Second EU RES Directive	EU Directive 2009/28/EC on the promotion of the use of energy from renewable sources
Solar Levy	A 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
SPVs	Special purpose vehicles
Statement of Claim	The Claimants' Statement of Claim, dated 19 March 2015
Statement of Defense	The Respondent's Statement of Defense, dated 30 October 2015
Subsidies	Subsidized Feed-in Tariffs and/or Green Bonuses, as appropriate, to be paid for qualifying RES electricity generation in accordance with the RES Regime
Technical Regulation	ERO Regulation No. 475/2005 implementing certain provisions of the law on support for the use of renewable sources
TFEU	Treaty on the Functioning of the European Union
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules (1976)
VCLT	Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969, entered into force on 27 January 1980
WACC	Weighted Average Cost of Capital
Yukos Cases	*Hulley Enterprises Limited v. The Russian Federation*, PCA Case No. AA226; *Yukos Universal Limited v. The Russian Federation*, UNCITRAL, PCA Case No. AA227; *Veteran Petroleum Limited v. The Russian Federation*, PCA Case No. AA228

DRAMATIS PERSONAE

	The Respondent's expert witness on EU State aid issues,
	The Claimants' fact witness, managing partner of MEP, an investment adviser to the Fund. The Fund held 95% of the shares in Radiance (one of the Claimants) until January 2016
	The Claimants' expert witness on the issue of whether the Solar Levy is a tax under Czech law,
Mr Josef Fiřt	The Respondent's fact witness, Chairman of the Czech Republic's ERO from September 2004 to July 2011
	The Claimants' expert witness on the issue of whether the Solar Levy is a tax under Czech law,
	The Claimants' expert witness on the EU RES support framework and issues pertaining to industry economic regulation,
	The Respondent's expert witness on the issue of whether the Solar Levy is a tax under Czech law, who withdrew from engagement in the case and whose expert report the Tribunal has decided to disregard.
	The Respondent's expert witness on the EU RES support framework and issues pertaining to industry economic regulation,
	The Respondent's expert witness on the issue of whether the Solar Levy is a tax under Czech law,
Mr Daniel Kunz	The Claimants' fact witness, CEO and Chairman of the Board of Directors of Energy 21 from 1 September 2008 to 20 June 2011
Mr Pavel Maleček	The Claimants' fact witness, CEO and Chairman of the Board of Directors of Energy 21
Mr Ladislav Minčič	The Respondent's fact witness, First Deputy Minister of Finance of the Czech Republic from 2010 to 2014
	The Respondent's expert witness on the calculation of damages,
	The Claimants' expert witness on EU State aid issues,
Mr Tomáš Raška	The Claimants' fact witness, representative and beneficial shareholder of Natland Investment and Natland Group, two of the Claimants
	The Claimants' expert witness on the calculation of damages,
	The Claimants' expert witness on the EU RES support framework and issues pertaining to industry economic regulation,
Mr Igor Wollner	The Claimants' fact witness, beneficial shareholder of GIHG (one of the Claimants)

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:

   Prof. Luca G. Radicati di Brozolo
   Mr Michele Sabatini
   Mr Emilio Bettoni
   Mr Flavio Ponzano
   ARBLIT – Radicati di Brozolo Sabatini Benedettelli Torsello
   Via Alberto da Giussano, 15
   20145 Milan
   Italy

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

   Ms Marie Talašová
   Mr Tomáš Munzar
   Ms Anna Bilanová
   Ministry of Finance of the Czech Republic
   Letenská 15
   118 10 Praha 1
   Czech Republic

   Mr Paolo Di Rosa
   Ms Mallory B. Silberman
   Mr John Muse-Fisher
   Arnold & Porter Kaye Scholer LLP
   601 Massachusetts Avenue NW
   Washington, D.C. 20001-3743
   United States of America

   Mr Dmitri Evseev
   Mr Peter Nikitin
   Mr Bart Wasiak
   Arnold & Porter Kaye Scholer (UK) LLP
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   25 Old Broad Street
   London EC2N 1HQ
   United Kingdom

Ms Karolína Horáková
Mr Libor Morávek
Weil, Gotshal & Manges s.r.o.
Advokátní Kancelář
Charles Bridge Center
Krizovnicke nam. 193/2
110 00 Praha 1
Czech Republic

3. At an earlier stage of the proceedings, the Respondent was represented by different counsel, as follows: (a) Prof. Zachary Douglas of Matrix Chambers, Geneva, represented the Respondent up until 1 July 2015; (b) Mr David Alexander, Mr Stephen P. Anway and Mr Rostislav Pekař of the law firm Squire Patton Boggs represented the Respondent up until 17 July 2015; and (c) Mr Petr Plášil and Ms Markéta Filipová of the Ministry of Finance of the Czech Republic also represented the Respondent 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:

- 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**");
- 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**");
- 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
- 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[1] 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**"). The Claimants argue that the "dismantling" of the RES Regime breached several obligations incumbent on the Czech Republic under the ECT and the BITs.

6. The Claimants seek declarations that the Respondent's actions (a) constitute unfair and inequitable treatment; (b) breach the obligation to provide full protection and security; and (c) were implemented through unreasonable and arbitrary measures which impaired the maintenance, use, enjoyment and disposal of the Claimants' investments, all in breach of the ECT and the BITs. The Claimants claim compensation for loss suffered as a result of the Respondent's breaches of the ECT and the BITs in an amount of not less than CZK 2,212 million (equivalent to approximately EUR 82 million), plus costs.

7. The Respondent argues that the Claimants have failed to meet the burden of establishing jurisdiction under the ECT and the BITs for their various claims. In the event that the Tribunal finds that it has jurisdiction, the Respondent submits that its conduct did not breach any of its obligations under the ECT and the BITs, and that the Claimants' analysis on quantum of damages is flawed. Accordingly, it requests the Tribunal to (a) declare that all of the Claimants' claims are barred for lack of jurisdiction; (b) declare that the Czech Republic did not breach any of its obligations under the ECT and the BITs; (c) declare that the Claimants are not entitled to any damages; and (d) order the Claimants to pay all costs.

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[1] The term "investments" is used here for convenience and is without prejudice to the Tribunal's consideration as to whether or not the Claimants' activities in the Czech Republic qualify as an "investment" under the ECT and the BITs.

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF ARBITRATION AND CONSTITUTION OF TRIBUNAL

8. On 8 May 2013, the Claimants, together with five other entities and one individual,[2] served upon the Respondent a Notice of Arbitration (the "**Notice of Arbitration**") 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. The Respondent received the Notice of Arbitration on 15 May 2013.

9. In the Notice of Arbitration, the Claimants requested "that the dispute be decided by a three-member arbitral tribunal" and appointed Mr Doak Bishop, a national of the United States of America, as arbitrator.

10. By letter dated 10 June 2013, the Respondent stated that it:

> . . . understand[s] the Notice of Arbitration to be an invitation for the Czech Republic to consent to the consolidation of the claims brought by [the Claimants] with the claims of the other six investors.
>
> . . .
>
> The Czech Republic does not consent to the proposed consolidation: the claims set forth in the Notice of Arbitration are brought under different investment treaties by largely unrelated claimants, with different alleged investments, and made at different times and in different circumstances.
>
> The Czech Republic does, however, consent to the consolidation of the claims brought by the [Claimants], as they involve the same investment operation.

11. By the same letter dated 10 June 2013, the Respondent notified the Claimants of its appointment of Mr J. Christopher Thomas, QC, a national of Canada, as the second arbitrator.

12. By letter dated 24 June 2013, the Claimants disputed that the issue was "one of consolidation," arguing that "there is only one arbitration brought by several claimants against the same respondent," and asserted that the Respondent's letter of 10 June 2013 did not meet the minimum

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[2] The claims of these five entities and this individual, against the Czech Republic, are being determined in five separate arbitral proceedings administered by the Permanent Court of Arbitration ("**PCA**"). These proceedings include: (i) *(1) Antaris Solar GmbH and (2) Dr. Michael Göde v. The Czech Republic*; PCA Case No. 2014-01; (ii) *WA Investments - Europa Nova Ltd. (Cyprus) v. The Czech Republic*, PCA Case No. 2014-19; (iii) *Voltaic Network GmbH (Germany) v. The Czech Republic*, PCA Case No. 2014-20; (iv) *Photovoltaik Knopf Betriebs - GmbH (Germany) v. The Czech Republic*, PCA Case No. 2014-21; and (v) *I.C.W. Europe Investments Ltd. (United Kingdom) v. The Czech Republic*, PCA Case No. 2014-22.

requirements for a response to the Notice of Arbitration under the United Nations Commission on International Trade Law Arbitration Rules as revised in 2010.

13. By letter dated 27 June 2013, the Respondent reiterated that the nine entities and one individual that filed the Notice of Arbitration had "different claims based upon different treaty obligations in different international instruments" and restated its understanding of the Notice of Arbitration as "a prospective offer to consolidate 10 arbitrations."

14. On 5 July 2013, the Claimants wrote to the Secretary-General of the Permanent Court of Arbitration (the "**PCA**") to request that he designate an appointing authority pursuant to Article 6(3) of the United Nations Commission on International Trade Law Arbitration Rules as revised in 2010. On 9 July 2013, the Respondent wrote to the Secretary-General of the PCA and submitted that "the Secretary-General has not been conferred any power under the UNCITRAL Arbitration Rules to proceed to make arbitral appointments in respect of the disputes described in the Claimants' Notice of Arbitration." The Respondent further argued that, contrary to the Claimants' position, "the 1976 UNCITRAL Arbitration Rules are clearly applicable."

15. 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, these arbitration proceedings are deemed to have commenced on 15 May 2013, the date on which the Respondent received the Notice of Arbitration.

16. On 13 August 2013, the Secretary-General of the PCA "decline[d] to act upon the Claimants' Request" to designate an appointing authority, for two separate reasons. First, he stated that he "is not empowered to act under some of the instruments invoked by the Claimants," including the Netherlands-Czech Republic BIT and the Luxembourg-Czech Republic BIT, "because appointing authorities have been agreed to in advance under those treaties." Second, he noted that the Respondent had "responded to the Notice of Arbitration . . . in a timely manner by appointing the second arbitrator" and that, accordingly, "no vacancy exists justifying my intervention in order to facilitate the constitution of an arbitral tribunal to hear the Claimants' claims."

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

B. First Procedural Meeting

18. On 23 January 2014, at the invitation of the Tribunal and in advance of a first procedural meeting, the Parties submitted a common draft procedural order and a proposed procedural calendar, identifying areas of agreement and disagreement. The Claimants argued that the arbitration should be seated in Geneva, whereas the Respondent preferred Paris. As to the written proceedings, the Respondent argued that (a) the Claimants should be required to file a full Statement of Claim; (b) the proceedings should be bifurcated; and (c) the Respondent "should have the right to request production of documents prior to the filing of its submissions." Conversely, the Claimants requested that the Tribunal order the Respondent to file a Statement of Defense pursuant to Article 19 of the UNCITRAL Rules, arguing that their Notice of Arbitration "already complies with the requirements of a statement of claim" under the UNCITRAL Rules. They further argued that only after filing of submissions would it be possible "to assess whether bifurcation is appropriate" and that the Respondent's request for a document production phase was "unwarranted and . . . not in line with standard practice."

19. On 24 January 2014, the Tribunal convened the first procedural meeting with the Parties by telephone conference. Following the meeting and at the Tribunal's request, on 29 January 2014, the Parties provided additional written submissions on the seat of arbitration.

20. Over the following weeks, by 3 March 2014, the Parties and the Tribunal signed the Terms of Appointment. In the Terms of Appointment, the Parties and the Tribunal confirmed their agreement that the PCA would serve as registry and that PCA Legal Counsel, Mr Hanno Wehland, would serve as the Tribunal Secretary.[3] The Terms of Appointment, *inter alia*, also identified the representatives of the Parties, confirmed the valid constitution of the Tribunal, confirmed that the language of the arbitration would be English, set in place arrangements for the payment of fees and expenses of the Tribunal and the Registry, and confirmed the confidentiality of the proceedings, "save that the PCA shall have permission to publish the fact of the existence of the arbitration, the names of the Parties, the names of the Members of the Tribunal and the names of counsel representing the Parties on its website."

21. On 14 February 2014, the Tribunal issued Procedural Order No. 1, in which it, *inter alia*: (a) decided that "the place of the arbitration shall be Geneva;" (b) directed the Claimants to file a Statement of Claim; (c) directed the Respondent to file its Request for Bifurcation; and

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[3] On 20 November 2015, Ms Judith Levine, PCA Senior Legal Counsel, replaced Mr Wehland as Tribunal Secretary.

(d) directed the Parties "to attempt to reach an agreement with regard to the dates for further submissions, including a timetable for document production . . . and hearing dates."

22. Following receipt of further proposals by the Parties, on 7 March 2014, the Tribunal issued Procedural Order No. 2, in which it decided that the Parties "should be given the opportunity to make simultaneous requests for the production of documents prior to the filing of their Statement of Claim and Statement of Defense, respectively."

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

24. In Procedural Order No. 3 dated 16 June 2014, following an exchange of document production requests and submission of Redfern Schedules, the Tribunal set out its decisions and directions on the Parties' respective requests for production of documents.

C. THE EUROPEAN COMMISSION'S INTERVENTION

25. On 11 July 2014, the European Commission (the "**Commission**") submitted an "Application for leave to intervene as a non-disputing party" in these proceedings in order to (a) invite the Tribunal "to decline jurisdiction;" (b) argue that "the Czech Republic, by adopting the contested measure, may have merely complied with its obligations under [European] Union State Aid law;" and (c) argue that "enforcement of a possible award may amount itself to State aid, and in that case would only be possible after an authorisation by the Commission."

26. In response to the Tribunal's invitation to the Parties to comment on the Commission's application, on 29 July 2014, the Respondent stated that it did "not oppose the European Commission's application" and the Claimants submitted their comments in which they requested the Tribunal to reject the application.

27. On 1 August 2014, the Respondent argued that the "Claimants' extensive submission of 29 July 2014 relates not only to the Commission's Application to Intervene but also raises several issues regarding document production" and requested the opportunity to respond to the Claimants' comments.

28. 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." He noted that he had not been involved in those matters and that they did not involve the Parties. Nonetheless, "in order to avoid any perception of bias," he resigned as arbitrator in these proceedings.

29. By letter dated 4 August 2014, and pursuant to Articles 7(1) and 13(1) of the UNCITRAL Rules, the Tribunal requested the Claimants to appoint a replacement arbitrator and suspended the arbitral proceedings pending the appointment of the replacement arbitrator.

30. On 24 September 2014, the Claimants advised that they had appointed Mr Gary Born, a national of the United States of America, as co-arbitrator in these proceedings to replace Mr Bishop. On 29 September 2014, Mr Born submitted a signed Declaration of Acceptance and Statement of Impartiality and Independence, made a disclosure pursuant to Article 9 of the UNCITRAL Rules, and confirmed his agreement to the Terms of Appointment.

31. On 6 October 2014, the extended deadline agreed to by the Tribunal, the Respondent submitted its response to the Claimants' submission dated 29 July 2014.

32. On 24 November 2014, the Tribunal issued Procedural Order No. 4 and the Concurring Opinion of Mr Born, in which the Tribunal (a) granted the Commission's 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;" (b) denied the Commission's request to gain access to the documents filed in these proceedings and to attend hearings; and (c) directed the Parties to attempt to agree on a revised procedural calendar, including the timing of the Commission's written submission. Mr Born, while stressing his agreement "with many of the conclusions, and much of the analysis, of the Tribunal's Order," wrote separately to address "aspects of the Tribunal's analysis of Article 15 of the 1976 UNCITRAL Arbitration Rules and the submissions that the Tribunal has received regarding the proper role of amicus curiae submissions in arbitrations such as this."

33. At the invitation of the Tribunal, on 25 and 27 November 2014 respectively, the Claimants and the Respondent provided their comments on whether the Tribunal "should make copies of the [Procedural Order and Concurring Opinion] available to the European Commission or, alternatively, write to the European Commission separately, summarising in relevant part the substance of the decision." The Claimants preferred the Tribunal to "summarize the substance of its decision in a separate letter," while the Respondent considered "that the Tribunal may make copies of the Amicus Decision available to the European Commission without compromising compliance with the confidentiality provision contained in . . . the Terms of Appointment."

34. On 3 December 2014, the Tribunal communicated to the Parties its decision on release of its Procedural Order No. 4 and the Concurring Opinion of Mr Born to the Commission, noting that it:

> considers that the disclosure of the documents to the Commission is necessary to inform the Commission of the Tribunal's decision and of the Commission's rights and obligations thereunder. Consequently, the documents may be disclosed to the Commission, subject to an undertaking by the Commission to keep the documents confidential.

35. On 3 December 2014, the Tribunal conveyed this decision to the Commission and sought its undertaking that:

> the European Commission will not disclose or otherwise communicate any information received with regard to the proceedings, including the Tribunal's decision on the Application, to any third party without the express written consent of the Parties to the arbitration.

36. By letter dated 9 December 2014, the Tribunal confirmed agreement to a revised procedural calendar agreed between the Parties.

37. In response to the Tribunal's letter to the Commission dated 3 December 2014, and a follow-up letter dated 12 December 2014, on 23 December 2014, the Commission confirmed that:

> it will not disclose or otherwise communicate any information received with regard to the proceedings, including the Tribunal's decision on the Application, to any third party without the express written consent of the Parties to the arbitration.

38. On 23 December 2014, the Tribunal sent Procedural Order No. 4 and the Concurring Opinion of Mr Born to the Commission.

39. On 6 January 2015, the Commission sought an extension of time to file its written submission. By letter dated 7 January 2015, the Tribunal agreed to the extension and the amended procedural calendar, to which both Parties also agreed.

40. 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,[4] 2014-01,[5] and the present arbitration, under which the parties agreed to disclose the rulings rendered in each of these cases.

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

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

The Tribunal further provided its specific consent to the disclosure of Procedural Order No. 4 and the Concurring Opinion of Mr Born.

41. On 2 February 2015, the Commission submitted 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. The Commission submitted a corrected version on 3 February 2015.

42. On 3 February 2015, the Claimants requested "the Tribunal not to accept the [Commission's] intervention unless the [Commission] accepts the undertaking set out in [Procedural Order] No. 4. On 6 February 2015, the Respondent stated that "the determination of this procedural issue ultimately and properly rests with the Tribunal."

43. In response to the Tribunal's letter dated 7 February 2015, on 12 February 2015, the Commission reiterated that "it is not in a position to give the required undertaking." In light of the Commission's refusal to provide the undertaking (which had been one of the conditions subject to which the Tribunal had granted the Commission's request to file an amicus submission), on 16 February 2015, the Tribunal advised the Commission that its submission could not be considered by the Tribunal.

D. WRITTEN PHASE AND REQUEST FOR BIFURCATION

44. On 19 March 2015, the Claimants submitted their Statement of Claim, together with witness statements and expert reports (the "**Statement of Claim**").

45. On 20 April 2015, the Respondent submitted its Request for Bifurcation of Proceedings, requesting the Tribunal to "hear its objections to the Tribunal's jurisdiction as a preliminary question" (the "**Bifurcation Request**").

46. On 15 May 2015, the Tribunal issued Procedural Order No. 5, in which it (a) rejected the Respondent's request for bifurcation of the proceedings; and (b) confirmed the relevant procedural calendar, as agreed by the Parties.

47. On 2 July 2015, the Respondent submitted its Application for further targeted document production requests and its related Redfern Schedule.

48. On 15 July 2015, the Tribunal issued Procedural Order No. 6, in which it (a) recorded its decision on the Respondent's Application Regarding Document Production in the Respondent's Redfern Schedule; and (b) directed the Claimants to produce the documents requested by the Tribunal.

49. By e-mail dated 14 September 2015, the Tribunal confirmed that, in light of the Parties' agreement, the hearing in this matter would take place during the week of 13 March 2017.

50. On 31 October 2015, the Respondent submitted its Statement of Defense, together with an annex, witness statement and expert reports (the "**Statement of Defense**").

51. On 17 December 2015, the Claimants submitted their Application for further targeted document production requests and the related Redfern Schedule.

52. On 23 December 2015, the Tribunal issued Procedural Order No. 7, dealing with the Claimants' Application Regarding Document Production in the Claimants' Redfern Schedule.

53. On 8 January 2016, the Parties submitted to the Tribunal an agreed revised procedural calendar.

54. On 24 March 2016, the Parties submitted to the Tribunal a further agreed revised procedural calendar.

55. On 4 May 2016, the Claimants submitted their Reply on the Merits and Quantum and Answer to Objections to Jurisdiction, together with annexes, witness statements and expert reports (the "**Claimants' Reply**").

56. In accordance with a revised procedural calendar, on 6 September 2016, the Respondent submitted its Rejoinder (the "**Respondent's Rejoinder**"), together with an annex, witness statement and expert reports.

57. On 21 September 2016, the Parties confirmed their agreement to the Tribunal's proposal that the hearing be held at the Peace Palace in The Hague.

58. On 28 October 2016, following exchanges amongst the Parties and the Tribunal about the timing and modalities of filing, the Claimants submitted their Rejoinder on Jurisdiction, together with two expert reports (the "**Claimant's Rejoinder**").

E. REQUESTS FOR FURTHER WRITTEN SUBMISSIONS

59. By letter dated 26 January 2017, the Claimants requested leave from the Tribunal to file a "Supplemental Report" by their quantum expert [redacted] in order "to clarify or narrow the issues in dispute between the quantum experts."

60. By letter dated 27 January 2017, the Respondent resisted the request as having no legal basis and increasing costs. Subsequently, at the Tribunal's invitation, the Parties exchanged further comments.

61. On 31 January 2017, the Parties wrote to the Tribunal to request that 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, be accepted in the record of the case. The Parties further requested that the Tribunal authorize the Parties to submit written comments on the decision. The Tribunal granted both of these requests.

62. On 1 February 2017, the Tribunal decided to grant the Claimants' request for leave to file the Supplemental Report of [redacted] of no more than 20 pages by 6 February 2017. The Respondent was invited to comment on the Report by 27 February 2017.

63. On 3 February 2017, the Parties notified each other and the Tribunal of which fact and expert witnesses they wished to call for cross-examination at the hearing in March.

64. On 6 February 2017, in accordance with leave granted by the Tribunal, the Claimants submitted the "Supplemental Report of [redacted]"

65. By letter dated 7 February 2017, the Claimants noted that the Respondent did not wish to cross-examine [redacted] – the Claimants' fact witness and managing partner of Mid Europa Partners LLP ("**MEP**"), an investment adviser to Mid Europa Fund III LP (the "**Fund**") that holds 100% of the shares in Radiance – and requested the Tribunal "to exercise its broad procedural powers and allow the appearance of [redacted] at the . . . hearing."

66. By e-mail dated 8 February 2017, the Respondent notified the Tribunal that [redacted] had withdrawn from his engagement with the Respondent for "financial reasons" and would not participate in the hearing. The Respondent requested that the Tribunal not completely exclude [redacted] written testimony from the record, but adopt a pragmatic approach to the treatment of his expert report.

67. On 10 February 2017, the Claimants requested that the Tribunal reject the Respondent's request and strike [redacted] report from the record. On the same date, the Respondent submitted their comments on the Claimants' request concerning [redacted] arguing that "there are no exceptional circumstances requiring the Tribunal to order [[redacted]] appearance."

68. By letter dated 14 February 2017, the Respondent elaborated on the circumstances surrounding [redacted] withdrawal from his engagement with the Respondent and denied alleged inconsistencies between the statements of [redacted] and the Respondent's other Czech tax law expert, [redacted] By letter of the same date, the Claimants submitted comments on the Respondent's letter dated 10 February 2017, observing that "the Respondent is incapable of explaining how it would suffer from [redacted] presence" at the hearing.

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

70. On 16 February 2017, the Tribunal acknowledged and confirmed the Parties' agreement as to the Claimants' introduction of six new exhibits to the record.

71. On 17 February 2017, the Tribunal noted and confirmed the Parties' agreement as to the Claimants' introduction of three exhibits to the record to correct errors contained in [redacted] and [redacted] expert witness report.

72. By letter dated 20 February 2017, the Tribunal communicated its decisions, pursuant to the terms of Procedural Order No. 1, that (a) it would not insist upon [redacted] appearance at the hearing, and (b) it would not consider [redacted] expert opinion, whose withdrawal in the circumstances did not constitute a "valid reason" for his failure to testify.

73. On 27 February 2017, the Respondent submitted its comments on the "Supplemental Report of [redacted]" together with the third expert report of [redacted]

74. On 6 March 2017, the Tribunal acknowledged and confirmed the Parties' agreement on the introduction of new exhibits to the record.

75. The Parties agreed on most procedural and logistical issues in advance of the hearing, as communicated by joint letter on 8 February 2017, and agreed that a pre-hearing conference was not necessary.

F. Hearing

76. From 13 to 17 March 2017, a hearing was held in The Hague. The following individuals attended:

Tribunal:

Dr Veijo Heiskanen (presiding)
Mr Gary Born
Mr J. Christopher Thomas, QC

The Claimants:

Prof. Luca G. Radicati di Brozolo
Mr Michele Sabatini
Mr Emilio Bettoni
Mr Flavio Ponzano
Ms Vanessa Zanetti
Ms Lucia Pontremoli
(*ArbLit - Radicati di Brozolo Sabatini Benedettelli Torsello)*

Mr Nico Leslie
(*Fountain Court Chambers*)

Mr Michal Hrabovský
(*Bpv Braun Partners*)

Fact Witnesses
Mr Daniel Kunz
Mr Tomáš Raška
Mr Igor Wollner

Expert Witnesses
(*Ernst & Young (CZ)*)

[not testifying]
(*Charles River Associates*)

[not testifying]
(*Compass Lexecon*)

The Respondent:

Mr Tomáš Munzar
(*Ministry of Finance of the Czech Republic*)

Mr Paolo Di Rosa
Ms Mallory Silberman
Mr John Muse-Fisher
Ms Aimee Kneiss
(*Arnold & Porter Kaye Scholer LLP*)

Mr Dmitri Evseev
Mr Peter Nikitin
Mr Bart Wasiak
Mr Eugenio Cruz Araujo
(*Arnold & Porter Kaye Scholer (UK) LLP*)

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

Fact Witnesses
Mr Josef Fiřt
Mr Ladislav Minčič

Expert Witnesses

(*Frontier Economics Ltd.*)

(*Dentons Europe CS LLP*)

[not testifying]
(*KPMG Ceská republika, s.r.o.*)

Permanent Court of Arbitration:

Ms Judith Levine
Mr E Jin Lee
Mr Nadir Pracha
Ms Erin Vaccaro

Assistant to Mr J. Christopher Thomas QC:

(*NUS Centre for International Law Practice Fellow*)

Court Reporter:

Mr Trevor McGowan

Interpreters:

77. During the course of the hearing, the Parties agreed to the submission of some new exhibits. Each expert witness made a presentation to the Tribunal before being subjected to cross-examination. The Tribunal asked the Parties to address particular issues during their closing statements.

Electronic versions of the experts' presentations, the Parties' opening and closing statements, and any demonstrative exhibits, were provided to the Tribunal during or shortly after the hearing.

78. Following discussions with the Parties at the close of the hearing, the Tribunal decided that it was not necessary for the Parties to submit post-hearing briefs. The Tribunal did, however, ask the Parties to prepare joint chronologies of exhibits in the record on issues of particular interest.

79. In accordance with a schedule agreed by the Parties, the Parties filed the requested joint chronologies on 21 April 2017, transcript corrections on 24 April 2017, and an updated list of exhibits on 25 April 2017

80. The final corrected transcript was circulated on 16 May 2017.

81. The Parties filed simultaneous costs submissions on 16 June 2017.

82. On 9 November 2017, the Respondent wrote the Tribunal to enquire whether, "in light of a number of recent arbitral awards addressing subjects closely related to those currently pending before this Tribunal," it was possible to introduce new legal authorities and to allow the Parties an opportunity to comment on them. The Respondent nonetheless added that it did not wish to delay the issuance of the award, had the Tribunal already completed its deliberations on the key issues at stake. The same day, the PCA conveyed a message on behalf of the Tribunal, informing the Parties that the latter was in the process of finalizing its decision.

III. FACTUAL BACKGROUND

83. The present dispute arises out of the Claimants' investments in the photovoltaic sector in the Czech Republic. This section sets out the factual background of the dispute and is divided into six sub-sections. First, it outlines the RES Regime that the Respondent established in the Czech Republic from 1992. Second, it sets out each of the Claimants' investments in the photovoltaic sector in the Czech Republic, beginning in 2008. Third, it describes the measures amending the RES Regime. Fourth, it discusses the review of these measures in Czech domestic courts. Fifth, it records the Parties' failed attempts to settle the dispute leading to commencement of the arbitration. Sixth, and finally, it briefly addresses the Commission's State aid decisions issued since the arbitration was commenced.

A. THE RES REGIME ESTABLISHED BY THE RESPONDENT

1. Domestic Legislation and EU Directives (1992-2005)

84. The Respondent's regime to encourage the use of RES, including photovoltaic plants, dates back to 1992. The Czech Republic's Act No. 586/1992 on Income Tax (the "**Act on Income Tax**") created two tax incentives related to RES, including photovoltaics. First, Article 19 of the Act on Income Tax provided for a tax exemption on "the income gained from the operation of . . . solar facilities . . . in the calendar year in which they were first launched into operation and in five immediately consecutive years" (the "**Income Tax Holiday**").[6] Second, the Act on Income Tax permitted the depreciation for tax purposes of certain components of photovoltaic plants (for example, solar installations) over a period between five to ten years (the "**Original Depreciation Provisions**").[7] The Claimants assert that the depreciation provisions could be applied starting at the expiry of the exemption period provided for in Article 19(1)(d) of the Act on Income Tax, effectively prolonging the exemption period.[8]

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6 Act on Income Tax No. 586/1992, s. 19(1)(d) (**Ex. C-18**). *See also* Act on Income Taxes No. 586/1992, s. 19(e) (**Ex. R-1**), which translates "solar facilities" as "solar installations." All exhibits, including statutes, were submitted in the original language together with an unofficial translation into English, in accordance with para. 4.6 of Procedural Order No. 1. Where the Parties have submitted English translations of the same source in Czech, the English translations frequently differ. In this circumstance, the Tribunal has quoted or extracted from the English translation that is the most clear and comprehensive and cited the alternative translation. It has also highlighted alternative phrasing or substantive differences, where relevant.

7 Act on Income Taxes No. 586/1992, s. 19(1)(d) (**Ex. R-61**). *See also* Act on Income Tax No. 586/1992, s. 19(1)(d) (**Ex. C-18**)

8 Notice of Arbitration, para. 18; Statement of Claim, para. 35.

85. On 13 December 1995, the former Commission of the European Communities (now the Commission) published a white paper entitled "An Energy Policy for the European Union," which called on Member States to promote renewable energies, including through "supportive market regulation permitting these investments to compete with others" and beneficial "fiscal regulations."[9] In 1997, the Commission published another white paper entitled "Energy for the Future: Renewable Sources of Energy." The 1997 white paper stated, *inter alia*, that "[a] long-term stable framework for the development of renewable sources of energy, covering political, legislative, administrative, economic and marketing aspects is in fact the top priority for the economic operators involved in their development."[10]

86. On 27 September 2001, in furtherance of these objectives, the European Parliament and the Council of the European Union adopted Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market (the "**First EU RES Directive**").[11] Under the Directive, Member States were obliged to "take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with . . . national indicative targets."[12] Member States were required to "adopt and publish a report setting [these] national indicative targets . . . in terms of a percentage of electricity consumption for the next 10 years."[13] Member States were also required to "outline the measures taken or planned, at the national level, to achieve these national indicative targets" and to publish their success in meeting the targets.[14]

87. On 16 December 2003, the Czech Society for Wind Energy and the Czech national section of Eurosolar, the non-profit European Association for Renewable Energy ("**Eurosolar**"), filed formal complaints with the Commission in relation to the draft Act on RES Promotion.[15] The

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9 Commission of the European Communities, "White Paper: An Energy Policy for the European Union," COM(95) 682, 13 December 1995, para. 119 (**Ex. C-19**).

10 European Commission, Energy for the Future: Renewable Sources of Energy, 26 November 1997, p. 7 (**Ex. C-345**); Hearing Transcript, Day 1, p. 23-24.

11 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**) (hereinafter "**First EU RES Directive**"); *see also* Hearing Transcript, Day 1, p. 24:8-20.

12 First EU RES Directive, art. 3(1) (**Ex. C-20**).

13 First EU RES Directive, art. 3(2) (**Ex. C-20**).

14 First EU RES Directive, art. 3(2), (3) (**Ex. C-20**).

15 Letter from [redacted] Czech Society for Wind Energy and [redacted] Czech section of EUROSOLAR to Mario Monti, European Commission, 16 December 2003 (**Ex. C-69a**); Letter from [redacted] Czech Society for Wind Energy and [redacted] Czech section of EUROSOLAR to Loyola de Palacio, European Commission, 16 December 2003 (**Ex. C-69b**).

complaints concerned alleged State aid granted to the Czech energy company ČEZ and an alleged contradiction between the draft legislation and the First EU RES Directive. By letter dated 27 July 2004, the Commission advised that it had assessed the draft Act on RES Promotion from a State aid perspective and determined that "the proposed support system does not constitute State aid."[16]

88. On 1 May 2004, the Czech Republic became a member of the European Union (the "**EU**"), and assumed all obligations under EU law, including the First RES Directive and its rules on State aid. EU accession instruments set the Czech Republic's national indicative target for contribution of electricity produced from RES to gross electricity consumption by 2010 at 8%.[17] The Commission described these targets, generally, as "non-binding."[18]

89. In 2005, the Commission issued a communication relating to the national support systems for RES, requesting EU Member States to optimize and fine tune their support schemes by, *inter alia*, "increasing legislative stability and reducing investment risk" and employing "the possibilities of tax exemptions and reductions offered to renewable energy sources."[19]

2. The Act on RES Promotion (2005)

90. According to the Respondent, it "began taking steps to implement the First [EU] RES Directive well before its Accession to the EU" and, in late 2003, it prepared a draft legislative instrument that eventually became Act No. 180/2005 on Promotion of Electricity Production from Renewable Energy Sources (the "**Act on RES Promotion**").[20] The Explanatory Statement to the draft Act noted that (a) "[t]o meet the indicative target, it is necessary to create a support system which . . . will create the necessary climate for investors with a long-term guarantee of return on investments made;" (b) predicted that the proposed RES "support system" might increase electricity prices by around 1% per a year; (c) estimated that photovoltaic power plants would

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[16] Letter from Humbert Drabbe, European Commission, concerning "Draft legislation on the promotion of electricity produced from renewable energy sources in the Czech Republic", 27 July 2004 (**Ex. C-70**).

[17] *See* Annex II to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic 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 also* Transcript, Day 1, p. 24:21-23.

[18] European Commission, "Renewable Energy: Progressing towards the 2020 target", 31 January 2011, p. 3 (**Ex. R-78**).

[19] European Commission, Communication from the Commission: The Support of Electricity from Renewable Energy Sources, 7 December 2005 (**Ex. C-349**); *see also* Hearing Transcript, Day 1, p. 24-25.

[20] Statement of Defense, para. 15.

account for the smallest proportion of electricity generation in 2010 (the same proportion of power plants as those using geothermal energy); and (d) predicted that "facilities producing electricity from solar energy . . . will mostly include small facilities."[21] Similarly, a 2005 Czech Government report stated that:

> Photovoltaic systems currently make a negligible contribution in terms of electricity production . . . In view of the technical capacities and the investment costs of available photovoltaic technologies, there is unlikely to be any significant increase in installed capacity or electricity production in the immediate future.[22]

91. The Explanatory Statement also stated that the draft Act aimed to "maintain[] the tax reliefs to the extent set out" in existing legislation[23] and "provid[e] a guarantee to investors and owners of facilities producing electricity from renewable sources that qualify for support … that the amount of revenue per unit of electricity produced from renewable sources acquired by producers from the support will be maintained for 15 years."[24]

92. On 31 March 2005, the Act on RES Promotion was adopted and, on 1 August 2005, it entered into force.[25] Section 1(2) states the aims of the Act in the following terms:

> Section 1
>
> **Subject Matter of Regulation**
>
> [. . .]
>
> (2) The aim of this Act is to, in the interest of climate protection and environmental protection,
>
> a) promote the exploitation of renewable energy sources ("Renewable Sources"),
>
> b) ensure that the share of Renewable Sources in the consumption of primary energy sources continually increases,
>
> c) contribute to conservation in the exploitation of natural resources and to the sustainable development of society,
>
> d) put in place the conditions for achieving the indicative target so that the share of electricity produce from Renewable Sources accounts for 8% of gross electricity

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21 "Explanatory statement on Act No 180/2005 Coll., on Promoting Electricity Production" (**Ex. C-72**).

22 Ministry of Industry and Trade, Ministry of the Environment, and the Energy Regulatory Office, Report on meeting the indicative target for the production of electricity from renewable sources in 2004 pursuant to Section 7 of Act No 180/2005 Coll. on the promotion of the production of electricity from renewable energy sources, September 2005, paras. 3.7, 3.7.3 (**Ex. R-165**). *See also* Opening Statement of the Czech Republic, slide 9; Hearing Transcript, Day 1, p. 134:10-14 (explaining that "the Czech Republic did not envision or want a significant amount of solar generation capacity by 2010").

23 "Explanatory statement on Act No 180/2005 Coll., on Promoting Electricity Production", p. 4 (**Ex. C-72**).

24 "Explanatory statement on Act No 180/2005 Coll., on Promoting Electricity Production", p. 5 (**Ex. C-72**).

25 Act No. 180/2005 on Promotion of Electricity Production from Renewable Energy Sources, 31 March 2005 (**Ex. C-26**) (hereinafter "**Act on RES Promotion**"); Notice of Arbitration, para. 27.

> consumption in the Czech Republic in 2010and to put in place the conditions for further increasing such share after 2010.[26]

93. The Act sought to promote electricity production from RES by establishing a combination of tariff and non-tariff mechanisms.[27] The non-tariff mechanisms included preferential treatment of RES producers in the distribution and transmission of electricity, as provided for in Section 4 of the Act on RES Promotion:

> Section 4
>
> **Rights and Obligations of the Entities on the Market in Electricity from Renewable Sources**
>
> (1) The operator of the transmission system or the operators of the grid systems shall be obliged, within the area delimited in their license), to preferentially connect to the transmission system or to the grid systems plants according to Article 3 (hereinafter referred to as the "plants") for the purpose of transmitting or distributing electricity from renewable sources, provided that the producer of electricity from renewable sources (hereinafter referred to as the "producer") so requests and that the producer meets the conditions for connection and electricity transport laid down in a special regulation).[28]

94. The two tariff incentives provided for in the Act on RES Promotion were (a) Feed-in Tariff, a fixed purchase price that was paid to RES producers for the electricity they delivered to the grid (the "**FiT**"); and (b) Green Bonus, a payment made by the grid operator to RES producers for electricity they sold on the free market or self-consumed (the "**Green Bonus,**" and together with FiT, the "**Subsidies**").[29] Under the FiT programme, grid operators were obliged to purchase electricity produced from RES on a priority basis and at a fixed minimum price, set annually by the Czech Government's Energy Regulatory Office (the "**ERO**").[30] Under the Green Bonus programme, RES producers had the right to sell electricity to third parties at market prices and would receive an additional financial bonus paid by the grid operator for every kilowatt hour ("**kWh**") produced and sold.[31]

95. These two programmes were set out in Section 6 of the Act on RES Promotion:

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[26] Act on RES Promotion, s. 1(2) (**Ex. C-26**); *see also* Hearing Transcript, Day 1, p. 27:3-18.

[27] Statement of Defense, para. 23.

[28] Act on RES Promotion, art. 4(1) (**Ex. C-26**) (footnotes omitted). *See also* Act No. 180/2005 on Promotion of Electricity Production from Renewable Energy Sources and on Amendments to Certain Laws (Act on Promotion of Exploitation of Renewable Energy Sources), 31 March 2005, Section 4(1) (**Ex. R-5**).

[29] Statement of Defense, para. 23.

[30] Notice of Arbitration, para. 29; Statement of Claim, para. 60; Act on RES Promotion, s. 6(1)(a) (**Ex. C-26**); Hearing Transcript, Day 1, p. 28:6-11.

[31] Notice of Arbitration, para. 30; Statement of Claim, para. 61.

Section 6

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

(1) The Office sets, one calendar year in advance, the purchasing prices for electricity from Renewable Sources (the 'Purchasing Prices'), separately for individual kinds of Renewable Sources, and sets green bonuses, so that

a) the conditions are created for the achievement of the indicative target so that the share of electricity produced from Renewable Sources accounts for 8% of gross electricity consumption in 2010 and

b) for facilities commissioned

1. after the effective date of this Act, there is attained, with the Support consisting of the Purchasing Prices, a fifteen year payback period on capital expenditures, provided technical and economic parameters are met, such parameters consisting of, in particular, cost per unit of installed capacity, exploitation efficiency of the primary energy content in the Renewable Source, and the period of use of the facility, such parameters being stipulated in an implementing legal regulation,

2. after the effective date of this Act, the amount of revenues per unit of electricity from Renewable Sources, assuming Support in the form of Purchasing Prices, is maintained as the minimum [amount of revenues], for a period of 15 years from the commissioning year of the facility, taking into account the industrial producer price index; the commissioning of a facility is also deemed to include cases involving the completion of a rebuild of the technological part of existing equipment, a change of fuel, or the completion of modernization that raises the technical and ecological standard of an existing facility,

3. prior to the effective date of this Act, there is maintained for a period of 15 years the minimum amount of Purchasing Prices set for the year 2005 in accordance with the legal regulations to date and taking into account the industrial producer price index.

(2) When setting the amounts of green bonuses, the Office also takes into account a heightened degree of risk associated with off-taking electricity from Renewable Sources in the electricity market.

(3) When setting Purchasing Prices and green bonuses, the Office proceeds on the basis of differing costs for the acquisition, connection and operation of individual types of facilities, including the development thereof . . . over time.

(4) Purchasing Prices set by the Office for the following calendar year shall not be less than 95% of the Purchasing Prices in effect in the year for which the setting decision is made. The provision of the first sentence shall not be used for setting the Purchasing Prices for the following calendar year for those types of Renewable Sources where the payback period on capital expenditures is shorter than 11 years in the calendar year in which the Office decides on the setting of the new Purchase Prices; When setting Purchase Prices, the Office proceeds in accordance with subsections 1 through 3.[32]

[32] Act No. 180/2005 on Promotion of Electricity Production from Renewable Energy Sources and on Amendments to Certain Laws (Act on Promotion of Exploitation of Renewable Energy Sources), 31 March 2005, Section 4(1) (**Ex. R-5**). *See also* Act No. 180/2005 on the promotion of electricity production from renewable energy sources and amending certain acts (Act on Promotion of Use of Renewable Sources), 31 March 2005, Section 4(1) (**Ex. C-26**).

96. Article 6(1)(b)(1) of the Act on RES Promotion thus provided for a 15-year return on investments provided that installations were able to comply with "technical and economic parameters, including in particular the costs of an installed unit of capacity, efficiency of use of the primary energy contents in the renewable source and the period of use of the plant." Article 6 of the Act imposed two limitations on the ERO's ability to adjust the tariffs. First, under Article 6(1)(b)(2), revenues per unit of electricity had to be maintained for a period of fifteen years from the year the plant was commissioned subject to the price index.[33] Second, when setting the tariff applicable to installations commissioned in the following year, the ERO could not reduce the tariff by more than 5% in comparison to the current year (the "**5% Limit**").[34]

3. Regulations Implementing the Act on RES Promotion (2005-2010)

97. Pursuant to Article 6(1)(b)(1) of the Act on RES Promotion, the ERO was to adopt implementing regulations to "determine the indicative technical and economic parameters to fix the feed-in-tariffs for each RES technology."[35] To this end, ERO Regulation No. 475/2005 (the "**Technical Regulation**") established the technical and economic requirements that RES producers needed to meet in order to benefit from the 15-year investment recovery or "payback period" provided for by Article 6(1)(b)(1) of the Act on RES Promotion.[36] The Technical Regulation was later amended by ERO Regulation No. 364/2007 and ERO Regulation No. 409/2009 which modified the technical and economic requirements and extended the "estimated lifetime" of new photovoltaic plants from 15 to 20 years.[37] ERO Regulation No. 140/2009 (the "**Pricing Regulation**") dealt, *inter alia*, with the method of pricing.[38] Article 2(9) of the Pricing Regulation provided in relevant part:

> *Method of regulation and pricing in power engineering*
>
> Feed-in tariffs and green bonuses stipulated by the Act providing for the promotion of renewable resources are applied throughout the estimated life of power plants determined by the regulation implementing some provisions of the Act on the promotion of renewable resources. The feed-in tariffs are increases y/y throughout the life of the power plant classified in the respective category depending on the type of the renewable resource used

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[33] *See also* Hearing Transcript, Day 1, p. 28-29.

[34] Act on RES Promotion, s. 6(4) (**Ex. C-26**); Hearing Transcript, Day 1, p. 30-31.

[35] Hearing Transcript, Day 1, p. 31:8-12.

[36] ERO Regulation No. 475/2005 implementing certain provisions of the law on support for the use of renewable sources, 30 November 2005 (**Ex. C-28**) (hereinafter "**Technical Regulation**"); Hearing Transcript, Day 1, p. 31:12-14.

[37] ERO Regulation No. 364/2007 (**Ex. C-29**); ERO Regulation No. 409/2010 (**Ex. C-30**).

[38] ERO Regulation No. 140/2009, 25 May 2009 (**Ex. C-31**) (hereinafter "**Pricing Regulation**").

> and the date of launch into operation with respect to the industrial producers' price index by the minimum 2 % and maximum 4 %, with the exception of biomass and bio gas burning plants.

98. As provided for in the above statutory provisions and regulations, payment of the FiT and Green Bonuses was guaranteed for the entire "estimated life" of photovoltaic power plants and the FiT payment was to increase each year by between 2% and 4% of the inflation price index related to industrial producers over the lifetime of the plant (20 years).[39]

99. At the time of the adoption of the Act on RES Promotion, government officials of the Czech Republic made public statements about the advantages of the RES Regime in general and the Act on RES Promotion in particular. For example, one of the co-authors of the Act on RES Promotion, who subsequently served as the Minister of Environment from 2007 to 2009, stated in a June 2005 article that the Act created "a long-term stable and attractive business environment for ecological power generation."[40] A 2005 communication of the Czech Republic on the UN Framework Convention on Climate Change of 2005 stated that "[f]avourable tariffs for purchase of electricity produced from renewable energy sources is intended to stimulate purchase of electricity produced from renewable sources and their increased use."[41]

100. According to the Claimants, "[f]rom 2005 to 2008 there were virtually no investments in the PV sector because the feed-in tariffs were too low and the investment costs were too high."[42] The Claimants suggest that photovoltaic investments in the Czech Republic only became attractive in late 2008, "when the prices of PV components started to decrease."[43]

101. By 2009, investment costs for PV plants had sharply declined, primarily due to the impact of the imported Chinese and Taiwanese PV panels,[44] and PV investments in the Czech Republic

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[39] Notice of Arbitration, para. 38; Statement of Claim, para. 79; Statement of Defense, paras. 38-39.

[40] Martin Bursík, "Renewable resources: the new law is an opportunity for modern municipalities", 1 June 2005, published on the website of Moderní obec, a journal for modern public administration (**Ex. C-32**). *See also* Ministry of Industry, Program of Support of Renewable Sources of Energy, 16 January 2006 (**Ex. C-33**); ERO, Presentation at Energy from the Sun Conference, 26 January 2006 (**Ex. C-34**); ERO, Lecture on support of renewable energy sources, 26 October 2006 (**Ex. C-35**).

[41] Ministry of the Environment of the Czech Republic and Czech Hydrometeorological Institute, "Fourth National Communication of the Czech Republic on the UN Framework Convention on Climate Change and Demonstrable Progress Report on Implementation of the Kyoto Protocol", 2005, p. 41 (**Ex. C-79**).

[42] Hearing Transcript, Day 1, p. 33:1-3.

[43] Hearing Transcript, Day 1, p. 33:4-6. *See also* Opening Statement of the Czech Republic, slide 27, *referring to* Photovoltaic Power Plants – Installed Capacity in 2009, Preliminary Estimate, p. 4 (**Ex. R-141**).

[44] The EU subsequently found that the prices were "dumped" and imposed anti-dumping duties; *see* R. Emmoli, B. Blanchard, "EU, China resolve solar dispute – their biggest trade row by far", *Reuters*,

surged.[45] In the summer of 2009, the ERO informed the Government of a dramatic increase in connection requests for PV plants, describing the situation as "extremely serious."[46] The ERO advised the Government to abolish the 5% Limit, so as to enable it to reduce the FiT to a level commensurate with actual investment costs.[47] Following these warnings, on 28 August 2009, the Ministry of Industry and Trade announced the immediate abrogation of the 5% Limit.[48]

102. Investors and banks contested the abrogation of the 5% Limit, and the Ministry subsequently retreated from its position in favor of a more gradual approach to reducing the FiT.[49] In a letter to the ERO, the Ministry stated that the goal of the 5% Limit was to "ensure the investors in renewable sources certainty of payback of their investments, 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 investments."[50]

103. On 16 November 2009, the Minister of Industry and Trade 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.[51] On 23 November 2009, the ERO issued its Price Decision No. 5/2009, fixing the FiT for PV plants commissioned between 1 January and 31 December 2010 with an installed capacity of up to 30kW inclusive.[52]

104. On 23 April 2009, the European Parliament and the Council of the European Union adopted Directive 2009/28/EC on the promotion of the use of energy from renewable sources (the "**Second**

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27 July 2013 (**Ex. R-125**). The impact of the dumped imports on solar panel prices was addressed in **RER-██ 1**, para. 5.16 and Figure 7.

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

46 Letter from Josef Fiřt to the Minister of Industry and Trade, 1 July 2009 (**Ex. C-332**); *see generally* Hearing Transcript, Day 2, p. 165:2:20.

47 Letter from Josef Fiřt to the Minister of Industry and Trade, 1 July 2009 (**Ex. C-332**); Claimants' Opening Statements, slide 19.

48 Tomáš Bartovský, Press Release: Ministry of Industry and Trade Equalises Support for Renewable Energy Sources, 24 August 2009 (**Ex. R-138**); Hearing Transcript, Day 1, p. 33:21-24.

49 Hearing Transcript, Day 1, pp. 33-34.

50 Letter from ██████ to ERO Vice-Chairman, 28 August 2009 (**Ex. R-145**); Hearing Transcript, Day 1, p. 34:4-14.

51 Press Conference Following the Government Session, 16 November 2009 (**Ex. C-324**); Hearing Transcript, Day 1, p. 35-36. *See generally*, Hearing Transcript, Day 2, pp. 176-77; Hearing Transcript, Day 3, p. 14:19-22.

52 ERO Price Decision No. 5/2009, 23 November 2009 (**Ex. R-38**); Hearing Transcript, Day 1, p. 37:11-14.

EU RES Directive"), which amended and repealed the First EU RES Directive.[53] The Second EU RES Directive increased the Czech Republic's target for share of energy produced from RES to 13% by 2020.[54] In compliance with Article 4 of the Second EU RES Directive, the Czech Ministry of Industry and Trade published a "National Renewable Energy Action Plan" in July 2010, which stated that "[s]upport for individual types of renewable energy sources will be paid for the period of their expected life, which in case of renewable energy sources means 20 years."[55]

B. THE CLAIMANTS' INVESTMENTS (2007-2011)

105. The claims in this arbitration are brought by four Claimants: Natland Group, Natland Investment, GIHG and Radiance. Natland Group and Natland Investment form part of the Natland group, a Czech-owned investment group whose activities consist in seeking investment opportunities in the sector of medium-sized companies ("**Natland**").[56] GIHG is an investment holding company that was incorporated in 2004 "with the purpose of investing in several countries in the field of sustainable development and renewable energy."[57] Radiance is an SPV, incorporated by the Mid Europa Fund III LP (the "**Fund**") – acting through its ultimate general partner Mid Europa III Management Limited – advised by Mid Europa Partners LLP ("**MEP**"), for investing in renewable energy in Central and Eastern Europe.[58]

106. According to the Claimants, from "around 2008 [they] identified the production of electricity from photovoltaic plants as a favorable investment" in the Czech Republic.[59] They state that 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.[60] The Respondent agrees that "significantly cheaper solar panels" were available to European investors from late 2008, but

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[53] Directive 2009/28/EC on the promotion of the use of energy from renewable sources, 23 April 2009 (**Ex. C-23**) (hereinafter "**Second EU RES Directive**").

[54] Second EU RES Directive, Annex I, Part A.

[55] Ministry of Industry and Trade, National Renewable Energy Action Plan of the Czech Republic, July 2010, p. 54 (**Ex. C-80**).

[56] Statement of Claim, para. 110; Statement of Defense, para. 586; **CWS- Raška-1**, para. 10.

[57] Statement of Claim, para. 109.

[58] Statement of Claim, para. 111.

[59] Statement of Claim, para. 96.

[60] *See* Statement of Claim, paras. 96-101; SunShot, U.S. Department of Energy, "SunShot Vision Study", February 2012 (**Ex. C-82**); European Photovoltaic Industry Association, "Set for 2020: Solar Photovoltaic Electricity: A mainstream power source in Europe by 2020", March 2009 (**Ex. C-83**).

characterizes this change in the market as "unexpected" and "unprecedented."[61] Both Parties agree that the cost of purchasing solar panels accounts for the majority of initial investment costs, while citing different percentages for the contribution of purchase of solar panels to capital outlays in constructing solar plants.[62]

107. The Claimants made their investments in the Czech Republic through Energy 21.[63] The Claimants describe Energy 21 as "a key player on the Czech solar market specialized in the development, construction and operation of solar power plants."[64] The Claimants purchased shareholdings in, or financed Energy 21.[65] In turn, Energy 21 invested in the Czech solar market by creating or purchasing shareholdings in SPVs incorporated under Czech law.[66] These SPVs own and operate solar installations.[67] The Claimants argue that these solar installations constitute their "effective investment[s] in the Czech Republic."[68]

108. Following its establishment in 2007, Energy 21 set up or purchased shareholdings in eleven SPVs.[69] In order to build and operate these installations, which were owned by the Claimants through Energy 21 and in turn through the SPVs, the Claimants went through a licensing process regulated by Czech law and, in particular, by Act No. 458/2000 (the "**Energy Act**").[70] This process required the Claimants to (a) file an application for connection to the grid; (b) receive a binding statement from the grid operator; (c) execute a grid connection agreement with the grid operator; (d) obtain all zoning and building permits from the relevant authorities as well as the actual energy production license from the ERO; and (e) execute a power purchase agreement with the grid operator (in the case where the plant was to receive the FiT) or execute an agreement for payment of Green Bonus (in the case where the plant was to receive the Green Bonus).[71]

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[61] Statement of Defense, paras. 66-70, *citing* **RER-[redacted]-1**, paras. 5.1 and 5.16.

[62] Statement of Claim, para. 97; Statement of Defense, para. 67.

[63] Statement of Claim, para. 103; Hearing Transcript, Day 1, p. 49:15-21.

[64] Statement of Claim, para. 103.

[65] Statement of Claim, para. 103.

[66] Statement of Claim, paras. 105 and 156.

[67] Statement of Claim, para. 156; Overview of Power Plants (**Ex. C-153)**.

[68] Statement of Claim, para. 140.

[69] *See* **Exs. C-125 to C-151.**

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

[71] *See* Statement of Claim, paras. 157-63.

109. The means and phasing by which Claimants' investments in Energy 21, and Energy 21's investments in the Czech Republic were effected are set out below. A 2011 organizational chart showing the entities involved in the Claimants' investments is reproduced from the Claimants' Notice of Arbitration as **Figure 1** (below at page 29).[72]

110. The Claimants invested in Energy 21 through a succession of equity and debt financings comprising three phases. First, GIHG, Natland Investment and Natland Group invested in Energy 21. Second, Radiance acquired control of Energy 21. Third, Radiance made a further investment in Energy 21 which brought about GIHG's, Natland Investment's and Natland Group's exit from Energy 21. Radiance then subsequently sold its entire shareholding in Energy 21 to Uniastra Holding Limited.

111. The first phase of the Claimants' investment in Energy 21 occurred on 20 May 2008 when GIHG purchased 50% of Energy 21 from Natland Investment Group B.V. (who was then 100% shareholder).[73] On 3 March 2009, GIHG sold to Mr Daniel Kunz 0.75% of Energy 21 and on 19 August 2009, GIHG sold to DCEMF Mezzanine Holdings B.V. 2.5% of Energy 21.[74] Subsequently, on 18 December 2009, Natland Investment[75] purchased 46.75% of Energy 21 from Natland Investment Group B.V.[76] In the course of Energy 21's operation and during some of these various acquisitions, Natland Investment Group B.V., GIHG, Natland Group (Natland Investment's controlling shareholder)[77] and two other entities known as Feraton Financial Services B.V. ("**Feraton**") and Blando Investments S.A. ("**Blando**") either extended various loans to Energy 21 or entered into agreements for the assignment of receivables from some of these loans.[78]

112. On 27 April 2010, GIHG sold to Mr Kunz 0.5% of Energy 21 and to Mr Pavel Maleček 0.25% of Energy 21. On the same date, Natland Investment sold 0.5% of Energy 21 to Mr Kunz and to Mr Maleček 0.25% of Energy 21.[79]

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72 Energy 21's Structure Diagram (**Ex. C-45**). *See also* Annex A to the Respondent's Rejoinder.

73 *See* Sale and purchase agreement of 20 May 2008 between Natland B.V. (as seller) and GIHG (as buyer) (**Ex. C-85**); Hearing Transcript, Day 1, p. 49:22-24; Claimants' Opening Statements, slide 46.

74 Statement of Claim, fn. 66.

75 Natland Investment was originally incorporated as Genus Investment N.V. On 8 December 2009. Genus Investment N.V. later changed its name to Natland Consulting N.V. on 2 February 2010, before changing its name to Natland Investment. *See* Natland Investment's commercial register as at 26 March 2014 (dated 2 September 2014) (**Ex. C-95**).

76 *See* Sale and purchase agreement of 18 December 2009 between Natland B.V. (as seller) and Genus Investment N.V. (subsequently Natland Investment) (as buyer) (**Ex. C-96**); Hearing Transcript, Day 1, p. 49-50; Claimants' Opening Statements, slide 46.

77 *See* Corporate Organizational Chart (**Ex. C-43**).

78 Statement of Claim, paras. 119-121, 123-124.

79 Statement of Claim, fn. 75.

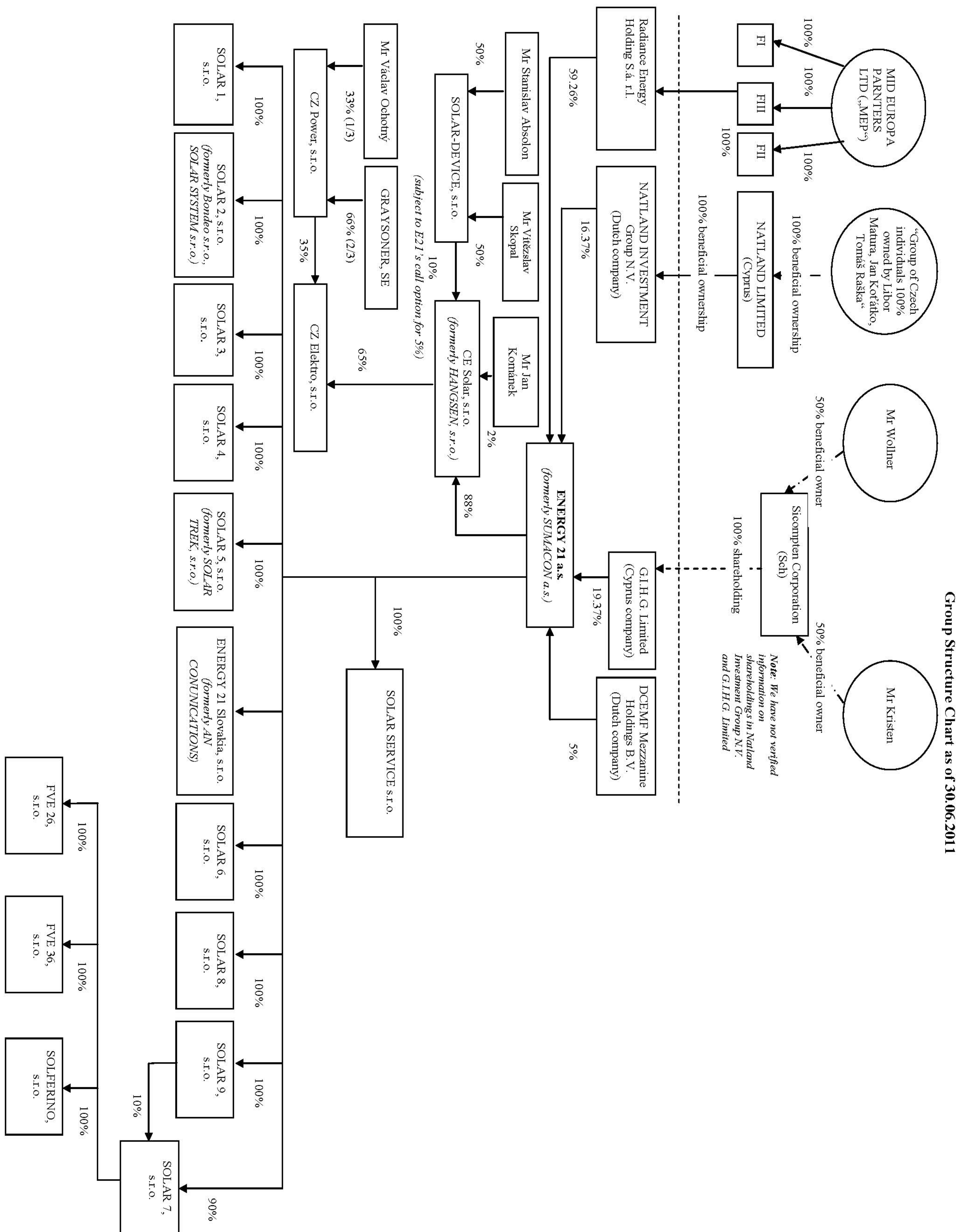

Figure 1*: Energy 21's Group Structure Chart as at 30 June 2011*

113. In the second phase of the investments, Radiance purchased the controlling stake in Energy 21. On 11 May 2010, Radiance acquired 59.26% of Energy 21 from GIHG and Natland Investment (each sold 29.63% shareholding) (the "**11 May 2010 SPA**").[80] On the same date, Radiance also entered into a Facility Agreement with Energy 21 (the "**11 May 2010 Facility Agreement**")[81] as well as an Investment and Subscription Agreement with the then shareholders of Energy 21 *i.e.*, GIHG, Natland Investment, Mr Kunz, Mr Maleček, DCEMF Mezzanine and Blando (the "**Investment and Subscription Agreement**").[82]

114. Under the 11 May 2010 Facility Agreement, Radiance agreed to provide a loan facility of up to EUR 27,000,000 to Energy 21.[83] Under the Investment and Subscription Agreement, read together with the terms of the 11 May 2010 SPA, Radiance and the 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 shareholding interests in Energy 21.[84] These 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."[85] 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 of the 11 May 2010 SPA but which was governed by Czech law.[86] These adjustments were given effect to on 20 June 2011 and 11 July 2011 under a number of subsequent agreements.[87]

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[80] *See* "Agreement for the sale and purchase of Shares" of 11 May 2010 between Natland Investment and GIHG (as sellers) and Radiance (as buyer) and Energy 21 governed by English law (**Ex. C-106**); Hearing Transcript, Day 1, p. 50:11-15; Claimants' Opening Statements, slide 47.

[81] *See* Facility agreement of May 11, 2010 between Radiance (as lender) and Energy 21 (as borrower) (**Ex. C-107**).

[82] Investment and Subscription Agreement between Natland Investment Group N.V. et al. and Energy 21 concluded on 11 May 2010 (**Ex. C-109**). Natland Investment and GIHG had obtained a loan from Blando under a 30 June 2009 EUR 15,300,000 Mezzanine Term Loan Facility Agreement and pursuant to this Facility Agreement, Natland Investment and GIHG had sold shares to DCEMF Mezzanine as a condition/additional compensation to Blando. *See* Sale and purchase agreement of 19 August 2009 between GIHG (as seller) and DCEMF (as buyer) (**Ex. C-96**).

[83] Hearing Transcript, Day 1, p. 50:7-9.

[84] The adjustments also provided for anti-dilution mechanisms for Mr Kunz's shares and DCEMF Mezzanine. Statement of Claim, para. 131; Investment and Subscription Agreement between Natland Investment Group N.V. et al. and Energy 21 concluded on 11 May 2010 (**Ex. C-109**); Hearing Transcript, Day 1, p. 50-51.

[85] Statement of Claim, para. 113; Hearing Transcript, Day 1, p. 50:16-21

[86] Statement of Claim, para. 129. *See* "Agreement on the transfer of shares" of 3 June 2010 between Natland Investment and GIHG (as sellers) and Radiance (as buyer) and E21 governed by Czech law (**Ex. C-108**); Hearing Transcript, Day 1, p. 51:8-13; Claimants' Opening Statements, slide 48.

[87] Statement of Claim, paras. 133-34. *See* Shareholders' subscription agreement of 20 June 2011 in the form of notarial deed (**Ex. C-114**); Sale and purchase agreement of 20 June 2011 between Natland Investment (as seller) and GIHG (as buyer) (**Ex. C-115**); Sale and purchase agreement of 20 June 2011 between GIHG

115. However, prior to these adjustments on 20 June 2011, on 1 December 2010, GIHG purchased 2.5% of Energy 21 from Mr Kunz and 0.5% of Energy 21 from Mr Maleček.[88]

116. The third phase consisted of a further investment by Radiance in Energy 21 which increased its shareholding to 95%.[89] On 4 August 2011, E21 Holding B.V. ("**E21 Holding**"), Radiance's wholly-owned subsidiary,[90] entered into an agreement between Natland Investment, GIHG, Natland Group and Energy 21.[91] This resulted in E21 Holding acquiring GIHG's and Natland Investment's remaining shareholdings in Energy 21 (22.50% and 20.08% respectively or 16.37% and 19.37% respectively[92]), as well as GIHG's and Natland Group's existing loans to Energy 21. Completion of the transaction took place on 5 October 2011 and as part of the transaction, Radiance contributed its stake in Energy 21 and extended a loan to E21 Holding for the latter's acquisition of GIHG's and Natland Investment's equity and financing in Energy 21. As a result, as of October 2011, Radiance indirectly controlled Energy 21 through E21 Holding, which directly held 95% of Energy 21's share capital.[93] However, on 22 December 2015, both E21 Holding and DCEMF Mezzanine sold 100% of Energy 21 to Uniastra Holding Limited (a special purpose vehicle of CEE Equity Partners) and completion of the transaction took place on 22 January 2016.[94]

117. The result of the processes and transactions outlined above is that, at various points in time, the Claimants indirectly became owners of eleven SPVs, each of which operates one or more solar

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and Natland Investment (as sellers) and DCEMF Mezzanine (as buyer) (**Ex. C-116**); "Agreement on the sale and purchase of shares and settlement of mutual receivables" of 11 July 2011 between Radiance (as seller) and GIHG and Natland Investment (as buyers) (**Ex. C-117**). *See also* Claimants' Opening Statements, slide 48 (demonstrating the Claimants' shareholding after the transaction and adjustments).

[88] Statement of Claim, para. 132. *See* Sale and purchase agreement of 1 December 2010 between Mr Kunz (as seller) and GIHG (as buyer) (**Ex. C-110**); Sale and purchase agreement of 1 December 2010 between Mr Maleček (as seller) and GIHG (as buyer) (**Ex. C-111**).

[89] Statement of Claim, para. 114; Hearing Transcript, Day 1, p. 51:14-23.

[90] Radiance became the sole shareholder on 1 July 2011. *See* Copy of E21 Holding's excerpt from the commercial register (**Ex. C-118**).

[91] *See* Agreement for the sale of Energy 21 between Natland Investment, GIHG, E21 Holding, Energy 21 and Natland Group, 4 August 2011 (full version of Ex. C-119) (**Ex. R-32**).

[92] Statement of Claim, para. 137 and Statement of Defense, para. 162. Both sets of pleadings set out different numbers although both agree that following the transaction, E21 Holding held 95% of Energy 21.

[93] Statement of Claim, para. 115; Claimants' Opening Statements, slide 50.

[94] Claimants' Reply, para. 371; Hearing Transcript, Day 1, p. 52:1:5; Claimants' Opening Statements, slide 51.

power plants in the Czech Republic.[95] However, at present, none of the Claimants hold any interest in Energy 21.[96]

C. THE "SOLAR BOOM" AND AMENDMENTS TO THE RES REGIME

118. According to the Respondent, "solar energy production vastly exceeded . . . original expectations."[97] Based on figures published in the expert report of [redacted] submitted by the Respondent, actual production of electricity from photovoltaic power plants amounted to 616 gigawatt hours ("**GWh**") in 2010 and 2,182 GWh in 2011. According to the report, the Respondent had in 2005 expected photovoltaic power plants to produce only 15 GWh of electricity in 2010.[98]

119. The Czech Republic became concerned about the "solar boom." This concern prompted a discussion, beginning in 2009, about legislative changes to abolish the 5% Limit.[99] In the words of Mr Josef Fiřt, Chairman of the Czech Republic's ERO from September 2004 to July 2011, in early 2009:

> ERO considered that an uncontrolled solar boom would be highly undesirable and even dangerous for several reasons. First, a geometric growth in the highest-priced RES electricity generation would greatly increase the price of RES support paid by consumers, leading to unsustainably high electricity prices for households and businesses, which were already suffering from the effects of the financial crisis. Second, the situation would result in significant and unjustified profit increase of solar investors vis-à-vis other RES producers and other price-regulated entities. Third, a solar boom would threaten the stability of the grid, given the unpredictable and volatile nature of solar electricity production.[100]

120. The Respondent suggests that, nonetheless, there continued to be "a great underestimation, at least until the middle of 2010, as to how much solar capacity would be built." This was because "the vast majority of solar capacity in the Czech Republic was built during a three-month window at

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95 Statement of Claim, paras. 156 and 164 (**Ex. C-153**). Energy 21's Structure Diagram (**Ex. C-45**); Hearing Transcript, Day 1, p. 52:12-19; Claimants' Opening Statements, slides 52-54.

96 Hearing Transcript, Day 1, p. 52:6-7.

97 Statement of Defense, para. 19.

98 **RER-[redacted] 1**, p. 64.

99 *See generally* Statement of Defense, paras. 76-92; **RWS-Fiřt-1**, paras. 12-17, and 19; **Ex. R-104**; **Ex. C-74**; **Ex. C-332**; **Ex. R-130** to **Ex. R-146**; **Ex. R-161**; Hearing Transcript, Day 1, p. 144-45. *See, e.g.*, Letter from the Minister of Industry and Trade to the ERO, 29 July 2009 (**Ex. R-135**).

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

the end of 2010."[101] The Respondent's figures show that the total installed PV capacity in the Czech Republic increased from 754 MW in September 2010 to 1,959 MW by the end of 2010.[102]

121. It is common ground that a sharp decrease in the cost of PV components towards the end of 2008 was instrumental in causing the solar boom.[103] However, the Parties disagree about whether this decrease was foreseeable. To the Respondents, the impact of the solar boom "could not have been predicted with accuracy before mid-2010,"[104] because "the production of photovoltaic panels was being largely moved to the Asian continent in the second half of 2008 while demand for photovoltaic panels in Western Europe . . . declined rapidly."[105] To the Claimants, "Czech Republic policy makers had evidence of the large potential for PV cost reductions as early as 2005."[106] The Claimants point to a Czech Technical University report issued in 2005 that stated that it "expected a 50-60% reduction in the cost [of PV components] by . . . 2010."[107]

122. The solar boom occurred during a time of political flux in the Czech Republic. In March 2009, following a vote of censure, the then-incumbent Topolánek government resigned from office.[108] In May 2009, an unelected caretaker government under the leadership of Prime Minister Jan Fischer was installed.[109] Upon its installation, the caretaker government announced in an official policy statement that it would not "open any politically contentious, polarising issues during its term in office, specifically that it [would] not submit to the Chamber of Deputies any politically or ideologically polarizing legislative proposals."[110] Because representatives and potential

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[101] Hearing Transcript, Day 1, p. 152:13-18, *referring to* Opening Statement of the Czech Republic, slide 40.

[102] Hearing Transcript, Day 1, p. 152:13-18. *See also* Opening Statement of the Czech Republic, 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**).

[103] Hearing Transcript, Day 1, p. 33:4-6; Hearing Transcript, Day 4, p. 90-91. *See also* Opening Statement of the Czech Republic, slide 27*, referring to* Photovoltaic Power Plants – Installed Capacity in 2009, Preliminary Estimate, p. 4 (**Ex. R-141**).

[104] Respondent's Rejoinder, para. 109; **RER-[redacted] 2**, para. 7.11; Hearing Transcript, Day 4, p. 91:3-20, *referring to* Presentation by [redacted], slide 6.

[105] Hearing Transcript, Day 4, p. 132:1-5.

[106] Direct Examination of [redacted] and [redacted] 15 March 2017, slide 9.

[107] Hearing Transcript, Day 4, p. 20:11-21; Czech Technical University in Prague, Proposal of Minimum Electricity Feed-in Tariffs and Green Bonuses for Renewable Sources Stage 2 (**Ex. C-356**).

[108] **RWS-Fiřt-1**, para. 15; Hearing Transcript, Day 1, p. 148:2-5.

[109] Hearing Transcript, Day 1, p. 148:2-5; Hearing Transcript, Day 2, p. 165:16-17; Hearing Transcript, Day 3, pp. 10-11 Opening Statement of the Czech Republic, slide 32.

[110] Policy Statement of the Government of the Czech Republic, p. 1 (**Ex. R-130**); Hearing Transcript, Day 1, p. 148-49; Hearing Transcript, Day 3, pp. 14-15; Hearing Transcript, Day 5, pp. 90-91.

investors from the solar sector lobbied the caretaker government, the caretaker government "did not feel up to proposing . . . specific measures" to counteract the solar boom during its term.[111] The caretaker government "committed to leave it to the next Parliament to take major decisions."[112]

123. The caretaker government's mandate was originally set to last only until legislative elections planned for October 2009 could take place. However, in September 2009, the Czech Constitutional Court postponed the October 2009 elections until May 2010. It was only in July 2010, following the May 2010 elections, that the new Nečas government was sworn in. As a result, "there was more than a year in which there was a caretaker government that did [not] have a majority in Parliament."[113]

124. During this same period, the Czech Republic was experiencing economic difficulties brought about by the global economic crisis that began in 2008.[114] According to the Respondent, "[i]n 2009, Czech GDP contracted by 4.8%, government debt increased from 24.9% to 30.0% of the country's GDP, and the budget deficit rose from 0.5% to 4.9% of the GDP."[115] Notwithstanding, the Claimants' experts, [redacted] and [redacted], suggest that from 2011-2015 the Czech Republic had a low budget deficit relative to other European countries.[116]

125. On 17 March 2010, Act No. 137/2010 was adopted and, on 20 May 2010, it entered into force ("**Act 137/2010**").[117] The Act repealed Article 6(4) of the Act on RES Promotion pursuant to which the FiT could not be decreased by more than 5% per year. However, this repeal applied prospectively – it only applied in respect of photovoltaic plants connected to the grid from 1 January 2011 onwards.[118]

126. Subsequently, the Respondent adopted a series of measures, which amended the Act on Income Tax and the Act on RES Promotion, and introduced a solar levy (the "**Measures**"). On 28 December

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111 Hearing Transcript, Day 1, p. 149:8-19. *See also* Hearing Transcript, Day 3, p. 24:14-20.

112 Hearing Transcript, Day 5, pp. 90-91. *See also* Hearing Transcript, Day 5, pp. 40-41.

113 Hearing Transcript, Day 1, p. 148:2-12; Opening Statement of the Czech Republic, slide 32.

114 *See* Statement of Defense, paras. 78 and 122-27.

115 Statement of Defense, para. 122 (internal citations omitted).

116 Hearing Transcript, Day 4, p. 24:13-16, *referring to* Direct Examination of [redacted] and [redacted] 15 March 2017, slide 14.

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

118 Hearing Transcript, Day 1, p. 202-03; Opening Statement of the Czech Republic, slide 145. *See also* Statement of Claim, para. 184; Claimants' Reply, paras. 206 and 231.

2010, Act No. 402/2010 was adopted and, on 1 January 2011, it entered into force ("**Act 402/2010**").[119] Act 402/2010 amended Section 7 of the Act on RES Promotion and established the "Solar Levy" which applied from 1 January 2011 to 31 December 2013 to revenues generated by photovoltaic power plants that had been put into operation between 1 January 2009 and 31 December 2010 (the "**Solar Levy**"). The Solar Levy 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.[120]

127. On 1 January 2011, Act No. 330/2010 entered into force ("**Act 330/2010**"). This act 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**") that were commissioned after 1 March 2011.[121]

128. On the same day, Act No. 346/2010 entered into force and amended the Act on Income Tax ("**Act 346/2010**"). It repealed the Income Tax Holiday and modified the Original Depreciation Provisions.[122]

129. Partly entering into force upon its publication on 30 May 2012 and partly on 1 January 2013, Act No. 165/2012 repealed further articles of the Act on RES Promotion altogether (the "**New RES Act**").[123] The Act terminated all existing contracts between RES producers and grid operators that provided for the payment of the FiT or Green Bonuses as of 31 December 2012. RES producers that intended to maintain entitlement to the FiT needed to enter into new non-negotiable supply contracts with "Mandatory Purchasers" chosen by the Czech Ministry of Industry and Trade. The Act also introduced an obligation to pay a "negative electricity hourly price," designed to be paid to the Mandatory Purchasers by RES operators entitled to the FiT or to be deducted from the payable FiT by the Mandatory Purchasers. The New RES Act also introduced recycling fees for the disposal of photovoltaic panels.

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[119] Act No. 402/2010 (**Ex. C-37**; **Ex. R-173**); Hearing Transcript, Day 1, pp. 44-45; Opening Statement of the Czech Republic, slide 41.

[120] Statement of Claim, para. 175; Statement of Defense, para. 148; Hearing Transcript, Day 1, pp. 44-45.

[121] Act No. 330/2010 (**Ex. R-172**); Claimants' Opening Statements, slide 45; Opening Statement of the Czech Republic, slide 53.

[122] Act No. 346/2010 (**Ex. C-38**; **Ex. R-28**); Hearing Transcript, Day 1, pp. 47-48.

[123] Act No. 165/2012 (**Ex. C-39**); Opening Statement of the Czech Republic, slides 73-74.

130. On 13 September 2013, Act No. 310/2013 entered into force ("**Act 310/2013**"). This act amended the New RES Act and extended the Solar Levy's application beyond 31 December 2013. Article 1(9) of Act 310/2013 set the Solar Levy at 10% for any payments received under the FiT system and at 11% for payments received under the Green Bonus system. The Solar Levy was to be applied from 1 January 2014 and was to continue for the duration of the support scheme.[124]

D. THE CZECH CONSTITUTIONAL COURT'S REVIEW OF THE MEASURES AMENDING THE RES REGIME

131. On 11 March 2011, a group of Czech senators (the "**Petitioners**") sought the repeal of the Measures before the Czech Constitutional Court.[125] The Petitioners argued that the Measures were "in conflict with the right . . . to own property . . . the right to protection against interference with the peaceful enjoyment of possessions . . . the right to engage in enterprise . . . the fundamental requisites of a democratic, rule-of-law state . . . and the constitutional principle of equality before the law." They variously based their complaints on the Constitution of the Czech Republic, the Charter of Fundamental Rights and Freedoms, the Charter of Fundamental Rights of the EU, and the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[126]

132. On 15 May 2012, the Czech Constitutional Court dismissed the petition. The Court found that, despite the fact that the Solar Levy changed the level of support provided to PV plant operators,[127] "the challenged provisions [were] not in conflict with the constitutional order of the Czech Republic."[128] The Court summarized its findings as follows:

> [A]lthough the enactment of the challenged provisions reduced the support provided to operators of [photovoltaic power plants] . . . this did not constitute interference that would cause a breach of the constitutionally-guaranteed rights of the affected entities . . . the

[124] Hearing Transcript, Day 1, p. 48-49. *See also* Programmatic Announcement of the Government of the Czech Republic, February 2014 (**Ex. C-328**) (referencing new Czech government's intention to "review the renewable energy sources promotion system").

[125] Czech Republic Constitutional Court Judgment in the Name of the Republic, Pl. ÚS 17/11: Photovoltaic Power Plants, 15 May 2012, para. 1 (**Ex. CLA-22**); Decision of the Constitutional Court in the Name of the Republic, Collection of Laws No. 220/2012, 15 May 2012, File No. Pl. ÚS 17/11, para. 1 (**Ex. R-29**) (hereinafter "**May 2012 Constitutional Court Judgment**").

[126] May 2012 Constitutional Court Judgment, para. 2 (**Ex. R-29**).

[127] Hearing Transcript, Day 1, p. 55:5-9, *referring to* May 2012 Constitutional Court Judgment, para. 45 (**Ex. R-29**); Hearing Transcript, Day 3, pp. 235-36.

[128] May 2012 Constitutional Court Judgment, para. 92 (**Ex. R-29**); Hearing Transcript, Day 1, p. 271:7-12; Hearing Transcript, Day 3, p. 85:11-12; Hearing Transcript, Day 5, p. 71:18-22.

> assumed fifteen year payback period on investment was not fundamentally put into question by the enactment of the challenged provisions.[129]

133. However, the Constitutional Court noted that "in individual cases, certain of the challenged measures may have a destroying effect (a 'strangling effect') on a producer or an effect that impacts the very asset base of the producer, in contravention of Article 11 of the Charter [of Fundamental Rights and Freedoms] – *i.e.*, unconstitutionally."[130] In light of these potential "strangling effects," the Court called on "lawmakers to establish a mechanism that would provide for an individual approach towards those producers that, even if they had been able to foresee the enactment of certain future restrictions when considering business risks, they could not have foreseen their specific form and immediate effects."[131]

134. Following the Constitutional Court's Judgment of 15 May 2012, individual photovoltaic investors (separate from the Claimants) who were subject to the Solar Levy brought proceedings against their local tax administrations, arguing that the Solar Levy had a "strangling effect" on them.[132] According to the Respondent, "[b]y late 2013, as many as 100 such cases reached the Supreme Administrative Court — the highest Czech Court competent in taxation matters."[133] In one judgment dated 17 December 2013, the Supreme Administrative Court noted that it had:

> already decided nearly a hundred cases in which the plaintiffs were attempting to infer liquidating effects of the solar power levy . . . The regional courts then typically rejected their lawsuits for failure to submit sufficiently specific allegations and evidence proving the liquidating effects of the levy.[134]

The Court concluded that:

> The Constitutional Court's instruction to take liquidating effects of the solar power levy into account in individual cases can only be carried out under current legislation using the institute of tax remission pursuant to Section 260 of the Tax Procedure Code with reference to Section 259 of the Tax Procedure Code.[135]

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129 May 2012 Constitutional Court Judgment, para. 90; *see also* Hearing Transcript, Day 1, p. 55:6-9, *referring to* May 2012 Constitutional Court Judgment, para. 45.

130 May 2012 Constitutional Court Judgment, para. 88 (**Ex. R-29**); Hearing Transcript, Day 3, p. 125:14-21.

131 May 2012 Constitutional Court Judgment, para. 89 (**Ex. R-29**).

132 Statement of Defense, para. 261. *See generally* Statement of Defense, paras. 261-77.

133 Statement of Defense, para. 262.

134 Supreme Administrative Court Ruling, 17 December 2013, para. 40 (**CER-[redacted] 1**, Annex 12).

135 Supreme Administrative Court Ruling, 17 December 2013, para. 59 (**CER-[redacted] 1**, Annex 12).

135. On 18 September 2014, the Czech Financial Administration announced in response to the decision of the Constitutional Court:

> [p]roducers potentially affected by the individual effect of the solar levy found by the Constitutional Court to be "strangling" have been and are able to at least mitigate, if not fully eliminate, its impact using standard tools under the Tax Administration Law.[136]

E. ATTEMPTS TO SETTLE THE DISPUTE AND THE CLAIMANTS' COMMENCEMENT OF ARBITRATION (2011-2012)

136. Each Claimant notified the Czech Republic of its dispute arising under the ECT and the BITs by separate letters sent in 2011.[137] Subsequently, representatives of the Claimants and the Ministry of Finance of the Czech Republic exchanged "without prejudice" correspondence.[138] On 24 November 2011, 15 December 2011, and 7 February 2012, representatives of the Claimants and the Ministry of Finance of the Czech Republic attended meetings.[139] According to the Claimants, "[n]o resolution of the dispute was achieved in those meetings, and no further discussions were scheduled."[140] As noted in paragraph 8 above, on 8 May 2013, the Claimants served upon the Respondent a Notice of Arbitration.

F. EUROPEAN UNION STATE AID ASSESSMENT (2013-2017)

137. On 8 January 2013, the Czech Republic notified the Commission of the New RES Act.[141] On 11 June 2014, the Commission issued its decision on the notification, concluding that, as to installations commissioned as of 1 January 2013:

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136 Czech Financial Administration, "Solution to Potential Individual Liquidation Effects of Levy on Electricity Generated from Solar Radiation", 18 September 2014 (**Ex. R-67**).

137 Notice of Arbitration, paras. 161, 164, 170, and 172; Statement of Claim, paras. 15 and 17-19; Letter on behalf of Natland Investment to the President of the Czech Republic, the Prime Minister of the Czech Republic, and the Minister of Foreign Affairs of the Czech Republic, 1 April 2011 (**Ex. C-52**); Letter on behalf of Natland Group to the President of the Czech Republic, the Prime Minister of the Czech Republic, and the Minister of Foreign Affairs of the Czech Republic, 4 July 2011 (**Ex. C-59**); Letter on behalf of GIHG to the President of the Czech Republic, the Prime Minister of the Czech Republic, and the Minister of Foreign Affairs of the Czech Republic, 1 April 2011 (**Ex. C-57**); Letter on behalf of Radiance to the President of the Czech Republic, the Prime Minister of the Czech Republic, and the Minister of Foreign Affairs of the Czech Republic, 1 April 2011 (**Ex. C-60**).

138 Notice of Arbitration, para. 173; Statement of Claim, para. 20.

139 Notice of Arbitration, para. 173; Statement of Claim, para. 20.

140 Notice of Arbitration, para. 173; Statement of Claim, para. 20.

141 Czech Republic's SANI notification in State Aid Case No SA.351777 (**Ex. R-7**). *See also* Hearing Transcript, Day 1 p. 9:14-15.

> the Czech Republic put the aid scheme under assessment into effect, in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
>
> However, it has decided, on the basis of the foregoing assessment, to consider 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.[142]

138. On 20 October 2014, the Czech Republic notified the Commission that the New RES Act was not limited to installations commissioned as of 1 January 2013 and requested that the notification procedure be continued. Following the Commission's agreement to consider a new notification with respect to these other installations, on 11 December 2014, the Czech Republic notified the Commission of the support scheme for electricity production from renewable energy sources by installations commissioned between 1 January 2006 and 31 December 2012 pursuant to Article 108(3) of the Treaty on the Functioning of the European Union ("**TFEU**").[143] On 28 November 2016, the Commission issued its decision (the "**Decision**").[144] The conclusion of the Decision was as follows:

> The Commission regrets that the Czech Republic put the aid measure in question into effect in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
>
> However, it has decided, on the basis of the foregoing assessment, not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.[145]

139. Although not dispositive of its decision, the Commission also discussed the violations of the ECT and the bilateral investment treaty between Germany and the Czech Republic (the "**German-Czech Republic BIT**") alleged by "[t]en investors from other EU Member States."[146] The German-Czech Republic BIT was not invoked by the Claimants in this case, but the Commission's approach to that treaty is analogously relevant to intra-EU BITs generally.

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

[143] *See generally* Czech Republic's Notification to the Commission (**Ex. R-49**), General notification form on State aid scheme in respect of State aid to installations put into operation prior to 1 January 2013; European Commission, "State Aid SA.40171 (2015/NN) – Czech Republic: Promotion of electricity production from renewable energy sources", C(2016) 7827, 28 November 2016, para. 1 (**Ex. R-367**) (hereinafter the "**Decision**").

[144] Decision (**Ex. R-367**).

[145] Decision, p. 25 (**Ex. R-367**). *See also* Hearing Transcript, Day 1, p. 111:5-13; Hearing Transcript, Day 1, pp. 185-86.

[146] Decision, para. 7 (**Ex. R-367**).

140. The Commission opined that "any provision that provides for investor-State arbitration between two Member States [violates] Union law."[147] According to the Commission, there are two facets to such a violation:

> On substance, Union law provides for a complete set of rules on investment protection . . . Member States are hence not competent to conclude bilateral or multilateral agreements in that field, because by doing so, they may affect common rules or alter their scope.
>
> [. . .]
>
> On enforcement, an Arbitral Tribunal created on the basis of the Energy Charter Treaty or an intra-EU BIT has to apply Union law as applicable law (both as international law applicable between the parties and as domestic law of the host state).[148]

141. The Commission also noted that:

> In case of the Energy Charter Treaty, it is also clear from the wording, the objective and the context of the treaty that it does not apply in an intra-EU situation in any event.[149]

142. For these reasons, the Commission took the view that "investors cannot rely on" the ECT or other intra-EU BITs.[150]

143. The Commission also considered that, in any event, the Czech Republic did not substantively violate the fair and equitable treatment ("**FET**") provisions contained in the ECT or the German-Czech Republic BIT. On the theory that those provisions had to be interpreted in line with (and subject to) the content of FET under EU law, which is part of the applicable law, the Czech Government did not violate the principle of legitimate expectations under Czech or EU law, and therefore could not have violated the FET provisions under the ECT and German-Czech Republic BIT.[151]

144. On 15 February 2017, the Parties submitted their comments on the Decision.[152] The Claimants assert that "[t]he Decision's key findings are dispositive of the State aid issue in this case."[153] However, they suggest that the Decision is flawed in its discussion of the Act on RES Promotion and the Measures, and that the decision incorrectly characterizes the incentive regime in the Czech

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147 Decision, para. 143 (**Ex. R-367**).

148 Decision, paras. 144-45 (**Ex. R-367**).

149 Decision, para. 147 (**Ex. R-367**).

150 Decision, para. 148 (**Ex. R-367**).

151 Decision, para. 149 (**Ex. R-367**).

152 *See generally*, Claimants' State Aid Comments and Respondent's State Aid Comments.

153 Claimants' State Aid Comments, p. 1.

Republic as State aid.[154] The Claimants also argue that the Commission erred in its decision on legitimate expectations under EU law, and that the Commission engaged in an unwarranted discussion of international law.[155]

145. In contrast, the Respondent suggests that the "Commission's Decision begins with a generally accurate description of the RES Scheme, which is consistent with the description contained in the Czech Republic's submissions to [the] Tribunal." [156] The Respondent suggests that the Commission was correct to find that the RES scheme constituted State aid (which would have been incompatible with the internal market, had measures such as Solar Levy not been taken to guard against overcompensation to investors benefitting from the scheme), no breach of legitimate expectations can occur under EU law, and that the Claimants have "no legitimate expectations to receive unapproved State aid."[157] The Respondent also claims that the Commission's findings on the "[a]pplication of the substantive provisions of the BIT and the ECT" are "entirely consistent with that of the Czech Republic."[158] The Respondent further alleges that the Commission was correct in finding that "[a]n award of damages in this case would itself amount to State Aid."[159]

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[154] Claimants' State Aid Comments, paras. 36-48.

[155] Claimants' State Aid Comments, paras. 49-53.

[156] Respondent's State Aid Comments, para. 5.

[157] Respondent's State Aid Comments, paras. 8-9, 10-11, 13-17, 23, and section II.C.

[158] Respondent's State Aid Comments, section III and para. 29.

[159] Respondent's State Aid Comments, section III.

IV. THE PARTIES' REQUESTS FOR RELIEF

146. In paragraph 1050 of their Reply, the Claimants request the Tribunal to:

(a) **DISMISS** the jurisdictional objections raised by the Respondent;

(b) **DECLARE** that the Respondent's actions:

(i) constitute unfair and inequitable treatment and violate the obligation to provide full protection and security in breach of the ECT and the Cyprus, Luxembourg and Netherlands BITs;

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

(c) **ORDER** the Czech Republic to:

(i) compensate the Claimants for all losses caused to them by the Czech Republic's breaches, in an amount of not less than **CZK 2,212 million** (inclusive of pre-award interest), apportioned among the Claimants as follows:

GIHG	CZK 375 million
Natland Group – Natland Investment	CZK 334 million
Radiance	CZK 1,503 million;

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

(iii) reimburse the Claimants for all costs and expenses of this arbitration, including legal and expert fees, the fees and expenses of any experts appointed by the Arbitral Tribunal, the fees and expenses of the Arbitral Tribunal, and all other costs of the arbitration, including any expenses arising from the participation of third parties.[160]

[160] Claimants' Reply, para. 1050 (emphasis in original). The Claimants' requests for relief have evolved since they served their Notice of Arbitration on the Respondent. *See* Notice of Arbitration, para. 185; Statement of Claim, para. 550. In addition to the requests listed above, at para. 185(a)(iii) and (iv) of the Notice of Arbitration, the Claimants also requested the Tribunal to "[declare] that the Respondent's actions and, in particular, the progressive dismantling of the Incentive Regime: . . . amount to indirect or creeping expropriation in violation of the ECT and the BITs; [and] constitute a failure to observe the Respondent's obligations in relation to the Claimants' investments in violation of the umbrella clauses contained in the ECT and the BITs." The Claimants have since confirmed that they are not putting forward a claim for expropriation, although they had reserved the right to advance it. *See* Claimants' Reply, paras. 336 and 543. The final request to the Tribunal—to declare that the Respondent's actions constitute a failure to observe its obligations in relation to the Claimants' investments in violation of the umbrella clauses contained in the ECT and the BITs—was not included in the Statement of Claim. Neither that request, nor the request relating to expropriation, were included in the requests for relief outlined above. Furthermore, the final amount in compensation requested by the Claimants increased from EUR 65 million (Notice of Arbitration, para. 185(b)(i)), to CZK 1,922 million (inclusive of pre-award interest) (Statement of Claim, para. 550(b)(i)), to the final CZK 2,212 million amount (equivalent to EUR 82 million) above. Finally, the Claimants' request to the Tribunal to "[dismiss] the jurisdictional objections raised by the Respondent" (listed above) first appeared in the Claimants' Reply.

147. During the course of the hearing, and following the exchange of further expert reports on damages subsequent to the Claimants' Reply, the Claimants clarified that the damages they seek under paragraph 1050(c)(i) of their Reply are as follows:

(a) Under the Updated Model, **CZK 2,022 million** (inclusive of pre-award interest), apportioned among the Claimants as follows:

i. GIHG: CZK 424 million

ii. Natland Group – Natland Investment: CZK 379 million

iii. Radiance: CZK 1,219 million[161]

(b) Alternatively, under the Deal Model, **CZK 1,814 million** (inclusive of pre-award interest), apportioned among the Claimants as follows:

i. GIHG: CZK 384 million

ii. Natland Group – Natland Investment: CZK 342 million

iii. Radiance: CZK 1,088 million[162]

148. The Respondent requests the Tribunal to grant the following relief:

> a. Declare all of Claimants' claims barred for lack of jurisdiction;
>
> b. In the event it exercises jurisdiction over any of Claimants' claims, declare that the Czech Republic did not breach any of its obligations under either the ECT or the BITs;
>
> c. In the event that it exercises jurisdiction over any of Claimants' claims and finds the Czech Republic liable, declare that Claimants' are not entitled to any damages;
>
> d. Order Claimants to pay all costs of the arbitration, including the totality of the Czech Republic's legal and expert fees and expenses and the fees and expenses of the Tribunal, as well as the costs charged by the PCA; and
>
> e. Award to the Czech Republic any such additional relief as it may consider just and appropriate.[163]

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[161] Presentation by [redacted] "Approach to Damages" Hearing, Day 4, slide 25. Before the Claimants' damages expert, [redacted] adjusted his calculations for his presentation at the hearing, the Claimants sought CZK 2,038 million in damages under the Updated Model. Claimants' Reply, para. 1041; **CER-**[redacted]**-2**, Table 18 at para. 6.3.5. *See also* **CER-**[redacted]**-3**, Table 6 at para. 5.1.3.

[162] Presentation by [redacted] "Approach to Damages", Hearing, Day 4, slide 26. Before the Claimants' damages expert, [redacted] adjusted his calculations for his presentation at the hearing, the Claimant had sought CZK 2,212 million in damages under the Deal Model. Claimants' Reply, para. 1032; **CER-**[redacted]**-2**, Table 14 at para. 5.4.4. *See also* **CER-**[redacted] **3**, Table 8 at para. 5.2.3.

[163] Respondent's Rejoinder, para. 712. *See also* Statement of Defense, para. 717, which is substantially the same as the Respondent's final requests for relief.

V. THE PARTIES' POSITIONS ON JURISDICTION

149. The Parties disagree on whether the Tribunal has jurisdiction over the dispute. Before discussing the seven grounds on which the Respondent objects to the Tribunal's jurisdiction, the Tribunal briefly recalls the Parties' respective positions on the pre-arbitration "cooling-off periods," sets out the Parties' general positions on the appropriate approach to jurisdiction and notes two jurisdictional objections no longer pressed by Respondents.

150. As a threshold matter, the Claimants argue that "[t]he cooling-off periods provided for in the ECT and in the BITs have expired."[164] The ECT and the BITs provide for a "cooling-off period" within which a contracting party and an investor of another contracting party in dispute must attempt to settle their dispute before arbitration can be initiated. The minimum period under the ECT is three months and, under the Netherlands-Czech Republic BIT, the Cyprus-Czech Republic BIT, and the Luxembourg-Czech Republic BIT, it is six months.[165] Each Claimant notified the Czech Republic of its dispute arising under the ECT and the BITs by separate letters sent in 2011.[166] Subsequently, representatives of the Claimants and the Ministry of Finance of the Czech Republic exchanged "without prejudice" correspondence.[167] On 24 November 2011, 15 December 2011, and 7 February 2012, representatives of the Claimants and the Ministry of Finance of the Czech Republic attended meetings.[168] According to the Claimants, "[n]o resolution of the dispute was achieved in those meetings, and no further discussions were scheduled."[169] Accordingly, the Claimants argue that they acted in compliance with their obligations under the ECT and the BITs and, further, that more than one and a half years elapsed between the Claimants sending the last

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164 *See* Notice of Arbitration, paras. 161-74; Statement of Claim, paras. 15-21.

165 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, art. 26(1)-(2) ("**ECT**"); Netherlands-Czech Republic BIT, art. 8(1)-(2) (**Ex. C-4**); Cyprus -Czech Republic BIT, art. 8(1)-(2) (**Ex. C-2**); Luxembourg -Czech Republic BIT, art. 8(1)-(2) (**Ex. C-62**).

166 Notice of Arbitration, paras. 161, 164, 170 and 172; Statement of Claim, paras. 15 and 17-19; Letter on behalf of Natland Investment to the President of the Czech Republic, the Prime Minister of the Czech Republic, and the Minister of Foreign Affairs of the Czech Republic, 11 April 2011 (**Ex. C-52**); Letter on behalf of Natland Group to the President of the Czech Republic, the Prime Minister of the Czech Republic, and the Minister of Foreign Affairs of the Czech Republic, 4 July 2011 (**Ex. C-59**); Letter on behalf of GIHG to the President of the Czech Republic, the Prime Minister of the Czech Republic, and the Minister of Foreign Affairs of the Czech Republic, 1 April 2011 (**Ex. C-57**); Letter on behalf of Radiance to the President of the Czech Republic, the Prime Minister of the Czech Republic, and the Minister of Foreign Affairs of the Czech Republic, 1 April 2011 (**Ex. C-60**).

167 Notice of Arbitration, para. 173; Statement of Claim, para. 20.

168 Notice of Arbitration, para. 173; Statement of Claim, para. 20.

169 Notice of Arbitration, para. 173; Statement of Claim, para. 20.

of their notices of the dispute to the Respondent and the Claimants serving the Notice of Arbitration on the Respondent.[170] The Claimants argue that they "were therefore entitled to submit the dispute to this Arbitral Tribunal."[171]

151. The Respondent argues that the Tribunal nonetheless lacks jurisdiction over the Claimants' claims related to the regulation of the Solar Levy as from 1 January 2014 under Act No. 310/2013 (the "**New Claims**") because the "Claimants have violated the mandatory cooling-off periods" under the ECT and the BITs.[172] The Respondent points out that the Claimants only notified the Czech Republic of their claims relating to the Czech Republic's measures taken prior to the adoption of Act No. 310/2013, but not their New Claims.[173] According to the Respondent, "this failure is fatal to Claimants' New Claims because the mandatory period constitutes a precondition to the Czech Republic['s] consent to arbitration."[174] However, the Respondent has not pursued this objection in its later pleadings.

152. The Respondent also criticizes the Claimants' description of the present case as "a single dispute," arguing that such an approach "papers over important differences between the various relevant 'investors,' 'investments' and investment treaties."[175] In the Respondent's view, the case encompasses distinct disputes, each of which "features a different Claimant, a different purported investment, and a different combination of investment treaties."[176] Accordingly, "not every Claimant has standing to assert claims under every treaty at issue in this arbitration."[177] The Respondent argues that "[t]he proper approach is for the Tribunal to consider separately each aspect of each claim as it relates to each Claimant."[178] Only by applying this approach, the Respondent argues, "could the Tribunal be certain that it has not overstepped the bounds of its jurisdiction under each individual treaty."[179]

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[170] Notice of Arbitration, paras. 161, 164, 170, 172, and 174; Statement of Claim, paras. 15 and 17-19.

[171] Statement of Claim, para. 21. *See also* Notice of Arbitration, para. 174.

[172] Request for Bifurcation, p. 11.

[173] Request for Bifurcation, para. 61, *referring to* Statement of Claim, paras. 17-19.

[174] Request for Bifurcation, para. 56.

[175] Statement of Defense, paras. 446 and 448.

[176] Statement of Defense, para. 446.

[177] Respondent's Rejoinder, para. 342.

[178] Statement of Defense, para. 448.

[179] Statement of Defense, para. 448.

153. Applying this approach to its arguments on jurisdiction, the Respondent challenges the Tribunal's jurisdiction on the following seven grounds:[180] (a) the Claimants GIHG, Natland Investment and Natland Group lost any right of standing that they might have had by virtue of their having sold their interests to Radiance without the retention of any rights of action against the Respondent;[181] (b) all of the Claimants' claims under the ECT fall within the ECT's tax carve-out;[182] (c) Natland Investment does not have an "investment" within the meaning of the Netherlands-Czech Republic BIT;[183] (d) the Tribunal has no jurisdiction over the "non-impairment" claims asserted by GIHG and Natland Group;[184] (e) GIHG and Natland Group are not "investors" within the meaning of the Cyprus-Czech Republic BIT;[185] (f) the claims asserted by Radiance under the Luxembourg-Czech Republic BIT exceed the scope of the Czech Republic's consent to arbitration;[186] and (g) Natland Group and Natland Investment have failed to establish that they legitimately made foreign investments under the ECT, the Cyprus-Czech Republic BIT and Netherlands-Czech Republic BIT.[187]

154. The Claimants assert that the Respondent's "objections are flimsy and immediately appear to lack any basis."[188] According to the Claimants, the "Tribunal has jurisdiction *ratione personae* and *ratione materiae* under [the ECT and the BITs] because the Claimants are investors . . . and made investments . . . within the meaning of the definitions contained in the treaties" and "the measures

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180 *See generally* Hearing Transcript, Day 1, p. 242:11-18, *referring to* Opening Statement of the Czech Republic, slide 194 (summarizing the "jurisdictional defects" alleged by the Respondent"). The Respondent also observed in its Statement of Defense that it had argued in other cases jurisdictional objections based on EU law but stated that "it is not raising a similar objection in this case." Nonetheless, it states that it shares many of the concerns expressed by the Commission in respect of intra-EU investment arbitrations. Statement of Defense, paras. 433-434. *See also* Hearing Transcript, Day 1, p. 242:11-18, *referring to* Opening Statement of the Czech Republic, slide 194 (summarizing the "jurisdictional defects" alleged by the Respondent).

181 Respondent's Rejoinder, paras. 351 and 356.

182 Statement of Defense, para. 477(b); Respondent's Rejoinder, para. 365(d); Hearing Transcript, Day 1, p. 243:1-7.

183 Statement of Defense, para. 523; Hearing Transcript, Day 1, p. 259:12-19.

184 Respondent's Rejoinder, para. 460.

185 Statement of Defense, para. 539; Opening Statement of the Czech Republic, slides 220-31.

186 Statement of Defense, para. 556; Hearing Transcript, Day 1, pp. 257-58.

187 Statement of Defense, paras. 571-88.

188 Claimants' Reply, para. 544.

of the Czech Republic complained of by the Claimants do not fall under the 'tax carve-out' of Article 21 ECT."[189]

155. The Claimants maintain that (a) the Solar Levy does not fall within the ECT's tax carve-out;[190] (b) the Netherlands-Czech Republic BIT protects indirect investments made through a local subsidiary, such as the one made by Natland Investment; (c) the Cyprus-Czech Republic BIT's most-favored nation clause (the "**MFN clause**") enables GIHG and Natland Group to import non-impairment protection into the Cyprus-Czech Republic BIT; (d) GIHG and Natland Group are "investors" pursuant to the Cyprus-Czech Republic BIT; (e) Radiance's claims under the Luxembourg-Czech Republic BIT are within the scope of the Parties' consent to arbitration; and (f) Natland Group and Natland Investment are "foreign investors" which made investments pursuant to the ECT, the Cyprus-Czech Republic BIT and Netherlands-Czech Republic BIT.[191]

156. The Respondent had initially raised two further jurisdictional objections: (a) that the Claimants' investments had been acquired through improper means; and (b) that GIHG cannot pursue its claims with respect to the 3% interest in Energy 21 which it had acquired from Messrs. Kunz and Maleček on 1 December 2010 as this was an attempt to manufacture jurisdiction.[192] In its Rejoinder and in respect of the "improper means" argument, the Respondent confirmed that it "no longer intends to pursue this jurisdictional objection, even though it continues to believe the violations committed were material and should be taken into account by the Tribunal when assessing the factual circumstances surrounding Claimants' investment."[193] As for the second objection, the Respondent in its Rejoinder states that "[t]he evidence does seem to corroborate Claimants' assertion that the December 2010 transaction was the conclusion of an agreement that had been reached in April 2010. The Czech Republic accordingly will not pursue its objection further."[194] However, the Czech Republic records its concern that this information had not been provided to it sooner during the document production phase and its hope that this was not indicative of a deeper problem with the reliability of the Claimants' document production.[195]

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[189] Statement of Claim, para. 296. *See also* Claimants' Opening Statements, slides 72-73 (providing an overview of the Claimants' jurisdictional claims).

[190] *See generally* Hearing Transcript, Day 1, pp. 64-75.

[191] Claimants' Reply, para. 544. *See generally* Claimants' Opening Statements, slides 72-73.

[192] Statement of Defense, section IV.B.7.

[193] Respondent's Rejoinder, para. 560.

[194] Respondent's Rejoinder, para. 556.

[195] Respondent's Rejoinder, para. 557.

A. WHETHER EACH OF THE CLAIMANTS HAS STANDING TO ASSERT THEIR CLAIMS

1. The Respondent's Arguments

157. The Respondent argues that GIHG, Natland Investment and Natland Group "sold all of their Energy 21 rights, including arbitration rights, and thus lack standing to pursue any claim in respect of the Measures."[196]

158. In relation to GIHG, the Respondent argues that based on GIHG's interest in Energy 21 at the relevant times, GIHG theoretically would have had standing to assert claims under the ECT and the Cyprus-Czech Republic BIT based on the introduction of the Solar Levy, the repeal of the Income Tax Holiday and the change to the tax depreciation rules. However, GIHG lost its standing in late 2011 when it sold its entire shareholding to Radiance's subsidiary, E21 Holding, "together with all rights attaching to the . . . [s]hares."[197] At that time, GIHG already had submitted a Notice of Dispute to the Czech Republic, invoking the Cyprus-Czech Republic BIT and the ECT. GIHG therefore was fully aware that one of the "rights" associated with its interest in Energy 21 was the right to assert claims in connection with such interest. The decision to sell "all rights attaching to the . . . [s]hares" without reserving for itself any arbitration rights accordingly must be construed as a deliberate choice by GIHG to sell any arbitration rights associated with the interest that it held in Energy 21 as of 1 January 2011.[198] This is also the case for Natland Investment which had agreed to "transfer [. . .] the Natland Shares to the Purchaser together with all the rights and benefits attaching or accruing thereto."[199]

159. According to the Respondent, while the Claimants disagree with the Respondent's interpretation and assert that a narrower reading should be taken, *i.e.*, the reference to rights is only a reference to corporate rights under Czech law associated with the Energy 21 shares, they have not cited any evidence to support their interpretation.[200] The fact that the Claimants continue to maintain their claims in this arbitration is not sufficient evidence.[201]

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196 Closing Statement of the Czech Republic, slide 43. *See also* Hearing Transcript, Day 5, p. 112:17-25.

197 Respondent's Rejoinder, para. 351. *See* Agreement for the sale of Energy 21 between Natland Investment, GIHG, E21 Holding, Energy 21, and Natland Group, 4 August 2011 (full version of **Ex. C-119**) (**Ex. R-32**).

198 Respondent's Rejoinder, para. 351.

199 Respondent's Rejoinder, para. 356. *See* Share purchase agreement between GIHG, Natland Investment, E21 Holding, and Energy 21, 5 October 2011 (**Ex. C-112**).

200 Respondent's Rejoinder, para. 357.

201 Respondent's Rejoinder, para. 352.

160. Natland Group holds an indirect interest in Energy 21 through its wholly-owned subsidiary, Natland Investment. Because Natland Investment has lost its standing following the shares sale transaction, it follows that Natland Group, as the parent company, also lacks standing to assert their claims. Aside from whether the transaction had caused Natland Group to lose its standing deriving from its indirect interest in Energy 21, Natland Group could not assert claims based on the same interest as its subsidiary without aspiring to a double recovery.[202] Natland Group could only assert a claim for loss of value in its subsidiary, Natland Investment. However, no such loss has been identified.[203]

161. The Respondent notes that Natland Group has not asserted any specific injury in relation to the loan receivables purchased in December 2009; in any event, any standing it might have had was lost as it had assigned "the Debt . . . with all related rights and duties" to E21 Holding in August 2011.[204] GIHG had also assigned to E21 Holding loan receivables "with all related rights and duties."[205]

162. More generally, the Respondent argues that the Claimant cannot insist on the retention of arbitration rights as the default position, when Radiance itself "explicitly retained the claim rights" when it sold its shares to Uniastra Holding in December 2015.[206]

2. The Claimants' Arguments

163. The Claimants argue that the sale of GIHG's and Natland Investment's interest in Energy 21 cannot be construed as also involving the sale of any arbitration rights associated with the interest.

164. The Claimants disagree that GIHG's and Natland Investment's awareness of their rights to bring investment claims should entail that they intended to transfer such rights to Radiance during the 2011 transaction. Instead, they assert that the correct interpretation is that GIHG's and Natland Investment's agreement to transfer "all the rights" is an agreement to transfer corporate rights (under Czech law) associated with the shares that were transferred to Radiance.[207] The lack of

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202 Statement of Defense, para. 472.

203 Respondent's Rejoinder, para. 361.

204 Statement of Defense, para. 473.

205 Statement of Defense, para. 463.

206 Hearing Transcript Day 5, p. 113:1-5, *referring to* Share Purchase Agreement Relating to the Sale and Purchase of 100% of the Shares of Energy 21 A.S., 22 December 2015 (**Ex. C-389**).

207 Claimants' Reply, para. 530.

intention to transfer those arbitration rights is irrefutably confirmed by the fact that GIHG and Natland Investments are still making a claim for damages in relation to the measures in dispute.[208]

165. The award in *Mihaly v. Sri Lanka* and commentary support the view that neither damages claims nor jurisdictional offers under investment treaties are freely transferable without the explicit consent of the host State. Since treaty claims cannot be freely assigned, the transfer of their shares cannot bring about the assignment of GIHG's and Natland Investment's treaty claims.[209]

166. However, even if they were freely transferable, the Claimants clearly did not want such a transfer. While the Respondent relies on the decisions in *El Paso v. Argentina* and *Daimler v. Argentina* for a contrary interpretation, it is worth noting that neither decision in any way suggests that, upon the sale of its protected investment, an investor must expressly reserve its treaty claims to avoid losing its investment treaty protection.[210]

167. It follows that Natland Group which wholly owns Natland Investment, has also not lost its standing. In response to the Respondent's point about double recovery, the Claimants argue that it is commonly accepted in investment case law that shareholders have standing to claim damages arising from measures affecting the local company in which they indirectly hold shares. Even assuming that Natland Group can claim the damages representing the diminution in the value of its shares in Natland Investment, this would in practice be equivalent to Natland Investment's claim. The reason is that under modern valuation techniques, the diminution in the value of the shares is calculated on the basis of the loss caused by the contested measures on an asset of the company *i.e.*, its cash flows. Notwithstanding that its investment claims are based on the same interest in Energy 21 and there can be a risk of double recovery, this is no such risk here as Natland Group and Natland Investment are collectively seeking damages in relation to the same interest in Energy 21.[211]

168. Finally, the Claimants deny that GIHG and Natland Group had transferred the arbitral protection related to their loan receivables when they assigned them to Energy 21 Holding for the same reasons above.[212]

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208 Claimants' Reply, para. 530.

209 Claimants' Reply, paras. 531-533.

210 Claimants' Reply, para. 533.

211 Claimants' Rejoinder, para. 25.

212 Claimants' Reply, para. 535.

B. WHETHER THE ECT'S TAX CARVE-OUT APPLIES TO ALL OF THE CLAIMANTS' ECT CLAIMS IN RESPECT OF THE SOLAR LEVY AND OTHER MEASURES

1. The Respondent's Arguments

169. The Respondent argues that *all* of its Measures, including the introduction of the Solar Levy, the repeal of the Income Tax Holiday and the changes to the Original Depreciation Provisions are "Taxation Measures" within the meaning of the ECT.[213] As a consequence, the Respondent argues, the Tribunal has no jurisdiction to decide *any* of the Claimants' ECT claims.

170. The Respondent points out that the Claimants "accept that the ECT contains a carve-out provision which excludes arbitral jurisdiction over disputes on taxation measures."[214] According to the Respondent, the Claimants only take issue with whether the Measures introducing and extending the Solar Levy are "taxation measures."[215] As a result, the Parties disagree only about whether the ECT's tax carve-out applies to the Solar Levy.

171. The Respondent recalls that "the scope of the Tribunal's authority is defined – and circumscribed – by the terms of" Article 26 of the ECT.[216] The Respondent states that only claims for "breach of an obligation" under Articles 10 to 17 of the ECT, *i.e.*, Part III, may be submitted to arbitration pursuant to Article 26(1).[217] However, Article 21 of the ECT contains a "tax carve-out," providing that "nothing in [the ECT] shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties."[218] This tax carve-out is subject to "only a limited number of exceptions that do not apply to claims under Article 10(1)."[219] As the Claimants have submitted that the Czech Republic breached obligations under Article 10(1),[220] the Claimants cannot assert any claims in respect of "Taxation Measures."[221]

172. At the hearing, the Respondent submitted that a "plain-text interpretation of the relevant ECT provisions" under the 1969 Vienna Convention on the Law of Treaties ("**VCLT**") demonstrates

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213 Statement of Defense, para. 477(b); Respondent's Rejoinder, para. 365(d).

214 Respondent's Rejoinder, para. 366, *referring to* Claimants' Reply, para. 700.

215 Respondent's Rejoinder, para. 366.

216 Statement of Defense, para. 488.

217 Statement of Defense, para. 489.

218 Statement of Defense, para. 490.

219 Statement of Defense, para. 490.

220 Statement of Defense, paras. 485-86, *referring to* Statement of Claim, para. 550.

221 Statement of Defense, para. 490.

that the Solar Levy "qualifies under the ECT carve-out."[222] According to the Respondent, this "plain-text interpretation" is dispositive of whether the Solar Levy and its prolongation are "Taxation Measures" for the purposes of the ECT's tax carve-out.[223] There is therefore no need to rely on any other interpretive standard.[224]

173. The Respondent notes that Article 21(7)(a)(i) of the ECT provides that "the term 'Taxation Measure' includes . . . (i) any provision *relating to* taxes of the domestic law of the Contracting Party . . . "[225] It follows that Article 21 captures a broad range of "revenue-raising functions."[226] Therefore, as long as a measure is "designed to bring in money to the general treasury as part of the general revenue-raising function of the state . . . it's covered by the ECT carve-out." It does not matter whether the measure is characterized as a tax or fee under Czech law or academic theory.[227] The measure need only be a "fiscal measure."[228]

174. The Respondent supports its interpretive theory by relying on the "equally authentic French and Italian versions of the ECT."[229] The Respondent argues that Article 21 of the French and Italian versions of the ECT refer to "fiscal measures" and not "taxation measures" as in the English version.[230]

175. Relying on this interpretive theory, the Respondent argues that the Solar Levy falls within Article 21(7) of the ECT because it is a fiscal measure.[231] In this connection, the Respondent relies on the evidence of its expert, [redacted], that although Czech positive law conflates various taxes and tax-like payments, such as fees, all such measures are fiscal measures.[232] The Respondent

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222 Hearing Transcript, Day 1, p. 243:1-15.

223 Hearing Transcript, Day 1, p. 255-57.

224 Hearing Transcript, Day 1, p. 255-57.

225 ECT, Article 21(7)(a) (**Ex. RLA-4**) (emphasis added).

226 Hearing Transcript, Day 1, p. 250-51.

227 Hearing Transcript, Day 1, pp. 250-51.

228 Hearing Transcript, Day 1, pp. 245-57. See also Hearing Transcript, Day 5, p. 54:3-14, *referring to* Claimants' Closing Statements, slide 71.

229 Hearing Transcript, Day 1, p. 245:5-7, *referring to* ECT, Article 50 (**Ex. RLA-4**).

230 Hearing Transcript, Day 1, pp. 245-46.

231 Hearing Transcript, Day 5, p. 125:3-6, *referring to* Closing Statement of the Czech Republic, slides 72 and 73.

232 Hearing Transcript, Day 3, pp. 182-83; Closing Statement of the Czech Republic, slide 73, *referring to* Hearing Transcript, Day 3, p. 182:8-19 and Hearing Transcript, Day 3, p. 183:5-8.

also points to Czech Constitutional Court and Czech Supreme Administrative Court judgments which suggest that the Solar Levy is either a tax or a fee, and in any event a fiscal measure.[233]

176. In addition, the Respondent submits that the introduction and extension of the Solar Levy are in any event "Taxation Measures" for purposes of the ECT when assessed against any of the following three interpretive standards: (a) the standard expressed in Article 21(7) of the ECT which turns attention to domestic law; (b) the standard adopted by the tribunal in the Yukos Cases; and (c) the autonomous standard used by many other investment tribunals.[234] The Respondent's assessment of the Solar Levy under these standards is as follows:

(a) The Solar Levy meets the ECT's Article 21(7) standard because it is a "tax" under Czech law.[235] Contrary to the assertion of the Claimants' expert, [redacted], that "[t]here is no comprehensive or generally applicable definition of a tax in Czech law,"[236] the Respondent argues that the Solar Levy meets the definition of the term "tax" contained in Article 2(3) of the Czech Tax Administration Law: "a financial performance in case a law provides that it shall be administered under this Act."[237] As the amended Act on RES Promotion provides that levies are administered pursuant to the Tax Administration Act, the Respondent's expert, [redacted] opines that the Solar Levy is a tax under the only legislative definition of the term "tax" contained in Czech law.[238] Furthermore, according to the Respondent, the Claimants' expert [redacted] concedes that the Solar Levy is a tax for the purposes of the Tax Administration Law and that it "meets most of the criteria generally attributed to a tax."[239] The Respondent relies on the expert reports of [redacted] and [redacted] to argue that the Solar Levy meets any remaining criteria of a tax.[240] In any event, the Respondent relies on [redacted] expert report to argue that

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[233] Closing Statement of the Czech Republic, slides 71 and 73, *referring to* Judgment of the Constitutional Court Ref. No. II. ÚS 2216/14 of 13 January 2015, para. 33 and Decision of the Czech Supreme Administrative Court, Case No. 1 Afs 6/2013 – 184, 9 July 2015, para. 62.

[234] Statement of Defense, para. 502. *See also* Hearing Transcript, Day 1, p. 251-52.

[235] Statement of Defense, para. 505.

[236] **CER-[redacted] 1**, para. 24. *See also*, Hearing Transcript, Day 3, p. 120:14-15.

[237] Statement of Defense, paras. 504-05; Tax Administrative Law, Act No. 280/2009, 22 July 2009, s. 2(3)(b) (**Ex. R-64**); Respondent's Rejoinder, para. 382, *referring to* **RER-[redacted]-1**, fn. 7.

[238] **RER-[redacted]-1**, paras. 18 and 21. *See also* Hearing Transcript, Day 3, pp. 206:8-9.

[239] Statement of Defense, paras. 505-06; *see also* **CER-[redacted]-1**, paras. 27-28 and 38-39. *See also*, Hearing Transcript, Day 3, p. 131-32.

[240] *See* Statement of Defense, paras. 507-08; **RER-[redacted] 1**, para. 71.

"academic literature listing various purported 'typical features,' or characteristics, of taxes cannot be determinative as to whether a particular measure is *legally* a tax."[241] The Respondent argues that it is more relevant that "Czech courts, including the Supreme Administrative Court and the Constitutional Court, repeatedly have confirmed that the Solar Levy is indeed a tax."[242] The Respondent notes that Mr Ladislav Minčič, First Deputy Minister of Finance of the Czech Republic from 2010 to 2014, confirms in his witness statement that the Ministry of Finance, which drafted the relevant legislation, never doubted that the Solar Levy was legally a tax.[243] Indeed, the Respondent points out that Czech legislation specifically designates the Solar Levy as a tax.[244] In addition, relying on [redacted] expert report, the Respondents point out that "the Solar Levy is also accounted for and reported as a tax in accordance with Czech accounting law and budgetary procedure, and listed as a tax in the reports of international organizations that use their own autonomous definitions of "tax" (OECD and Eurostat)."[245] Accordingly, the Respondent submits that "the Czech legislative, executive, and judiciary all agree that the Solar Levy is a tax."[246]

(b) As to the test in the Yukos Cases, as a preliminary matter, the Respondent argues that arbitral tribunals should not "look behind the motivation of a taxation measure."[247] However, the Respondent contends that even if the Tribunal were to embrace the test for a "Taxation Measure" contained in the Yukos Cases, the Solar Levy passes muster because it was "motivated by the purpose of raising general revenue for the State" and not by bad faith reasons.[248] According to the Respondent, "[n]either Claimants nor their legal expert identifies any principled basis for overturning the presumption that the Solar Levy was motivated by the purpose of raising general revenue for the State."[249]

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241 Respondent's Rejoinder, para. 398, *referring to* **RER-[redacted] 1**, paras. 41, 47, 96 and 100.

242 Respondent's Rejoinder, *referring to* **RER-[redacted] 1**, paras. 72, 97 and 100. *See also* Statement of Defense, para. 509, *referring to* **RER-[redacted]** paras. 47-48; **CER-[redacted] 1**, Annex 13, para. 50.

243 Respondent's Rejoinder, para. 381, *citing* **CWS-Minčič-1**, para. 14.

244 Respondent's Rejoinder, para. 386-95, *referring to* **RER-[redacted]-1**, paras. 17-21.

245 Respondent's Rejoinder, para. 382, *referring to* **RER-[redacted] 1**, paras. 22-32.

246 Respondent's Rejoinder, para. 384.

247 Hearing Transcript, Day 1, p. 256:7-14.

248 *See* Statement of Defense, paras. 514-17, *citing Yukos*, para. 1407. *See also* **CER-[redacted] 1**, para. 28; **RER-[redacted]-1**, para. 59; Explanatory Report on Act No. 402/2010, 13 October 2010 (**Ex. R-14**); Hearing Transcript, Day 1, p. 254-55.

249 Statement of Defense, para. 515.

The Respondent explains that, "[t]he Ministry of Industry and Trade projected that the increase in the cost of RES support in 2011 would prove devastating for households and industry."[250] The Respondent therefore "undertook to ease the burden on consumers, by undertaking to cover part of the costs out of general budget revenues."[251] The Respondent argues that its "intention was to (a) reduce the budget deficit resulting from the decision to finance a portion of the increase in RES support costs, and (b) limit the impact of the support payments on end-user electricity prices."[252] The Respondent highlights that "[t]his purpose stands in contrast with cases where taxation authority is employed for an ulterior purpose, *e.g.*, to force an enterprise into bankruptcy, as was the case in *Yukos*."[253]

(c) The Solar Levy "qualifies as a 'tax' under the standard most used in investment arbitrations in which the tribunal autonomously defines that term."[254] According to the Respondent, the Solar Levy meets the following four requirements under that standard: "(i) there is a law, which (ii) imposes a liability on classes of persons (iii) to pay money to the State (iv) for public purposes."[255] The Respondent argues that "the Claimants' own expert expressly concedes that the first three elements have been satisfied."[256] In the Respondent's view, the Solar Levy also meets the "public purposes" requirement because the relevant funds are generally available to be used by the State for public purposes.[257]

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250 Statement of Defense, para. 515. *See also*, Hearing Transcript, Day 3, p. 16.

251 Statement of Defense, para. 515.

252 Respondent's Rejoinder, para. 419.

253 Respondent's Rejoinder, para. 418, *referring to Yukos Universal Limited v. Russia*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 (**Ex. CLA-16**). *See also* Hearing Transcript, Day 1, p. 255-56.

254 *See* Statement of Defense, paras. 518-21.

255 Statement of Defense, para. 518, *citing EnCana Corporation v. Republic of Ecuador*, LCIA, Award, 3 February 2006, para. 142 (**Ex. CLA-13**) (hereinafter "**EnCana**"); *Burlington Resources Inc. V. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paras. 165, 175 (**Ex. CLA-21**) (hereinafter "**Burlington**"); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 174 (**Ex. CLA-55**) hereinafter "**Duke**").

256 Statement of Defense, para. 518, *citing* **CER-[redacted]-1**, paras. 28 and 40.

257 Statement of Defense, paras. 519-20, *citing Burlington*, Decision on Jurisdiction, para. 166 (**Ex. CLA-21**).

177. Additionally, the Respondent submits that the Claimants are "estopped from characterizing the Solar Levy any differently" from Energy 21's SPVs' recording of the Solar Levy as a "tax expense in their 2011 to 2013 financial statements."[258]

178. Finally, in response to the Claimants' argument that the Respondent should be estopped from arguing that the Solar Levy is a tax due to its pleadings before the Czech Administrative Court to the contrary, the Respondent insists that "no such argument was ever made."[259] Finally, in response to the "five further strong indicators of the non-tax nature of the Solar Levy" advanced by the Claimants, the Respondent asserts in its Rejoinder that (a) it is not relevant that the draft Act 402/2010 was presented to Parliament by the Ministry of Industry and Trade[260] and "[t]he fact that different ministries collaborated on a package of measures in no way undermines the fiscal nature of the Solar Levy, particularly since the Ministry of Finance was in fact responsible for that portion of the bill;"[261] (b) the use of the term "levy" and not "tax" is not decisive, as the choice of the term "levy" was due to the Ministry of Finance's policy to reserve the term "tax" for stand-alone tax acts and to use different terminology for *ad hoc* taxes introduced by general legislation – a majority of the "at least eight other 'levies' . . . are 'taxes';"[262] (c) "there is nothing 'extreme' or 'unusual'" about the small target group of the Solar Levy;[263] (d) the "strangling" effect is not relevant to the nature of the Solar Levy as a tax, this goes only to the issue of the constitutionality of the tax;[264] and (e) "a measure does not need to be of indefinite duration to qualify as a tax."[265]

2. The Claimants' Arguments

179. The Claimants argue that the ECT tax carve-out does not apply to the present case because the Solar Levy and its prolongation are not "Taxation Measures." Accordingly, the Claimants submit that their claims "fall squarely under the ECT protection" and that the Tribunal has jurisdiction

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[258] Statement of Defense, para. 513, *citing* **RER-[redacted] 1**, para. 5.4.2.

[259] Respondent's Rejoinder, paras. 437-40, *referring to* Claimants' Reply, paras. 576-77.

[260] Respondent's Rejoinder, para. 442

[261] Respondent's Rejoinder, para. 442.

[262] Respondent's Rejoinder, para. 444; **RER-[redacted]-1**, para. 35.

[263] Respondent's Rejoinder, para. 445, *referring to* Claimants' Reply, para. 623; **RER-[redacted] 1**, para. 65.

[264] Respondent's Rejoinder, para. 446.

[265] Respondent's Rejoinder, para. 447; **RER-[redacted]-1**, para. 68.

over them.[266] The Claimants submit that the term "Taxation Measures" under Article 21 of the ECT "must be construed in accordance with the principles of interpretation of international treaties" and "cannot be interpreted with blind obsequiousness to national law."[267]

180. The Claimants argue that the Tribunal should examine whether measures constitute "bona fide taxation actions, *i.e.*, actions that are motivated by the purpose of raising general revenue for the State."[268] The Claimants further argue that the Solar Levy cannot be characterized as a "tax" under this *bona fide* test (used in the Yukos Cases) or under the other standards put forth by the Respondent: (a) under the Respondent's "plain-text" interpretive theory of Article 21(7)(a)(i); (b) under Czech law; or (c) under the autonomous definition used in *EnCana*, *Duke* and *Burlington*.[269] The Claimants do not, however, "deny that the Tax Incentives provided for by the Act on Income Tax are 'taxation measures' for the purposes of the ECT."[270]

181. According to the Claimants, the approach of interpreting the meaning of "taxation" under a standard untied to national law has been endorsed in the Yukos Cases,[271] as well as confirmed by international tribunals with respect to similarly-worded bilateral investment treaties.[272] The alternative, the Claimants argue, would allow a State to "determine the scope of" or "escape its international obligations simply by labelling a measure as a tax."[273]

182. Therefore, to determine whether the Solar Levy is a tax under Article 21 of the ECT, the Claimants rely on the *bona fide* standard articulated in the Yukos Cases. The test asks whether actions are

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266 Statement of Claim, para. 323.

267 Claimants' Reply, para. 547. *See also*, Hearing Transcript, Day 1, pp. 64-65.

268 Statement of Claim, para. 340 and fn. 192; Claimants' Reply, para. 577; Hearing Transcript, Day 1, p. 68-69.

269 Claimants' Reply, paras. 634-37.

270 Claimants' Reply, fn. 700.

271 Statement of Claim, paras. 332-34, *citing Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014, paras. 1412 and 1415 (**Ex. CLA-16**); *Hulley Enterprises v. The Russian Federation*, PCA Case No. AA 226, Final Award, 18 July 2014, paras. 1412 and 1415 (**Ex. CLA-17**); *Veteran Petroleum v. The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014, paras. 1412, 1415 (**Ex. CLA-18)**. *See also* Hearing Transcript, Day 1, p. 68-69.

272 Statement of Claim, paras. 335-339, *citing RoslnvestCo UK Ltd. V. The Russian Federation*, SCC Case No. 079/2005, Arbitration Institute of the Stockholm Chamber of Commerce, Final Award, 12 September 2010, para. 628 (**Ex. CLA-19**); *Quasar de Valors SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. The Russian Federation*, SCC Case No. 24/2007, Arbitration Institute of the Stockholm Chamber of Commerce, Award, 20 July 2012, para. 179 (**Ex. CLA-20**); *Burlington*, Decision on Jurisdiction, para. 161- 162 (**Ex. CLA-21**). *See also* Hearing Transcript, Day 1, p. 68:2-10.

273 Claimants' Reply, paras. 559 and 561. *See also* Hearing Transcript, Day 1, pp. 66-67.

"bona fide taxation actions, *i.e.*, actions that are motivated by the purpose of raising general revenue for the State."[274] The Claimants observe that the tribunal in the Yukos Cases "did not rewrite the [ECT], but simply did the job . . . of an international tribunal, which is to interpret an international treaty according to the rules of interpretation of international law."[275] To this end, the Claimants argue that "[t]he bona fide test applied in *Yukos* is simply a general test that stems directly from the good faith criterion of Article 31 of the Vienna Convention."[276] The Claimants further argue that the "*bona fide* standard" used by that tribunal is confirmed by the Energy Charter Secretariat's publication on Article 21 of the ECT which states that "taxes shall be imposed in good faith."[277]

183. In the Claimants' view, "the mechanism of the Solar Levy itself is proof of the Czech Republic's bad faith."[278] The Claimants argue that "the Solar Levy's real purpose was to camouflage as a tax what . . . was . . . rather a pure and simple reduction of a promised benefit . . . aimed at taking advantage of the ECT's tax carve-out and avoiding this arbitration and international responsibility."[279] The Claimants further point to the Respondent "adopt[ing] exactly the opposite stance" on whether the Solar Levy is a tax in a case before the Czech Supreme Administrative Court.[280] Accordingly, the Claimants conclude that "the Solar Levy cannot be defined a *bona fide* measure" and therefore cannot "benefit from the tax carve-out of Article 21(1) ECT."[281] According to the Claimants, the Respondent's inability to meet the *bona fide* standard causes it to "irredeemably fail [. . .]" the *Yukos* standard.[282]

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274 Statement of Claim, para. 334, *citing Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014, para. 1407 (**Ex. CLA-16)**; *Hulley Enterprises v. The Russian Federation*, PCA Case No. AA 226, Final Award, 18 July 2014, para. 1407 (**Ex. CLA-17**); *Veteran Petroleum v. The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014, para. 1407 (**Ex. CLA-21**).

275 Claimants' Reply, para. 566.

276 Hearing Transcript, Day 1, p. 68:17-20.

277 Claimants' Reply, paras. 564-65 and 569, *referring to* Uğur Erman Özgür, Taxation of Foreign Investments under International Law: Article 21 of the Energy Charter Treaty in Context, June 2015, p. 20 (**Ex. CLA-21**). *See also* Hearing Transcript, Day 1 p. 67-68.

278 Claimants' Reply, para. 571.

279 Claimants' Reply, paras. 574-75, *citing* Minutes of Meeting of the Economic Committee of the Chamber of Deputies, 2 November 2010, p. 5 (**Ex. C-341**); Minutes of the Third Meeting of the Coordination Committee, 15 October 2010, p. 4 (**Ex. C-325**).

280 Claimants' Reply, para. 576; Decision of the Czech Supreme Administrative Court of 10 July 2014, paras. 19-20 (**Ex. CLA-2**). *See also* **CER-[redacted] 2**, paras. 41-50.

281 Claimants' Reply, para. 577.

282 Claimants' Reply, para. 577.

184. According to the Claimants, there are three additional indicators of "the lack of the bona fide nature of the solar levy."[283] First, the Claimants suggest that "[t]he adoption of retroactive measures to make the investors pay for the government's error is . . . a symptom of bad faith."[284] To the Claimants, the Solar Levy was enacted retroactively to shift onto PV producers the costs of the Respondent's mismanagement of a foreseeable situation. Second, the Claimants argue that the statements of Czech ministries in parliamentary discussions leading up to the adoption of the Solar Levy "irrefutably show that the levy was dressed up as a tax."[285] Third, the Claimants contend that the Respondent acted inconsistently after enacting the Solar Levy. The Respondent insists in this arbitration that the Solar Levy is a taxation measure under the ECT, when its own Supreme Court rejected its tax nature.[286] According to the Claimants, "the Respondent wants to have it both ways: the levy is a tax when it is convenient, it is not a tax when it is not convenient."[287]

185. The Claimants take issue with the Respondent's "plain-text interpretation" of Article 21(7)(a)(i) of the ECT.[288] In the first place, the Claimants argue that the Respondent's reliance on a plain-text interpretation of Article 21 is "a rather spectacular U-turn" from the position the Respondent took in its written pleadings.[289] The Claimants note that, prior to the hearing, "the Respondent . . . insistently called for the scope of the carve-out to be determined simply by reference to Czech law."[290] As a result, the Claimants suggest that it is not credible that the Respondent proffered at the hearing a revised interpretation of the tax carve-out, "considering the amount of time and collective . . . effort . . . devoted to the Czech tax law aspects over the years."[291]

186. The Claimants also argue that the Respondent's "plain-text interpretation" is a strained attempt at rewriting the ECT's tax carve-out.[292] The Claimants describe the Respondent's "attempt to leverage on" the French and Italian versions of the ECT as misguided, because the translations

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283 Hearing Transcript, Day 1, p. 73:4-5.

284 Hearing Transcript, Day 1, pp. 11-13.

285 Hearing Transcript, Day 1, pp. 14-20, *referring to* Claimants Opening Statements, slide 87.

286 Hearing Transcript, Day 1, p. 74:8-15, *referring to* Decision of the Czech Supreme Administrative Court of 10 July 2014, paras. 19-20 (**Ex. CLA-2**).

287 Hearing Transcript, Day 1, p. 74:20-22.

288 *See generally*, Hearing Transcript, Day 5, pp. 52-59.

289 Hearing Transcript, Day 5, p. 52:7-11.

290 Hearing Transcript, Day 5, p. 52:10-11.

291 Hearing Transcript, Day 5, pp. 52-53.

292 Hearing Transcript, Day 5, p. 54:15-18.

put forth by the Respondent are incorrect.[293] In any event, the Claimants note the Respondent's concession that German and Spanish versions of the ECT refer to "taxation measures in the same sense as the English" version.[294] When asked by the Tribunal whether it could reconcile the other authentic versions of the ECT with its favored interpretation, the Respondent admitted that the matter was "essentially left a little bit ambiguous."[295]

187. The Claimants also take issue with the Respondent's purported reliance on the VCLT for its "plain-text interpretation." According to the Claimants, the Respondent's proffered interpretation simultaneously seeks to find support in the VCLT, while "evading [the VCLT's] interpretative criteria."[296] To the Claimants, it is not possible to find a plain-text meaning in Article 21, given the complexity of the provision.[297] It is also not possible, in invoking the VCLT's interpretive principles, to ignore the principle of good faith "because of the importance of good faith in the interpretation of treaties."[298] The Claimants therefore argue that a proper construction of Article 21 under the VCLT's interpretive criteria should lead the Tribunal to apply the standard enunciated in the Yukos Cases.[299]

188. In respect of the Czech law interpretive standard, the Claimants argue that this method of interpreting "Taxation Measure" "amounts to saying that the 'explicit reference to domestic law' in Article 21 reduces the interpretation of the ECT tax carve-out to an exercise in Czech law," which the Claimants describe as "overly simplistic" and "self-serving."[300] In the Claimants' view, "[g]iven that the ECT is an international agreement, the expression 'taxation measures' . . . must be interpreted under an autonomous standard, in light of the principles of interpretation of international treaties."[301] The Claimants note that these principles are codified in Articles 31-33 of the VCLT, which "embrace [. . .] the 'objectivist' canon of interpretation" such that "the intentions of the Contracting Parties . . . no longer ha[ve] any place in the construction of

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[293] Hearing Transcript, Day 5, pp. 54-55.

[294] Hearing Transcript, Day 5, p. 55:3-4; Hearing Transcript, Day 1, p. 252:12-14.

[295] Claimants Closing Statements, slide 74, *referring to* Hearing Transcript, Day 1, pp. 252-53.

[296] Hearing Transcript, Day 5, p. 3-10.

[297] Hearing Transcript, Day 5, pp. 55-56.

[298] Hearing Transcript, Day 5, p. 56:13-21. *See also* Claimants' Closing Statements, slide 76, *referring to Phoenix Action, Ltd. V. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 107 (**Ex. RLA-146**) and ECT Secretariat's Guide on Article 21, p. 29 (**Ex. CLA-81**).

[299] *See generally,* Hearing Transcript, Day 5, p. 57.

[300] Claimants' Reply, paras. 550 and 558; Hearing Transcript, Day 1, pp. 64-65.

[301] Statement of Claim, para. 327; Hearing Transcript, Day 1, p. 65:7-19.

treaties."[302] Under Article 31(1) of the VCLT, "Taxation Measure" "must be interpreted 'in good faith' and bearing in mind the 'context' of the relevant expressions and the 'object and purpose' of the ECT."[303] According to the Claimants, the "'object and purpose' of the ECT is to protect investors from the encroachments on their rights by the host state," so that "characterization of the Solar Levy for the purposes of determining whether it is caught by the ECT's tax carve-out cannot be made by reference to domestic law."[304]

189. The Claimants clarify that their position is "not that the reference to domestic law must be disregarded in general," but rather that "the reference to domestic law contained in [Article 21 of the ECT] . . . must be interpreted according to the criteria of Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties."[305] The Claimants note that the Respondent also relies on the VCLT to provide the applicable interpretive standard.[306] The Claimants also suggest that their "discussion on the Vienna Convention has . . . clarified that [they] do not propose to rely on autonomous standard in a technical sense."[307]

190. The Claimants point out that even if the Tribunal were to apply the national law-focused definition in Article 21(7), the Solar Levy is not a tax under Czech law.[308] Contrary to the Respondent's claim, the Claimants rely on the expert report of ███ their expert on taxation matters, to argue that there is no general definition of "tax" in Czech law. In response to the Respondent's reliance on the definition in Article 2(3) of the Czech Tax Administration Law, the Claimants assert that this "is not a general definition of the notion of tax, but simply a definition for the purposes of the [Tax Administration Law] itself."[309] In further support of their argument that the

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302 Statement of Claim, paras. 328-329; United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations Treaty Series, vol. 1155, p. 331. The Claimants note that the Czech Republic, Cyprus, Luxemburg, and the Netherlands are all parties to this Convention. Statement of Claim, para. 328.

303 Claimants' Reply, para. 553; Hearing Transcript, Day 1, p. 65:7-19. *See also* Claimants' Reply, paras. 554-57, *citing* International Law Commission Draft Articles on the Law of Treaties, 1966, p. 221 (**Ex. CLA-78**); R. K. Gardiner, *Treaty Interpretation*, 2nd ed., Oxford, (2015), pp. 197 and 211 (**Ex. CLA-79**); J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration*, Oxford, (2012), para. 3.38 (**Ex. CLA-80**); *Phoenix Action, Ltd. V. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 107 (**Ex. RLA-146**).

304 Statement of Claim, para. 331; Hearing Transcript, Day 1, pp. 66-67.

305 Hearing Transcript, Day 1, p. 65:7-19.

306 Hearing Transcript, Day 1, p. 65:12-13; Hearing Transcript, Day 1, p. 244:6-9; Hearing Transcript, Day 5, p. 55:9-17; Hearing Transcript, Day 5, p. 123:4-11.

307 Hearing Transcript, Day 1, p. 65:16-19.

308 *See, e.g.*, Hearing Transcript, Day 1, pp. 74-75.

309 Claimants' Reply, paras. 580-81; **CER-███ 1**, paras. 27 and 30; **CER-███ 2**, paras. 12 and 15. *See also* Hearing Transcript, Day 3, p. 119:19-21. However, the Claimants' other tax expert, ███ ███,

definition of "tax" in the Tax Administration Law is not a general definition, the Claimants also note that the definition "covers certain payments (such as administrative and court fees), that are unquestionably not considered taxes."[310] Furthermore, according to the Claimants, the Czech Supreme Administrative Court in 2014 arrived at the "unequivocal conclusion" that the Solar Levy is not a tax, but a decrease in a government subsidy.[311] The Claimants dispute the Respondent's characterization of the judgment as "an exceptional ruling," noting that it "is the only case in which a Czech Court closely analysed the nature of the Solar Levy."[312] The Claimants criticize the Respondent's reliance on Czech case law, arguing that, "[r]ather than supporting the Respondent's theory that the Solar Levy is a taxation measure, they confirm that it is a *de facto* reduction of the FiT and Green Bonuses."[313]

191. The Claimants come to the same conclusion as the Supreme Administrative Court based on a "serious tax law analysis," referring to "the commonly accepted definition of tax theory and Czech case law."[314] That is:

> a measure is a tax if it has the following six features: it is an (a) obligatory, (b) non-refundable and (c) non-equivalent payment (d) introduced by law, (e) intended to serve as income of the state budget for the financing of society-wide needs and (f) paid for no specific purpose.[315]

The Claimants submit that the Solar Levy "lacks at least two of these requirements."[316] First, the Claimants argue that the Solar Levy lacks non-equivalence because there is "a direct link between the solar levy and the FiT/Green Bonuses because the solar levy withheld from FiT/Green Bonuses is reinvested to finance future FiT/Green Bonuses."[317] Second, the Claimants argue that

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disagrees that the Tax Administration Law does not contain a definition of "tax." Hearing Transcript, Day 3, p. 133:19-23.

[310] Claimants' Reply, para. 583; Hearing Transcript, Day 3, pp. 120-21.

[311] Decision of the Czech Supreme Administrative Court of 10 July 2014, paras. 19-20 (**Ex. CLA-2**). *See also* Claimants' Reply, paras. 586 and 605-09; Hearing Transcript, Day 3, p. 120:4-7.

[312] Claimants' Reply, para. 608; **CER-[redacted] 2**, paras. 49-50.

[313] Claimants' Reply, para. 619; Hearing Transcript, Day 3, p. 126:16-22.

[314] Claimants' Reply, paras. 587-88.

[315] Claimants' Reply, para. 589; **CER-[redacted] 1**, para. 27; **CER-[redacted]-1**, para. 31; **CER-[redacted]** para. 21. *See also*, Hearing Transcript, Day 3, p. 121:15-20, *referring to* Oral Presentation by [redacted] slide 6.

[316] Claimants' Reply, para. 589.

[317] Claimants' Reply, paras. 602-09; **CER-[redacted] 1**, para. 36; **CER-[redacted] 2**, para. 59. *See also* Hearing Transcript, Day 3, p. 122:17-22 (describing a "mathematically direct correlation" between the Solar Levy and FiT that PV producers receive).

the Solar Levy was paid for a specific purpose.[318] The Claimants contend that "the Solar Levy was not intended to – and indeed did not – raise revenues for the State;" "[i]ts aim was simply to reduce the pressure on final electricity consumers, avoiding an increase in the State deficit."[319] The Claimants rely on second expert report, where he opines that the Czech Republic had a specific purpose in introducing the Solar Levy: to lower costs for customers by funding the State subsidy necessary to finance grid operators who are responsible for the payment of FiT/Green Bonuses.[320] concedes that there are examples in the Czech Republic of taxes paid for a specific purpose, but suggests that the specific purpose criterion is "of smaller importance" to the academic definition of a tax than non-equivalence.[321]

192. The Claimants advance "five further strong indicators of the non-tax nature of the Solar Levy:" (a) "the legislative process for the adoption of the Solar Levy is atypical for a tax in the Czech system," having been presented by the Ministry of Industry and Trade and not the Ministry of Finance; (b) "the Solar Levy targets an extremely (and unusually) narrow group of taxpayers;" (c) the Solar Levy is temporary; (d) the Parliament uses the term "levy" in Czech instead of "tax"; and (e) "the Czech courts recognized several times that the Solar Levy may have 'strangling effects'" which "violates the proportionality test and suggests that the Solar Levy cannot be considered a tax."[322]

193. Applying the "autonomous" standard adopted by other investment tribunals, and to counter the Respondent's arguments that "the Solar Levy would qualify as a tax under the autonomous definition of a tax used in *EnCana*, *Duke* and *Burlington,*" the Claimants argue that the Solar Levy does not satisfy all four requirements established by these tribunals.[323] This is because, based on the Claimants' arguments outlined above, the Solar Levy targets a narrow group of taxpayers, is not a payment of money to the State, and does not serve a public purpose.[324]

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318 *See e.g.*, Hearing Transcript, Day 3, p. 123:13-17.

319 Claimants' Reply, para. 596, *citing* Document presented by the Czech Ministry of Finance for the Czech Government session on 20 October 2010, Annex 5 to **CER- 1**, p. 3; Minutes of Meeting of the Economic Committee of the Chamber of Deputies, 2 November 2010, p. 1 (**Ex. C-341**); **CER- 2**, para. 68 and 71; **CER- -1**, para. 40-45; **RER- 1**, para. 50; Electricity Prices Study, p. 11 (**Ex. C-336**); **CER- 2**, para. 79.

320 Claimants' Reply, para. 601, *referring to* **CER- 2**, para. 79. *See also*, Hearing Transcript, Day 3, p. 123:13-17.

321 Hearing Transcript, Day 3, p. 147:8-22.

322 Claimants' Reply, paras. 621-26.

323 Claimants' Reply, paras. 634-41; *see also* para. 176(c) above.

324 Claimants' Reply, paras. 637-41.

Notwithstanding, the Claimants recall that this autonomous definition is not applicable because "Taxation Measures" is defined in Article 21 of the ECT (and which would have been the starting point of analysis had the Respondent not acted in bad faith).[325] *EnCana*, *Duke* and *Burlington* are concerned with treaties with tax carve-outs that did not define "tax" or "taxation measure."[326] The Claimants conclude that the Respondent's jurisdictional objections relating to the ECT's tax carve-out must be rejected.

194. Finally, the Claimants dispute the Respondent's argument that they are estopped from characterizing the Solar Levy as a non-tax measure due to certain of the SPVs having characterized it as a withholding tax in their records, by arguing that these "did not purport to provide a characterization of the nature of the Solar Levy" and by contextualizing the purpose of the documents and the language used.[327]

C. Whether Natland Investment has made an "Investment" under the Netherlands-Czech Republic BIT

1. The Respondent's Arguments

195. The Respondent argues that "Natland Investment has failed to identify an 'investment' that is protected by the Netherlands BIT."[328] The Respondent recalls that "investment" is defined in Article 1(a) of the Netherlands-Czech Republic BIT, which provides in relevant part:

> **Article 1**
>
> [. . .]
>
> (a) the term 'investments' shall comprise every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively:
>
> i. movable and immovable property and all related property rights;
>
> ii. shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived therefrom;
>
> iii. title to money and other assets and to any performance having an economic value;
>
> iv. rights in the field of intellectual property, also including technical processes, goodwill and know-how;
>
> v. concessions conferred by law or under contract, including concessions to prospect, explore, extract and win natural resources.

325 Claimants' Reply, para. 641.

326 Claimants' Reply, para. 635.

327 *See* Claimants' Reply, paras. 629-33.

328 Statement of Defense, para. 523; Hearing Transcript, Day 1, p. 259:12-15.

196. The Respondent emphasizes that "protection is limited to 'asset[s] invested either directly or through an investor of a third State.'"[329] Relying on the Explanatory Note that accompanied the ministerial request for approval of the Netherlands-Czech Republic BIT and the *HICEE v. Slovak Republic* Award, the Respondent argues that "the only investments in the Czech Republic that are protected by the Netherlands BIT are those that (1) a Dutch entity makes directly in the Czech Republic; and (2) a Dutch entity makes indirectly, through an entity from a third State."[330] In the Respondent's view, neither category applies to Natland Investment's investment. The Respondent submits that Natland Investment's "'investments' were made in the Czech Republic through a Czech subsidiary,"[331] rejecting the Claimants' argument that "Energy 21 was merely the *instrument* for their investment in the Czech Republic, and that the *investment* itself is the collection of solar installations that Energy 21 indirectly held."[332]

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329 Statement of Defense, para. 526.

330 Statement of Defense, paras. 528-29, *citing* Dutch Explanatory Note on the Netherlands-Czech Republic BIT, 31 March 1992, p. 3 (**Ex. R-174**); *HICEE B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 May 2011, paras. 111, 116, 127, 140 and 145 (**Ex. RLA-6**). *See also* Hearing Transcript, Day 1, p. 259-60.

331 Statement of Defense, para. 531.

332 *See* Hearing Transcript, Day 1, pp. 260-61

197. The Respondent illustrates the ownership structure of the investment made by Natland Investment as follows:[333]

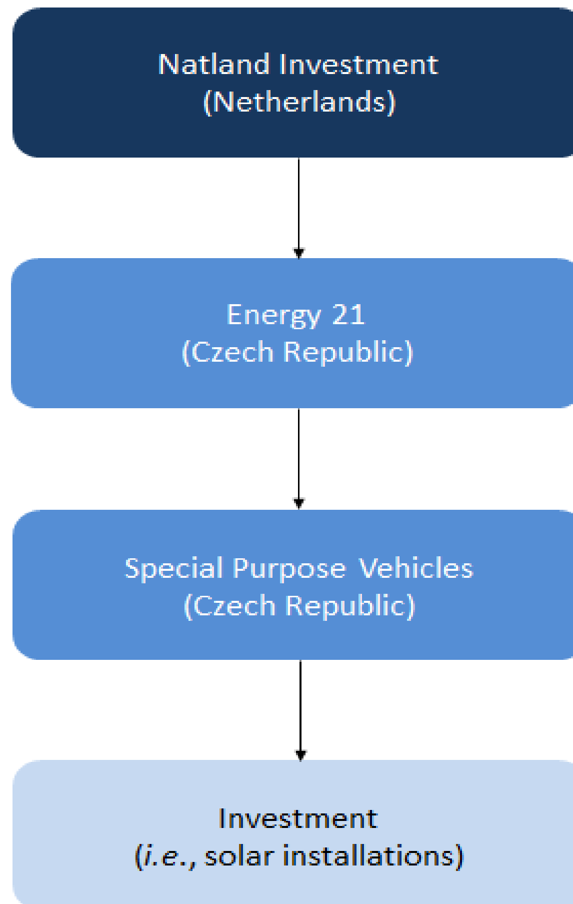

***Figure 2**: The ownership structure of the investment made by Natland Investment*

198. On the basis of this ownership structure, the Respondent submits that Natland Investment invested through a Czech investor (Energy 21) which in turn invested in other Czech investors (the SPVs) "which in turn owned the solar installations to which the Taxation Measures applied."[334] The Respondent concludes that "Natland Investment cannot assert any claim in respect of its indirect interest in the Czech solar installations to which the Taxation Measures applied, because Natland did not own such entities 'either directly or through an investor of a third State.'"[335] The Respondent explains that the Dutch Explanatory Note to the Netherlands-Czech Republic BIT

[333] Statement of Defense, para. 533.

[334] Statement of Defense, para. 534.

[335] Statement of Defense, para. 537.

states that "Czechoslovakia would like to exclude 'sub-subsidiaries' from the effect of the Agreement," and that this was a requirement to which "the Netherlands delegation agreed."[336] The Respondent states that the effect of this was to "exclude[] from the scope of the treaty precisely the type of investment structure that Natland Investment has . . . the Dutch entity at the top, and a series of Czech sub-entities flowing downstream."[337] On this basis, the Respondent submits that the Tribunal "cannot entertain any of the claims that Natland Investment has asserted under the Netherlands BIT."[338]

2. The Claimants' Arguments

199. The Claimants argue that "the 'subsidiary/sub-subsidiary' investment structure does not fall outside the protection of the Netherlands BIT."[339] Therefore, Natland Investment, which invested based on such structure, has made a qualifying investment. The Claimants dispute the Respondent's interpretation of the phrase "either directly or through an investor of a third State" in Article 1(a) of the Netherlands-Czech Republic BIT. They also dispute the reliability and value of the Dutch Explanatory Note.

200. First, the Claimants argue that the phrase "either directly or through an investor of a third State" in Article 1(a) has a "clear meaning."[340] The Claimants describe *HICEE v. Slovak Republic* as an "isolated and non-unanimous" precedent.[341] They rely on Judge Brower's dissent, in which he decided that "investing 'directly' simply means investing without the involvement of a third State, without further qualification."[342]

201. Second, the Claimants argue that the Respondent's proposed interpretation of "directly" "would lead to illogical results."[343] According to the Claimants, such an interpretation "would permit

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336 Hearing Transcript, Day 1, p. 261:3-21, *referring to* Dutch Explanatory Note on the Netherlands-Czech Republic BIT, 31 March 1992, p. 3 (**Ex. R-174**).

337 Hearing Transcript, Day 1 p. 261:16-21.

338 Statement of Defense, para. 537.

339 Claimants' Reply, para. 655.

340 Claimants' Reply, para. 649.

341 Claimants' Rejoinder, para. 159.

342 Claimants' Reply, para. 650; *HICEE B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Dissenting Opinion of Judge C. N. Brower, 23 May 2011, para. 7 (**Ex. CLA-82**). *See also* Claimants' Closing Statements, slide 66.

343 Claimants' Reply, paras. 649, 651; Claimants' Closing Statements, slide 67.

'indirect investments' 'so long as they are structured through a third State',"[344] which "would stand in contradiction with the treaty drafters' alleged intention to exclude locally incorporated sub-subsidiaries from the scope of the protected investments."[345] Further, the Claimants argue that the Respondent's objection "assumes that either the Czech nationality of the Claimants' shareholders or the alleged Czech origin of the funds used by the Claimants have relevance for jurisdictional purposes."[346] According to the Claimants, "there is no legal ground for this" because "in investment treaty law, nationality is linked to the investor and not to the investment."[347] To the Claimants, the Respondent unjustifiably "aims to circumvent the jurisprudence on the notion of investor and investment."[348]

202. Third, the Claimants argue that the Explanatory Memorandum relied on by the Respondent has a "doubtful reliability."[349] According to the Claimants, "[i]t is unclear how the Respondent's suggested interpretation could serve the goal allegedly enunciated in the Explanatory Note."[350] The Claimants further argue that the document was "composed 'for internal purposes.'"[351] Finally, the Claimants argue that the Czech Republic's failure to raise the objection it now raises under Article 1(a) in *Eastern Sugar v. Czech Republic*[352] constitutes an "impermissibl[e] backtrack [. . .] on its previous official position" in favor of "put[ting] forward an interpretation of Article (1) purporting to give effect to a hypothetical and completely unproven 'real intention' of the Contracting Parties."[353]

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344 *HICEE B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Dissenting Opinion of Judge C. N. Brower, 23 May 2011, para. 15 (**Ex. CLA-82**).

345 Claimants' Reply, para. 651.

346 Hearing Transcript, Day 5, p. 50:15-18.

347 Hearing Transcript, Day 5, p. 50:18-24.

348 Hearing Transcript, Day 5, p. 50:19-22.

349 Claimants' Reply, para. 649.

350 Claimants' Reply, para. 652.

351 Claimants' Reply, para. 654.

352 *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Arbitration Institute of the Stockholm Chamber of Commerce, Partial Award, 27 March 2007 (**Ex. CLA-7**).

353 Claimants' Reply, para. 654.

D. Whether the Tribunal has Jurisdiction to hear the "Non-Impairment" Claims under the Cyprus-Czech Republic BIT

1. The Respondent's Arguments

203. The Respondent objects to the Claimants' request that the Tribunal "[declare] that the Respondent's actions . . . were implemented through unreasonable and arbitrary measures which impaired the maintenance, use, enjoyment and disposal of the Claimants' investment in violation of the ECT and the Cyprus, Luxembourg and Netherlands BITs."[354]

204. The Respondent argues that the "problem" with the Claimants' request is that the Cyprus-Czech Republic BIT, invoked by Natland Group and GIHG, "does not contain a 'non-impairment' clause."[355] In response to the Claimants' contention that Natland Group and GIHG "can . . . benefit from the specific Non-Impairment protection by virtue of the Cyprus BIT's MFN clause" contained in Article 3(1) and (2) of the Cyprus-Czech Republic BIT,[356] the Respondent points out that Article 3(4) of the Cyprus-Czech Republic BIT states that the treatment referred to in Article 3(1) and (2) "will be granted on the basis of reciprocity."[357] According to the Respondent, "this type of 'reciprocity' limitation means that the granting party is not required to provide MFN treatment to investors of the other Contracting Party unless and until that other Contracting Party accords equivalent treatment to investors of the granting party."[358] The Respondent relies on Article 13 of the ILC Draft Articles on MFN clauses in support of its proposition that reciprocity clauses condition the granting by one Party of MFN treatment on the grant by the other Party of equivalent treatment to investors of the first Party.[359]

205. The Respondent therefore disagrees with the Claimants' interpretation of Article 3(4) and asserts that the proper reading of the provision is "that the Czech Republic is obliged to grant more favorable treatment to Cypriot investors on condition that Cyprus grant such treatment to Czech investors."[360] This is on the ground that, "since Articles 3(1) and 3(2) already provide that each

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354 Claimants' Statement of Claim, para. 550; Claimants' Reply, para. 1050; Claimants' Rejoinder, para. 241.

355 Respondent's Rejoinder, para. 460; Hearing Transcript, Day 5, pp. 120-21.

356 Claimants' Reply, para. 864.

357 Statement of Defense, para. 668; Hearing Transcript, Day 5, p. 121:6-14.

358 Statement of Defense, para. 669, *citing to* ILC Draft Articles on Most-Favoured-Nation Clauses with Commentaries (1978), art. 13; Respondent's Rejoinder, para. 462 (**Ex. RLA-32**).

359 Hearing Transcript, Day 5, p. 122:7-13, *referring to* ILC Draft Articles on Most-Favoured-Nation Clauses with Commentaries (1978), art. 13 (**Ex. RLA-32**).

360 Claimants' Reply, para. 864.

Contracting State will afford MFN treatment to investors of the other Contracting State, it effectively renders Article 3(4) meaningless."[361] The Respondent argues that, in order not to render Article 3(4) mere surplusage, the Cyprus-Czech Republic BIT should be read to suggest that MFN treatment is "not an automatic grant."[362]

206. According to the Respondent, it follows that since "the condition of reciprocity . . . has not been fulfilled,"[363] the Claimants cannot import MFN protection. Accordingly, the Respondent concludes that "neither GIHG nor Natland Group can assert a 'non-impairment' claim."[364]

2. The Claimants' Arguments

207. Relying on the Cyprus-Czech Republic BIT's *travaux préparatoires*, the Claimants argue that "the reciprocity condition, as the Parties understood it, was intended to operate only in relation to [national treatment]," and that "the Contracting Parties did not address the relation between the reciprocity condition set out in Article 3(4) and MFN protection."[365] In the Claimants' view, Article 3(4) "should reasonably be understood as [referring] only to the [national treatment] provisions contained in [Article 3(1) or (2)], with the exclusion of the MFN ones invoked by the Claimants."[366]

208. Even if the reciprocity condition in Article 3(4) applied also to the MFN treatment set out in Article 3(1) and (2), the Claimants argue that "the Claimants can benefit from the Netherlands BIT's Non-Impairment [clause] because [the reciprocity] condition is fulfilled."[367] According to the Claimants, "the Cyprus BIT's MFN clause enables Czech investors to count on the Cyprus-Hungary BIT's Non-Impairment clause, which is worded exactly as the Non-Impairment

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[361] Respondent's Rejoinder, para. 463.

[362] Hearing Transcript, Day 5, p. 122:17-18.

[363] Respondent's Rejoinder, para. 463.

[364] Respondent's Rejoinder, para. 464.

[365] Claimants' Rejoinder, paras. 147-49. The Cypriot delegation's note, dated 20 September 2000 (**Ex. C-439**) enclosed a document containing the comments/views of the Cypriot side with regard to the changes proposed by the Czech side to the draft text of the Cyprus-Czech Republic BIT; Agreed Minutes of Meeting Negotiations on the Agreement between the Czech Republic and the Republic of Cyprus on the promotion and reciprocal protection of investments, dated 30 November 2000 (**Ex. C-440**) which explains that "[i]n relation to Article 3 – National and Most Favoured – Nation Treatment of Investments, the Cypriot Side explained that paragraph 4 which provides that the treatment referred to in this Article will be granted on the basis of reciprocity, does not affect the scope of the extension of national treatment to investments or investors of the Czech Republic."

[366] Claimants' Rejoinder, para. 149.

[367] Claimants' Rejoinder, para. 150.

clause that the Claimants wish to import from the Netherlands BIT."[368] On this basis, the Claimants argue that the reciprocity condition would be "plainly satisfied given that Cypriot and Czech investors are in the same substantial position."[369]

E. WHETHER GIHG AND NATLAND GROUP ARE "INVESTORS" UNDER THE CYPRUS-CZECH REPUBLIC BIT

1. The Respondent's Arguments

209. The Respondent submits that "GIHG and Natland Group have failed to meet their burden of proving that they qualify as 'investors' for purposes of the Cyprus BIT."[370] Article 1(2) of the Cyprus-Czech Republic BIT defines "investor" as "any natural or legal person of one Contracting Party who invests in the territory of the other Contracting Party." Article 1(2)(b) relevantly provides that "legal person" means "any entity incorporated or constituted in accordance with, and recognized as legal person by its laws, having the permanent seat in the territory of that Contracting Party." The definition provides four cumulative conditions that Natland Group and GIHG must satisfy in order to be considered a Cypriot investor.[371] However, the Claimants' approach effectively reduces this four-element inquiry into a single standard. Under Cypriot law, every legal entity incorporated in Cyprus must have a registered office there, and interpreting the seat requirement as being satisfied by proving the existence said registered office would render the "permanent seat" requirement redundant, as it would overlap directly with the requirement of incorporation.[372] The Respondent notes that "the Claimants admitted in their Rejoinder on Jurisdiction that when Cyprus and the Czech Republic were negotiating the BIT, the Cypriot delegation proposed using the phrase 'registered office' (rather than 'permanent seat')." However, "this proposal was rejected."[373]

210. The Respondent concedes that both GIHG and Natland Group are incorporated under Cypriot law, thus satisfying the first criterion under Article 1(2)(b) of the Cyprus-Czech Republic BIT.[374] However, it argues that the Claimants have not shown that they have their "permanent seat" in

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368 Claimants' Rejoinder, para. 156.

369 Claimants' Rejoinder, para. 156.

370 Statement of Defense, para. 539.

371 Respondent's Rejoinder, para. 479; Opening Statement of the Czech Republic, slide 221.

372 Respondent's Rejoinder, para. 483.

373 Opening Statement of the Czech Republic, slide 222.

374 Statement of Defense, para. 551.

the territory of Cyprus which should be understood as the place of actual or effective management.[375] The test for this is a flexible one, which takes into account the precise nature of the company in question and its actual activities.[376]

211. While the Claimants contend that it would be unreasonable to apply such a test to a mere holding company and to expect it to provide evidence of extensive activities at its corporate location, the Respondent disagrees that Natland Group and GIHG should be subject to a lighter standard.[377]

212. First, Natland Group is not a mere holding company and has had at least four domiciles, at least eight employees and an active employee recruitment program, and it is a company involved in a wide array of activities. The Respondent analyzes the various factors considered by past tribunals and the relevant evidence as follows:[378] (a) its offices are outside Cyprus;[379] (b) its board of directors includes only one Cypriot director who is highly likely not a genuine director, but rather one who was provided by the corporate secretary of Natland Group to satisfy Cypriot incorporation requirements (further, the Claimants have not shown that there is more than this one Cypriot director, even though they assert that Natland Group's Cypriot directors meet regularly at the relevant registered offices);[380] (c) the managers of Natland Group are located in the Czech Republic and not in Cyprus;[381] (d) there is no evidence that Natland Group has employees in Cyprus and all indications suggest that they were based in the Czech Republic;[382] (e) the Natland Group's website identifies only Czech and Dutch branches and a Slovak head office;[383] (f) there is no evidence of where management records are kept;[384] (g) there is no evidence of its property interests in Cyprus;[385] (f) the fact that the financial statements are audited

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375 Respondent's Rejoinder, para. 485; Opening Statement of the Czech Republic, slide 224, *referring to* UNCTAD, *Scope and Definition*, in UNCTAD Series on Issues in International Investment Agreements, (1999), p. 39 (**Ex. RLA-257**) and P. Sauvé, *Trade and Investment Rules: Latin American Perspectives*, United Nations, (2006), p. 22 (**Ex. RLA-259**).

376 Respondent's Rejoinder, para. 486.

377 Respondent's Rejoinder, para. 489.

378 *See generally* Opening Statement of the Czech Republic, slide 225.

379 Respondent's Rejoinder, para. 495; Hearing Transcript, Day 2, pp. 112-14.

380 Respondent's Rejoinder, paras. 496-99; Hearing Transcript, Day 2, pp. 85-87.

381 Respondent's Rejoinder, para. 500; Hearing Transcript, Day 2, p. 75:13-17. *But see* Hearing Transcript, Day 2, pp. 85-86.

382 Respondent's Rejoinder, para. 501; Hearing Transcript, Day 2, pp. 87-89.

383 Respondent's Rejoinder, para. 502; Hearing Transcript, Day 2, pp. 84-85.

384 Respondent's Rejoinder, para. 503; Hearing Transcript, Day 2, p. 87:21-24.

385 Respondent's Rejoinder, para. 504; Hearing Transcript, Day 2, pp. 82-84.

by Cypriot accountants is insufficient proof given that this post-dates the submission of Natland Group's claims and the "items included in the . . . financial statements are measured using the currency of the primary economic environment in which the entity operates" which in this case is the Czech koruna;[386] and (g) finally, the Claimants do not identify any evidentiary support that it has a Cypriot bank account and pays taxes in Cyprus, which in any case, is far too little to establish actual or effective management in Cyprus, compared to the myriad and consistent acts of management outside of Cyprus, and primarily in the Czech Republic.[387]

213. Second, even if GIHG is genuinely a holding company, the Claimants have failed to show that GIHG is effectively managed from Cyprus. The only evidence is its corporate register.[388] Instead, the Respondent points out that the Claimants' own ownership structure chart shows that GIHG, while registered in Cyprus and owned by a number of Seychellois companies, has been owned and controlled by a Czech national and a Slovak national since at least March 2010.[389] GIHG appears to have been operated exclusively from the Czech Republic, as illustrated by the company's contact details and the identity of its legal representatives. In fact, it remains unclear whether GIHG is completely independent of Natland Group.[390]

214. Accordingly, the Respondent argues that "the Tribunal has no power to entertain any of the claims asserted by [GIHG and Natland Group] under the Cyprus BIT."[391]

2. The Claimants' Arguments

215. In the Claimants' view, the Respondent's interpretation of "seat" as "a synonym for 'place of actual or effective management' . . . lacks legal basis."[392] The Claimants rely on Professor Schreuer's commentary to argue that "the concept of 'seat' should be understood simply as a 'formal' one, requiring no 'genuine economic activity' in a given country."[393] They assert that

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[386] Respondent's Rejoinder, para. 505.

[387] Respondent's Rejoinder, para. 506.

[388] Respondent's Rejoinder, paras. 487-90; Opening Statement of the Czech Republic, slide 226.

[389] Hearing Transcript, Day 2, p. 119:1-23.

[390] Statement of Defense, para. 168.

[391] Statement of Defense, para. 553, *citing Daimler Financial Services v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, paras. 206, 210, and 251 (**Ex. CLA-14**).

[392] Claimants' Rejoinder, para. 183.

[393] Claimants' Rejoinder, para. 183, *citing* C. Schreuer, "Nationality of Investors: Legitimate Restrictions vs. Business Interests", in *ICSID Review*, 2009, Vol. 24(2), p. 522 (**Ex. CLA-83**). *See also Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 43 (**Ex. CLA-84**);

"the Cyprus BIT contains no definition of 'seat' and that no uniform definition of this term exists at international level."[394] According to the Claimants, the "meaning of 'seat' should be determined by reference to domestic law" and, specifically in this case, to Cypriot law.[395] In light of Cypriot law, the Claimants assert that "the term 'seat' in the Cyprus BIT must be understood as 'registered office' for Cypriot investors."[396] Pointing to the certificates from the Registrar of Companies of Nicosia certifying that the "Registered Office" of both Natland Group and GIHG is within Cyprus territory,[397] the Claimants argue that this test is easily satisfied.[398] In response to the Respondent's argument that, as Cypriot legislation requires every legal entity to have a registered office, interpreting "seat" as "registered office" would "render the 'seat' requirement redundant,"[399] the Claimants note the distinction in Cyprus between a registered office and company incorporation.[400] Based on an analysis of the "treaty practice of the Contracting Parties to the Cyprus-Czech Republic BIT," the Claimants argue that, when Cyprus and the Czech Republic "wanted a more stringent nationality test, they included a *specific* language to this effect."[401] The Claimants point, for example, to the reference to "control" in Article 1.3 of the Israel-Cyprus BIT,[402] and "real business activities" in Article 1.2 the Cyprus-Iran BIT.[403] The Claimants also contend that the Respondent's interpretation conflicts with "Cyprus's well-known

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Total v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006, para. 57 (**Ex. CLA-85**). *See also* Hearing Transcript, Day 5, p. 48:18-22.

394 Claimants' Rejoinder, para. 184.

395 Claimants' Rejoinder, para. 185.

396 Claimants' Rejoinder, para. 187; Hearing Transcript, Day 5, p. 49:10-13.

397 Hearing Transcript, Day 5, pp. 48-49.

398 Claimants' Reply, para. 661; *see* GIHG's commercial register, p. 3 (**Ex. C-9**); Natland Group's commercial register, p. 1 (**Ex. C-11**).

399 Respondent's Rejoinder, para. 483.

400 Claimants' Rejoinder, para. 186.

401 Claimants' Rejoinder, paras. 187-88. *See also* Claimants' Rejoinder, para. 192, *citing Central European Aluminium Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, paras. 16 and 20 (**Ex. CLA-153**). *See also*, Hearing Transcript, p. 49:14-23.

402 Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments, signed on 13 October 1998, entered into force on 17 June 2003 (**Ex. C-442**) ("**Israel-Cyprus BIT**").

403 Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Republic of Cyprus and the Government of the Islamic Republic of Iran, signed on 2 March 2009, entered into force on 4 May 2012 (**Ex. C-444**) ("**Iran-Cyprus BIT**").

practice of trying to promote the incorporation of local holding companies, including those managed abroad."[404]

216. The Claimants also state that an analysis of the *travaux préparatoires* of the Cyprus-Czech Republic BIT revealed no "trace of an alleged intention of the Czech Republic to require a substantial connection between an investor and its State of incorporation."[405] The Claimants also dispute the Respondent's interpretation based on its practical effects, which they argue would "eliminate the Cyprus BIT's protection in relation to a large number of Cypriot holding companies not managed from Cyprus."[406]

217. The Claimants argue that, even if the Tribunal were to endorse the Respondent's interpretation, Natland Group and GIHG would in any event qualify as Cypriot investors, since they are managed or administered from Cyprus.[407] In support of this argument, the Claimants note that: (a) both have a Cypriot bank account; (b) their financial statements are audited by Cypriot accountants; (c) both pay taxes in Cyprus; and (d) both had Cypriot directors who held meetings at the registered offices.[408] The Claimants conclude that the Respondent "does not (and cannot) contest that GIHG and Natland Group are incorporated under Cypriot law."[409]

F. Whether Radiance is entitled to Make Claims under the Luxembourg-Czech Republic BIT

1. The Respondent's Arguments

218. The Respondent submits that the Tribunal has no jurisdiction over Radiance's claims brought pursuant to the Luxembourg-Czech Republic BIT. According to the Respondent, the Luxembourg-Czech Republic BIT has a "very limited" dispute resolution clause which provides

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404 Hearing Transcript, Day 5, p. 49:20-23.

405 Claimants' Rejoinder, para. 189. The Claimants also distinguish the *Alps Finance* decision submitted by the Respondent, by arguing that the tribunal in that case was called on to interpret "a rather unusual clause", including the requirements of both "seat, together with real economic activities" Claimants' Rejoinder, para. 191.

406 Claimants' Rejoinder, para. 191.

407 Claimants' Rejoinder, para. 197. *See generally also*, Hearing Transcript, Day 2, pp. 112-14.

408 Claimants' Reply, para. 662, *citing* Natland Group's report and financial statement for 2012 (**Ex. C-437**); GIHG's commercial register, p. 3 (**Ex. C-9**); Natland Group's commercial register, p. 1 (**Ex. C-11**); Minutes of the meetings held on 31 October 2009, 1 July 2011 and 12 March 2012 (**Ex. C-438**).

409 Claimants' Reply, para. 669.

that "the only claims that are subject to arbitration thereunder are claims for compensation due as a result of a violation of Articles 3(1) and 3(3)."[410]

219. The Respondent notes that the Claimants do not make an expropriation claim, but base their claims under the non-impairment and full protection and security ("**FPS**") provisions of the BIT (Article 2(3) and 2(4)), as well as a FET standard that they argue can be imported into the Luxembourg-Czech Republic BIT through its MFN clause.[411] The Claimants argue that:

> [t]he Luxembourg BIT's MFN [Most-Favored Nation] clause entitles Luxembourg nationals (such as Radiance) to rely on broader FPS [Full Protection and Security] and FET [Fair and Equitable Treatment] standards, together with the relevant arbitral protection, by incorporating more favorable provisions contained in several BITs to which the Czech Republic is a party.[412]

220. Article 8, the dispute resolution clause of the Luxembourg-Czech Republic BIT, provides in relevant part:

> 1. Disputes between one Contracting Party and an investor of the other Contracting Party concerning compensation due pursuant to article 3 paragraphs 1 and 3, shall be the subject of a written notification, accompanied by a detailed report, addressed by the investor to the Contrary Party [sic] concerned. As far as possible, such disputes shall be settled amicably.

221. The MFN clause in Article 2(4) of the Luxembourg-Czech Republic BIT provides:

> Subject to the measures required for the maintenance of public order, such investments [made in the territory of one Contracting Party by investors of the other Contracting Party] shall be safeguarded and protected at all times, in the same manner as investments belonging to investors of the most favored nation.

222. The Respondent argues that Article 2(4) of the Luxembourg-Czech Republic BIT "expressly limit[s] MFN protection to the full protection and security standard."[413] As to the Claimants' argument about FET, the Respondent argues that "there is no support for [the Claimants'] theory that 'since Radiance can rely on the FET protection of the Netherlands and Cyprus BITs, it follows that it can also invoke the right to arbitration provided by those BITs in relation to FET and FPS violations.'"[414] The Respondent emphasizes that "[t]he mere existence of a fair and equitable

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410 Hearing Transcript, Day 1, p. 258:5-10; Statement of Defense, para. 556.

411 Hearing Transcript, Day 1, p. 258:1-4.

412 Statement of Claim, para. 371.

413 Statement of Defense, paras. 560-61.

414 Statement of Defense, para. 564.

treatment clause does not — without more — apprise a tribunal of jurisdiction to hear fair and equitable treatment claims (or any other claims)."[415]

223. According to the Respondent, "consistent with the key treaty principles of *lex specialis* and *effet utile*, a treaty provision that specifically addresses a particular issue (like the dispute resolution clause of the Luxembourg BIT) must be deemed to prevail over more general provisions contained elsewhere in the same treaty."[416] Finally, the Respondent raises a procedural objection to the Claimants' MFN argument on the grounds that they did not raise it until their Statement of Claim.[417]

2. The Claimants' Arguments

224. The Claimants acknowledge that "the Luxembourg BIT does not foresee FET protection and provides for arbitration only in relation to disputes on compensation for expropriation," however, they assert that the Luxembourg-Czech Republic BIT "contains an MFN clause expressly linked to FPS."[418] It further argues that, "[g]iven that the FPS obligation is equivalent to the FET one when legal security is at stake (as in this case), Radiance, as a Luxembourg national, is entitled to rely on the more favorable FET protection accorded by the Cyprus and Netherlands BITs respectively to Cypriot and Dutch investors."[419] In turn, "[t]he protection afforded by those treaties is more favorable because it encompasses the investor's right to resort to international arbitration in relation to FET violations."[420]

225. The Claimants cite case law to support their contention that "MFN clauses have been applied to expand the scope of dispute settlement provisions, and thus in relation to 'procedural matters.'"[421] The Claimants highlight Judge Brower's position in *Austrian Airlines*, in which he states that "[i]f

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415 Statement of Defense, para. 566.

416 Statement of Defense, para. 569, *citing Austrian Airlines v. Slovak Republic*, UNCITRAL, Final Award, 9 October 2009, para. 135 (**Ex. RLA-138**).

417 Statement of Defense, para. 570, *citing* Christer Söderlund, "Most Favoured Nation (MFN) Clauses in Bilateral Investment Treaties", *Liber Amicorum Bernardo Cremades*, 1126 (2010) (**Ex. RLA-143**); Zachary Douglas, "The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails," 2 *Journal of International Dispute Settlement* 97, (2011), p. 108 (**Ex. RLA-144**). *See generally also* Opening Statement of the Czech Republic, slide 212.

418 Claimants' Rejoinder, para. 198; Claimants' Closing Statements, slide 69.

419 Claimants' Rejoinder, para. 198.

420 Claimants' Rejoinder, para. 198.

421 Claimants' Rejoinder, para. 200.

every time a MFN clause were invoked it were to be read together with the treaty provision which the MFN clause is alleged to circumvent, such a clause might never be given any effect."[422] They further highlight the tribunal's finding in *RosInvestCo*, to the effect that "the very character and intention of [MFN clauses] is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty."[423]

G. Whether Natland Group and Natland Investment are Investors who have Made Investments entitled to Protection under the Cyprus-Czech Republic BIT, Netherlands-Czech Republic BIT and the ECT

1. The Respondent's Arguments

226. The Respondent argues that the Tribunal should dismiss all claims asserted by Natland Investment and Natland Group for lack of jurisdiction on the basis that they have failed to establish that they have made good faith foreign investments, as required by the ECT, the Netherlands-Czech Republic BIT and the Cyprus-Czech Republic BIT.[424]

227. While these treaties define the term "investment," they are only concerned with its legal aspect. There are economic characteristics of an investment, which a tribunal must also consider and which include "contribution, duration, and risk."[425] Applying this argument to investment treaties, "it is clear that this contribution must come from outside of the host State."[426] In light of "[a] clear objective of multilateral and bilateral investment treaties is to promote and protect *international* investments — as opposed to purely domestic ones,"[427] "investment treaty tribunals have

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[422] Claimants' Rejoinder, paras. 201-02, *citing Austrian Airlines v. Slovak Republic,* UNCITRAL, 9 October 2009, Separate Opinion of Charles N. Brower, p. 7 (**Ex. CLA-39**). *See also* Claimants' Closing Statements, slide 69.

[423] Claimants' Rejoinder, paras. 201-202, *citing RosInvestCo UK v. The Russian Federation*, SCC Case No. 079/2005, Arbitration Institute of the Stockholm Chamber of Commerce, Award on Jurisdiction, 5 October 2007, para. 131 (**Ex. CLA-40**)

[424] Statement of Defense, para. 575. Respondent's Rejoinder, paras. 531 ff.

[425] Respondent's Rejoinder, paras. 537-48, *citing* Zachary Douglas, *Investment Claims*, p. 163 (**Ex. RLA-271**); *Nova Scotia Power v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Excerpts of the Award of 30 April 2014, para. 84 (**Ex. RLA-270**); *Romak v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 207 (**Ex. RLA-273**); *KT Asia Investment Group v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paras. 165-66 (**Ex. CLA-98**); *GEA Group v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 141 (**Ex. RLA-110**).

[426] Respondent's Rejoinder, para. 539.

[427] Statement of Defense, para. 575, *citing* ECT, Preamble (**Ex. RLA-4**), Netherlands-Czech Republic BIT (**Ex. C-4**), and Cyprus-Czech Republic BIT (**Ex. C-2**); *Phoenix Action, Ltd. V. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 97 (**Ex. RLA-146**); Expert Opinion of Professor Rudolf

consistently declined to exercise jurisdiction over investments deemed to be an "abuse of the system of international investment protection."[428] Such an abuse of process exists here where the timing of the alleged investment and claim, the substance of the transaction, and the true nature of the operation all indicate that the putative investment was an all-Czech operation.[429]

228. In support of its assertion that "the investments of Claimants Natland Group and Natland Investment in the Czech Republic amount to an all-Czech operation,"[430] the Respondent notes that Natland Group and Natland Investment "form part of a family of companies under the aegis of the Czech company Natland," founded by Czech national Mr Tomáš Raška (who is also a representative and beneficial shareholder of Natland Investment and Natland Group).[431] The Respondent further notes that Natland Group is 100% owned by a group of Czech individuals – Messrs. Tomáš Raška, Jan Koťátko and Libor Matur – and that Natland Group owns 100% of Natland Investment.[432] The Respondent concludes that "Natland Group and Natland Investment are simply shell companies devised by the Czech company Natland for the purpose of developing solar power plants in Czech territory."[433] Accordingly, the Respondent submits that their investments "cannot be considered *bona fide foreign* investments entitled to the international protections afforded under . . . the ECT, the Cyprus BIT, and the Netherlands BIT," and that the Tribunal must "decline jurisdiction over the merits claims of Natland Group and Natland Investment."[434]

229. The Respondent argues that, contrary to the Claimants' characterization, its objection is not based on improper forum shopping.[435] The Respondent notes that while the Claimants deny any improper forum shopping, they "do not contest at all the Czech Republic's showing that the

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Dolzer, *Hulley Enterprises Ltd., Yukos Universal Ltd., and Veteran Petroleum Ltd. V. Russia*, Case No. 1:14-CV-01996-ABJ (U.S.), 20 October 2015, paras. 200 and 213 (**Ex. RLA-203**).

428 Statement of Defense, para. 575, *citing Phoenix Action, Ltd. V. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 34, 107, 137, 142, and 144 (**Ex. RLA-146**). *See also* Hearing Transcript, Day 5, p. 138-44.

429 Respondent's Rejoinder, para. 544.

430 Statement of Defense, para. 586. *See also* Opening Statement of the Czech Republic, slide 225, *referring to* Respondent's Rejoinder, paras. 495-507.

431 Statement of Defense, para. 585; **CWS-Raška-1**, para. 10.

432 Statement of Defense, para. 585, *citing* Energy 21, Group Structure Chart as of 30 June 2011, p. 1 (**Ex. C-45**). *See also* Hearing Transcript, Day 2, p. 76:22-25.

433 Statement of Defense, para. 586; Hearing Transcript, Day 5, p. 118:10-19.

434 Statement of Defense, paras. 586-87.

435 Respondent's Rejoinder, para. 544.

substance and nature of the 'investment' by Natland Group and Natland Investment make it clear that such 'investment' was a 'domestic investment[] disguised as [an] international investment[]' by virtue of their being incorporated abroad.'"[436]

230. In any event, according to the Respondent, even the Claimants' attempt to focus exclusively on the timing of Natland Group's and Natland Investment's establishment proves unsuccessful. As the Claimants themselves agree, it is an abuse of process for a claimant to attempt to garner investment treaty protection by restructuring its "investment" at a time when an investment treaty dispute is foreseeable.[437] Here, the reasonable prospect of a future dispute emerged from the dramatically altered market conditions in the Czech solar sector – as a result of the unanticipated fall in panel costs – which compelled a response by the Czech Government to address the solar power market distortion.[438]

231. Finally, the Respondent denies that it has not raised a formal jurisdictional objection to the "investment" made by Natland Group and Natland Investment as it clearly indicated in its Request for Bifurcation that the Claimants' claim suffered from jurisdictional defects *ratione materiae* and *ratione temporis* and devoted an entire section of its Statement of Defense to this objection. The Claimants have also responded to this objection albeit reframed as an issue of jurisdiction *ratione personae*.[439]

2. The Claimants' Arguments

232. The Claimants characterize the Respondent's jurisdictional objection as "an attempt to camouflage an objection *ratione personae* concerning the existence of protected 'investors' as an objection *ratione materiae* concerning the existence of protected 'investments.'"[440] Contrary to

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[436] Respondent's Rejoinder, para. 544.

[437] Respondent's Rejoinder, para. 545.

[438] Respondent's Rejoinder, para. 547.

[439] Respondent's Rejoinder, para. 531.

[440] Claimants' Rejoinder, para. 208. *See also* Claimants' Reply, para. 702 where the Claimants argue that "since the Respondent has not raised a formal objection to the 'investment' made by Natland Group and Natland Investment, this issue need not be considered by the Tribunal."

the Respondent's position, the Claimants argue that identifying "the nationality of the Claimants' investments has no basis in the definitions of 'investment' of the relevant treaties."[441]

233. First, the Claimants argue that "the Czech nationality of Natland Group's and Natland Investment's *shareholders* does not impact on the Claimants' standing as protected 'investors' under the applicable treaties."[442] The Claimants note that the Parties agree that the nationality of a legal entity "must be determined based on the *specific* criteria of the relevant investment treaty."[443] Recalling that the criteria for nationality under the ECT and the Netherlands-Czech Republic BIT is the "place of incorporation" and, under the Cyprus-Czech Republic BIT, "permanent seat," the Claimants argue that "any inquiry into the nationality of the party controlling the investor is irrelevant to determine the investor's nationality."[444] According to the Claimants, "[t]his holds true also when the controlling shareholders of the investor are nationals of the host State."[445] The Claimants rely on the decision in *Tokios Tokelès v. Ukraine*, in which (in the words of the Claimants) the tribunal "refused to import a 'control test' into the nationality provision of the relevant BIT, which sets out an 'incorporation test,' and held that "it is not for tribunals to impose limits on the scope of BITs not found in the text."[446] The Claimants conclude that "the nationality of the shareholders is irrelevant for the determination of nationality of the

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441 Claimants' Rejoinder, para. 208; Hearing Transcript, Day 5, p. 49:3-8 (arguing that "[t]he suggestion that GIHG and Natland are shell companies misses the point, because the treaty language shows that there is no need to explore the quality or the factual connection between the Claimants and Cyprus . . . ").

442 Claimants' Rejoinder, para. 209 (emphasis added).

443 Claimants' Reply, para. 685.

444 Claimants' Reply, para. 685; Hearing Transcript, Day 5, p. 49:3-8. *See also* Claimants' Closing Statements, slides 57-60; Hearing Transcript, Day 5, p. 50:15-24.

445 Claimants' Reply, para. 685.

446 Claimants' Reply, para. 685, *citing Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 36 (**Ex. CLA-84**). *See also* Claimants' Reply, paras. 686-91, *citing Saluka Investments v. Czech* Republic, PCA Case No. 2001-04, Partial Award, 17 March 2006, paras. 240-41 (**Ex. CLA-52**) (hereinafter "**Saluka**"); *Rumeli Telkom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 326 (**Ex. CLA-97**); *Rompetrol Group* v. Romania, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, para. 83 (**Ex. RLA-119**); *ADC Affiliate et. al. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 332-62 (**Ex. CLA-54**); *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 110 (**Ex. CLA-98**); *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA227, Final Award, 18 July 2014, para. 413-45 (**Ex. CLA-16**); *Hulley Enterprises Limited v. The Russian Federation*, PCA Case No. AA 226, Final Award, 18 July 2014, para. 413-45 (**Ex. CLA-17**); *Veteran Petroleum Limited v. The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014, para. 513-45 (**Ex. CLA-18**).

investor under [the ECT, the Cyprus-Czech Republic BIT and the Netherlands-Czech Republic BIT].”[447]

234. Second, in response to the Respondent's argument that the contribution to an investment must come from outside the host State,[448] the Claimants assert that "whether an investment is made with or without an active contribution of funds from outside the host State is irrelevant to determine the existence of protected investments."[449] Supported by case law, the Claimants argue that "there is no justification for importing into the definitions of 'investment' any additional requirements not found in the text of the ECT, Cyprus BIT and Netherlands BIT."[450] In the Claimants' view, "nationality is meaningful for the definition of an 'investor'," but identifying "the nationality of an 'investment' for jurisdictional purposes is misplaced, and certainly devoid of any textual foundation in the ECT, Cyprus BIT and Netherlands BIT."[451]

235. Third, the Claimants dispute the Respondent's argument that "the Claimants engaged in abusive 'forum shopping,' as totally inapposite because the Claimants invested when the dispute with the

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447 Claimants' Reply, para. 691; Hearing Transcript, Day 5, p. 50:15-24.

448 *See* para. 226 above.

449 Claimants' Rejoinder, para. 210. *See* Claimants' Rejoinder, paras. 224-25, citing *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 106 (**Ex. CLA-160**); *ADC Affiliate et. al. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 357 (**Ex. CLA-54**); *CME Czech Republic v. Czech Republic*, SCC, Arbitration Institute of the Stockholm Chamber of Commerce, Partial Award,13 September 2001, para. 418 (**Ex. CLA-43**); *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, para. 355 (**Ex. CLA-161**); *Rompetrol Group v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, para. 110 (**Ex. RLA-119**); *Yukos Universal Limited v. The Russian* Federation, PCA Case No. AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 432 (**Ex. CLA-24**); *Hulley Enterprises Limited v. The Russian Federation*, PCA Case No. AA226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 431 (**Ex. CLA-25**); *Veteran Petroleum Limited V. The Russian Federation*, PCA Case No. AA228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 488 (**Ex. CLA-26**); *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, para. 66 and fn. 4 (**Ex. CLA-162**). *See also* Hearing Transcript, Day 5, p. 50:15-24.

450 Claimants' Rejoinder, para. 215-22, *citing Yukos Universal Limited v. The Russian* Federation, PCA Case No. AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 432 (**Ex. CLA-24**); *Stati et al. v. Republic of Kazakhstan*, SCC, Arbitration Institute of the Stockholm Chamber of Commerce, Award, 19 December 2013, para. 806 (**Ex. CLA-33**); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 128 (**Ex. CLA-156**); *Electrabel v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras. 5.44-45 (**Ex. CLA-4**); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, para. 204 (**Ex. CLA-157**); *Guaracachi America, Inc. and Rerelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, para. 364 (**Ex. CLA-158**).

451 Claimants' Rejoinder, para. 222.

Czech Republic was not foreseeable at all."[452] According to the Claimants, there is a distinction between legitimate "treaty shopping" and abusive "forum shopping," depending on whether or not a dispute has already arisen.[453] "Forum shopping" occurs after a dispute has arisen or is already foreseeable, whereas "treaty shopping" occurs before the outbreak of a dispute and involves nationality planning to attract investment protection.[454] In support of their assertion that Natland Group's and Natland Investment's Czech beneficial owners engaged in "perfectly legitimate 'treaty shopping',"[455] the Claimants note that Natland Group and Natland Investment were established respectively in October and December 2009, "about *one year* before the Solar Levy was announced and when the Czech Government had publicly announced that it would abolish the 5% Break-Out Rule effective as of January 2011."[456] In *Philip Morris v. Australia*, the tribunal held that a specific dispute is foreseeable when there is a "reasonable prospect" that a measure that may give rise to a treaty claim will materialize[457] – in this case, the "repeal of the 5% Break-Out Rule is a measure not even remotely comparable to the Solar Levy and other retroactive measures triggering this arbitration."[458]

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452 Claimants' Rejoinder, para. 211.

453 Claimants' Reply, para. 696; Claimants' Rejoinder, para. 234, *citing Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, paras. 184-85 (**Ex. RLA-199**); *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 330 (**Ex. RLA-197**); *Investissements S.A. & Rhone Investissements S.A. c. La República de Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction, 15 December 2014, para. 293 (**Ex. CLA-99**); Z. Douglas, *The international law of investment claims*, Cambridge, (2009), p. 290 (**Ex. CLA-100**), "Rule 51", p. 460 *in* "Rule 51"; C. Schreuer, Nationality Planning in Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation*, The Fordham Papers 2012, Martinus Nijhoff Publishers, (2013), p. 26 (**Ex. CLA-101**); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 94-95 (**Ex. RLA-146**); *Mobil Corporation et. al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision of Jurisdiction, 10 June 2010, para. 204-05 (**Ex. RLA-118**); *Pac Rim Cayman LLC v. The Republic of Salvador*, ICSID Case No. ARB/09/2012, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.99 (**Ex. RLA-198**); *Tidewater et. al. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, para. 184 (**Ex. RLA-147**).

454 Claimants' Reply, para. 694.

455 Claimants' Reply, para. 698.

456 Claimants' Rejoinder, para. 237 (emphasis in original).

457 Claimants' Rejoinder, para. 236, *citing Philip Morris v. Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 539, 554 and 585 (**Ex. RLA-280**) (hereinafter "**Philip Morris v. Australia**").

458 Claimants' Rejoinder, para. 237.

236. Accordingly, the Claimants conclude that Natland Group and Natland Investment "are protected 'investors' despite the Czech nationality of their beneficial owners."[459]

VI. THE TRIBUNAL'S ANALYSIS ON JURISDICTION

A. THE CLAIMANTS' STANDING TO ASSERT THEIR CLAIMS

237. As summarized above, the Respondent argues that three of the Claimants, GIHG, Natland Investment and Natland Group, lost their standing to assert claims in respect of their shareholding in Energy 21 on 4 August 2011, when they sold their shares to a subsidiary of Radiance, without reserving their "arbitration rights." The Respondent notes that, according to the sales agreement, the transaction involved GIHG's entire shareholding in Energy 21, "together with all rights attaching to the . . . Shares." At the time of the transaction, GIHG had already served the Notice of Dispute to the Respondent and was thus "fully aware that one of the 'rights' associated with its interest in Energy 21 was the right to assert claims in connection with such interest."[460]

238. According to the Respondent, the same applies to two other Claimants, Natland Investment and Natland Group, which similarly sold their shareholding in Energy 21 to Radiance in 2011. The Respondent further argues that Natland Group in any event cannot assert any 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.

239. According to the Claimants, the Respondent's argument is flawed. First, the reference to "all the rights" attaching to the shares in the 2011 transaction is obviously a reference to the "corporate rights" of GIHG, Natland Investment and Natland Group under Czech law, associated with Energy 21's shareholding. The Claimants further note that the claims relating to the 2011 Measures are being claimed by GIHG, Natland Investment and Natland Group, not Radiance, and that such arbitration rights "cannot freely circulate."[461] As to the alleged risk of double recovery between the claims of Natland Group and Natland Investment, the Claimants

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459 Claimants' Rejoinder, para. 208; Hearing Transcript, Day 5, p. 51:1-12. *See also* Claimants' Closing Statements, slide 63, *citing Charanne B.V. Construction Investments S.A.R.L. v. The Kingdom of Spain,* SCC Case No. 062/2012, Arbitration Institute of the Stockholm Chamber of Commerce, Final Award, 21 January 2016, para. 415 (**Ex. CLA-66**); *Saluka*, Partial Award, para. 241 (**Ex. CLA-52**).

460 Respondent's Rejoinder, para. 351.

461 Claimants' Rejoinder on Jurisdiction, para. 23.

argue that there is no such risk in the present case, "given that Natland Group and Natland Investment *collectively* seek damages in relation to the same 20.08% interest in E21."[462]

240. The Tribunal notes that the 2011 transaction indeed does not contain any reservations as to "arbitration rights" or, more precisely, the right to pursue the claims at issue in this arbitration. However, in the Tribunal's view, it does not follow from this that the three Claimants must be considered to have transferred or assigned their claims to Radiance. First, had the parties intended to transfer the claims of GIHG, Natland Investment and Natland Group to Radiance in connection with the 2011 transaction, one would have expected that this would have been done expressly, and that the value of the claim would have been reflected in the transaction. There is no evidence of this anywhere in the 2011 transaction. Second, as the Claimants point out, Radiance is not in fact asserting these claims in this arbitration which indicates that the parties to the 2011 transaction indeed did not intend to transfer or assign the claims of GIHG, Natland Investment and Natland Group to Radiance. In the circumstances, there is no risk of double recovery, and the Respondent will also not suffer any prejudice if GIHG, Natland Investment and Natland Group (instead of Radiance) are allowed to pursue their claims.

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.

B. THE TRIBUNAL'S JURISDICTION UNDER THE ECT

242. The Parties disagree as to whether the Tribunal has jurisdiction over the Claimants' claims insofar as they arise under the ECT. The Respondent argues that all three measures of which the Claimants complain – the Solar Levy, the repeal of the Income Tax Holiday and the amendments to the Original Depreciation Provisions – constitute "Taxation Measures" within the meaning of Article 21 of the ECT and therefore fall outside the scope of the dispute resolution provision in Article 26 of the ECT. Article 21(1) ("Taxation"), which falls under Part IV of the ECT, provides:

[462] Claimant's Rejoinder on Jurisdiction, para. 25 (emphasis in original).

> (1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.[463]

243. The general rule under Article 21(1) therefore is that "except otherwise provided" nothing in the Treaty "shall create rights or impose obligations" with respect to Taxation Measures of the Contracting Parties. However, unlike some other capitalized terms used in the Treaty, Article 1 ("Definitions") of the ECT does not contain a comprehensive definition of "Taxation Measures." Instead, the balance of Article 21 contains a series of relatively complex paragraphs that specify that certain ECT obligations apply to certain types of Taxation Measures, at least in certain circumstances, while others, such as Article 21(5)(a), specify that the expropriation provision of the ECT shall apply to "taxes."

244. The Parties have focused their submissions on Article 21(7) of the ECT, in particular Article 21(7)(a)(i). Article 21(7) provides, in its entirety:

> (7) For the purposes of this Article:
>
> (a) The term "Taxation Measure" includes:
>
> (i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and
>
> (ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.
>
> (b) There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
>
> (c) A "Competent Tax Authority" means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorised representatives.
>
> (d) For the avoidance of doubt, the terms "tax provisions" and "taxes" do not include customs duties.

245. As summarized above in Section V.B, the Respondent argues that the Tribunal's jurisdiction under Article 26(1) of the ECT is limited to claims for "breach of an obligation" under Part III of the ECT.[464] According to the Respondent, all of the Measures that the Claimants challenge are

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463 ECT, art. 21 (**Ex. RLA-4**).

464 Statement of Defense, para. 489; Respondent's Rejoinder, para. 365(a)-(b).

"Taxation Measure[s]" within the meaning of Article 21(7) of the ECT; accordingly, they cannot constitute a "breach of an obligation" under Article 26(1).[465]

246. The Claimants do not dispute that the repeal of the Income Tax Holiday and the Original Depreciation Provisions indeed constitute "Taxation Measures" within the meaning of Article 21(7) of the ECT.[466] The Respondent reiterated this point at the Hearing, and the Claimants did not comment on it.[467] The Tribunal agrees. It cannot be seriously disputed that the repeal of both the Income Tax Depreciation and the Original Depreciation Provisions fall under the rubric of "Taxation Measures" in Article 21(7) of the ECT. The Tribunal therefore unhesitatingly accepts that it has no jurisdiction to consider the Claimants' claims to the extent that they arise out of these two measures.

247. However, the Claimants argue that the Solar Levy cannot be properly characterized as a "Taxation Measure" within the meaning of Article 21(7) of the ECT. According to the Claimants, the relevant test in determining whether a particular regulatory measure qualifies as a "Taxation Measure" under Article 21(7) of the ECT is "whether it is a *'bona fide* taxation actions (sic), *i.e.*, actions that are motivated by the purpose of raising general revenue for the State,'"[468] and that this approach has been confirmed in the Yukos Cases.[469] The Claimants assert that the Solar Levy does not satisfy this test *inter alia* for lack of *bona fides*, regardless of how the measure might be characterized under Czech law.[470] In any event, according to the Claimants, the Solar Levy does not qualify as a tax either under Czech law or under the autonomous standard applied by investment treaty tribunals operating under investment treaties other than the ECT, including in cases such as *EnCana, Duke* and *Burlington.*[471]

248. The Tribunal agrees with the Parties that Article 21 of the ECT, including the provisions on "Taxation Measures" in Article 21(7), must be interpreted in accordance with the rules of treaty interpretation as set out in the VCLT. The relevant rule in this context is the general rule of treaty interpretation in Article 31, which provides that "[a] treaty shall be interpreted in good faith in

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[465] Statement of Defense, para. 490; Respondent's Rejoinder, para. 365.

[466] Claimants' Reply, fn. 700.

[467] Transcript, Day 1, pp. 242-43.

[468] Statement of Claim, para. 340 and fn. 192.

[469] Statement of Claim, paras. 332–39.

[470] Statement of Claim, para. 341.

[471] Claimants' Reply, paras. 634-37.

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

249. The Tribunal notes that Article 21(7)(a)(i) of the ECT does not contain a self-standing definition of "Taxation Measures" but instead refers to domestic law of a Contracting Party ("any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein") and to the applicable international conventions ("any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound"). The Parties' argument on Article 21 has focused on the domestic law of the Czech Republic, and neither Party has argued that the Solar Levy qualifies as a "Taxation Measure" according to "any provision[s] relating to taxes" under any applicable international convention or other international agreement or arrangement.

250. As noted above, under Article 21(7) of the ECT, "Taxation Measures" include "any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein." The Parties disagree on how this provision should be interpreted under the VCLT, the Claimants contending that the provision does not mean that the interpretation of the tax carve-out is merely "an exercise in Czech law."[472] According to the Claimants, the reference to domestic law must be interpreted in accordance with the general rule of treaty interpretation in Article 31(1) of the VCLT and is therefore a matter of international law. The Respondent argues, in turn, that a "plain-text interpretation" of Article 21(7) and Article 26 of the ECT confirms that the Solar Levy qualifies under the ECT tax carve-out. According to the Respondent, the language of Article 21(7) is broad and implies that any "fiscal measure" designed to bring money to the general treasury falls under the provision. The Parties also disagree on whether the Solar Levy qualifies as a tax under Czech law.

251. In the Tribunal's view, the reference in Article 21(7) to "the domestic law of the Contracting Party" requires the Tribunal to consider, as a preliminary matter, the provisions of the relevant domestic law, in order to determine whether the Solar Levy "relat[es] to taxes" under the domestic law of the Contracting Party in question; however, the Tribunal agrees with the Parties that this determination is ultimately subject to the language of Article 21(7) of the ECT and therefore is not a determination to be made exclusively under domestic law. The Tribunal therefore must

[472] Claimants' Reply, paras. 550, 558.

consider both Czech law and the terms of the ECT, in accordance with the general rule of treaty interpretation.

252. The Parties have produced extensive evidence, including expert opinions, on the issue of whether the Solar Levy qualifies as a tax under Czech law. The expert evidence discusses the indicia for identifying a "tax" under Czech economic tax theory (since there is no general definition of tax in Czech law), as well as commentary on the meaning of various decisions of the Czech courts that have considered the constitutionality and legality of the Solar Levy under Czech law. The Tribunal has therefore paid careful attention to these pronouncements of the courts, including in particular the decisions of the Supreme Administrative Court. However, in reviewing the courts' decisions, the Tribunal has formed the view that while many of these decisions addressed the Solar Levy and have found it to be a lawful exercise of governmental power, they approached it primarily as an issue of whether the Solar Levy qualified formally as a tax, in particular for the purposes of the Tax Administration Law (or the Tax Procedure Code),[473] and did not deal specifically with the issue of whether the Solar Levy could be characterized, in substance, as a tax. That is, the analysis in most cases was aimed at whether the Solar Levy was governed by the Tax Administration Law such that it could be lawfully levied and collected from the entities to which it applied. The Tribunal notes in this regard that the Tax Administration Law permits the various charges and fees that would not ordinarily be considered to be taxation measures to be collected under the Law. Section 2(3(b) of the Tax Administration Law provides that that "[f]or purposes this Act, tax means . . . pecuniary levy, if the law stipulates that its administration complies with this Act."[474] Thus the fact that a number of Czech courts have found that the Tax Administration Law supported the operation of the Solar Levy is not dispositive of the issue of whether it qualifies as a tax as this term is understood under Czech law.

253. The foregoing applies in particular to the decision of the Grand Chamber of the Supreme Administrative Court of 17 December 2013, to which the Respondent has attached considerable significance in support of its position that the Solar Levy qualifies indeed as a tax under Czech Law. The Tribunal has carefully considered this judgment and the Respondent's submission as to the weight to be attached to a decision of the Grand Chamber of the Supreme Administrative Court as opposed to a decision of a particular division of the Court. In the Tribunal's view, while the Grand Chamber found, referring to what it "ha[d] already stated above" in the same decision, that "the solar power levy is actually a tax," it is evident from the context that the Grand Chamber

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[473] Both translations have been used in the course of the arbitration.

[474] **CER-[redacted] 1**, para. 39 and Annex 1.

was referring to its earlier finding that the Solar Levy qualified as a tax "pursuant to Section 2(3)(b) of the [Tax Administration Law]."[475] In other words, the Grand Chamber's characterization of the Solar Levy as "actually" a tax was based merely on the observation that the Solar Levy was administered in accordance with the Tax Administration Law, and the Grand Chamber made no finding as to its substantive qualification under Czech law.

254. The Tribunal considers that the context in which the Solar Levy was introduced must be examined when determining the substantive nature of the measure under Czech law. While the evidence is that new tax laws or changes to existing tax laws are typically introduced into the Czech Parliament by the Minister of Finance, in the case of the Solar Levy, it was the Minister of Industry and Trade who introduced the Solar Levy. Moreover, the statutory means by which the Solar Levy was effected was by an amendment to the Act on RES Promotion as opposed to an amendment to existing taxation laws (in contrast to the two other measures which the Tribunal has already held fall squarely under the Article 21 taxation exclusion).[476] The Tribunal notes further that the statements of the Minister of Industry and Trade at the time both to the Economic Committee of the Chamber of Deputies and in correspondence with European Commissioner Günther H. Oettinger forthrightly acknowledged that the intent of the measure was to reduce the level of subsidy enjoyed by a group of operators who recently invested in the PV sector so as to make it "bearable" for the State and for its electricity consumers.[477]

255. In light of this context, and returning to the decisions of the Czech courts, the Tribunal considers that the most relevant evidence as to the nature of the Solar Levy as a matter of Czech law is the decision of the Czech Supreme Administrative Court of 10 July 2014, which addressed specifically the issue of whether, in combination with the corporate income tax, the Solar Levy amounted to improper double taxation. This decision clearly confirms the position that, even if the Solar Levy was introduced in the form of a measure to raise revenue to the general budget of the State (*i.e.*, in the form of a "levy"), it is, in substance, not a tax but a measure designed to reduce the level of government support to solar levy producers. The relevant part of the Court's reasoning is as follows:

> The Supreme Administrative Court notes with regard to the petitioner's argumentation regarding the nature of the levy as a tax that the nature of any tax in the taxation system involves the government requiring funds from tax payers without immediate compensation. It can thus be stated that a common essential feature of all taxes is their non-equivalence. The

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475 **CER-[redacted] 1**, Annex 12, paras. 23-25.

476 **CER-[redacted] 1**, paras. 47-52.

477 The statements are cited in **CER-[redacted]-1**, paras.58-60.

> subject of the levy collected under the Renewable Energy Sources Act is the amount resulting from the consideration of stipulating the amount of government support for this type of economic activity. Unlike collecting income tax on income resulting from the activities of the entity subject to the tax without any performance from the state at the time of taxation, the state uses the levy to lower the support it calculated and provided. The levy was therefore correctly not included under Section 36 of the Income Taxes Act among the income subject to the withholding tax and that is not included in the tax base, for the reasons consisting of the differing natures of a levy and a tax. Despite the fact that the levy uses the same collection mechanism as the withholding taxes on certain types of income, the levy does not have the nature of a tax . . . The levy under Section 7a – 7i of the Renewable Energy Sources Act is in nature a decrease in government subsidy and not a tax, where the basic criterion is non-equivalence.[478]

256. The Tribunal considers this decision, read in conjunction with decisions of the Constitutional Court and other decisions of the Supreme Administrative Court, to be the authoritative position regarding the nature of the Solar Levy under Czech law and it accords with the factual context in which the measure was adopted.[479] While the Solar Levy was subject to the Tax Administration Law and was collected in accordance with the provisions of the Law, this is not a sufficient basis to conclude that the Solar Levy qualifies as a tax under Czech law; the Tribunal has already noted that other payments, including payments for public services such as court fees, are collected in accordance with the procedures set out in the Tax Administration Law, but they are obviously not taxes. In other words, while the Solar Levy is collected in accordance with the same procedural provisions that apply to taxes (and fees), this is not conclusive as the issue before the Tribunal is not whether the Solar Levy is collected and administered in accordance with procedures that apply to taxes (as it indeed is), but whether it is, in substance, a tax.

257. In the Tribunal's view, this is not the case. The Solar Levy operates, as a matter of fact, specifically to reduce the subsidy (the feed-in tariff) payable by the State, that is, to *reduce*

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

479 *See, e.g.*, May 2012 Constitutional Court Judgment, para. 45 (**Ex. CLA-22**) ("The Constitutional Court states that although § 6 of Act no. 180/2005 Coll., setting the level of prices for electricity from renewable sources and green bonuses, is not affected by amendment of Act no. 420/2010 Coll., it is unquestionable that, as a result of inserting the new § 7a and following provisions, which introduce the levy on solar electricity, in essence there was a change in the level of support that is provided to operators of photovoltaic power plants.") and of 13 January 2015, paras. 25, 33 (**Ex. CLA-23**) ("The amendment to the Act on Promotion of Use of Renewable Sources adopted as Act No. 402/2010 Coll. (hereinafter "**Act No. 402/2010 Coll.**") stipulated an obligation to pay a levy on solar electricity with effect from 1 January 2011; pursuant to the then valid provision of Section 7a of the Act on Promotion of Use of Renewable Sources, electricity produced from solar radiation in the period from 1 January 2011 to 31 December 2013 in a facility put into operation in the period from 1 January 2009 to 31 December 2010 was subject to the levy. The reason for the adoption of the above amendment was the fast development of production of electricity from renewable sources that resulted in growing costs of financing such production; as a result, the state administration was forced to reassess its approach to public support of production of electricity from renewable sources. The obligation of solar levy thus effectively changed the amount of support provided to operators of photovoltaic power plants.")

revenue outflow as opposed to raising revenue for the State.[480] This is reflected in the fact that the Solar Levy is only payable by businesses that benefit from the feed-in tariff, is directly withheld from the feed-in tariff, and is quantified as a percentage of it.

258. The evidence surrounding the introduction of the measure also supports the conclusion that its purpose was to reduce the subsidy paid by the State. The fact that the Solar Levy was credited to the general state budget account of the Ministry of Finance cannot, and does not, change this conclusion as it does not affect the way in which the measure operates. Indeed, if the analysis focused exclusively on the form of the measure, without any consideration of its substance, the door could be opened for the Contracting Parties abusively to avoid their obligations under Part III of the ECT, and consequently also their undertaking in Article 26 of the ECT to arbitrate any disputes arising under Part III, by simply labelling any governmental measures having a financial component as "taxation measures." There is nothing in Article 21 or Part V of the ECT that would suggest that an ECT tribunal's jurisdiction does not extend to the determination of whether a particular putative taxation measure qualifies, as a matter of fact, as a "Taxation Measure" within the meaning of Article 21 of the ECT. Consequently, while the legal form is no doubt the starting point of the analysis, and while it is not unusual for States to employ narrowly targeted taxation measures (as indeed the other two measures that the Tribunal has accepted as clearly falling within the Article 21 exclusion show), when making such a determination, an ECT tribunal therefore cannot rely exclusively on form; it must make a substantive determination in light of the relevant facts.

259. This is not to suggest, and the Tribunal does not find, that the Czech Republic was acting in any way in bad faith when searching for ways to reduce the level of subsidy in a manner that it hoped would be consistent with its legal obligations, including its investment protection obligations (an issue which had been raised by solar energy investors and of which the Government was aware). The Tribunal merely finds that these attempts, including making the Solar Levy subject to the procedures set out in the Tax Administration Law, cannot change the fact the Solar Levy is, in substance, a measure that was designed to, and did operate so as to, reduce the support payable to solar energy producers, whatever the procedure applied to its collection and administration and whatever the purpose for which the collected funds were ultimately used.

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480 As also noted by the Supreme Administrative Court in its decision of 17 December 2013 (noting that "introducing the solar power levy *de facto* results in decreasing the level of government support") (**CER-█████ 1**, Annex 12, para. 28).

C. THE TRIBUNAL'S JURISDICTION OVER NATLAND INVESTMENT UNDER THE NETHERLANDS-CZECH REPUBLIC BIT AS TO THE EXISTENCE OF "INVESTMENT"

260. The Parties also disagree on whether the Tribunal has jurisdiction over the claims of Natland Investment under the Netherlands-Czech Republic BIT. The Respondent argues that Natland Investment has failed to make an "investment" within the meaning of Article 1(a) of the Netherlands-Czech Republic BIT, which defines "investments" as "every kind of asset invested either directly or through an investor of a third State." According to the Respondent, the BIT therefore does not cover Natland Investment's investment since it was not made "directly" but through a Czech subsidiary, Energy 21. In support of its position, the Respondent relies, in particular, on the Explanatory Note accompanying the ministerial request for approval of the BIT and the *HICEE v. Slovak Republic* decision. The Claimants challenge the Respondent's reading of Article 1(a) of the BIT and contends that "investing directly" simply means investing without the involvement of a third State. The Claimants also argue that the Explanatory Note has "doubtful reliability" and disputes the relevance of *HICEE v. Slovak Republic*.

261. The Tribunal notes that the language of Article 1(a) of the Netherlands-Czech Republic BIT (which defines "investments" as "every kind of asset invested either directly or through an investor of a third State") is somewhat ambiguous in that the definition can be read as a distinction between direct and indirect investment (a) based on whether the investment is made "directly" by an investor of a contracting State or "indirectly" through an entity incorporated in a third State; and/or (b) based on whether the investment is made "directly" by an investor of a contracting State in the host State or "indirectly" through a local subsidiary. In other words, the distinction may be read to apply to either or both of the two different ways of investing in the host State (directly or indirectly through a third country subsidiary; and/or directly or indirectly through a local subsidiary). Consequently, if the purpose of the definition is to make the former distinction, then investments made indirectly by a local subsidiary fall within the definition (as the purpose of the provision is merely to ensure that investments made through a third country are *also* covered by the Treaty, and not only investments made by an investor of a contracting State, whether directly or indirectly). If its purpose is to make the latter distinction, then investments made indirectly by a local subsidiary fall outside the definition (as the purpose of the provision is merely to confirm that investments made through a third country subsidiary qualify as direct investments insofar as they are made in a local subsidiary, but not beyond, *i.e.*, investments made by a local subsidiary in a local sub-subsidiary are not covered). The former position is that of the Claimants; the latter is that of the Respondent.

262. The Tribunal notes that the Claimants' reading seems on its face more persuasive in that, in view of the plain language of Article 1(a), the purpose of the provision indeed appears to be to distinguish between a "direct" investment made by an investor of a contracting State and an "indirect" investment made by an investor of a contracting State through a third State. In other words, the purpose of the provision is to make it clear that "indirect" investments made through a third country are covered even if they do not directly emanate from a contracting State. Therefore, according to this reading, all investments made by an investor of a contracting State in the host State are covered by the Treaty, whether made directly by way of a local subsidiary or indirectly through a local sub-subsidiary.

263. However, the Respondent argues that its reading should be preferred because it is supported by the Explanatory Note and therefore better reflects the intentions of the contracting States. The Explanatory Note states in relevant part:

> Article 1 provides a definition of the various terms used in the Agreement. The Agreement covers direct investments and investments made through an enterprise in a third country. Normally, an investment protection agreement also covers an investment in the host country that is made by a subsidiary of a Dutch enterprise already established in that country ('subsidiary' – 'sub-subsidiary' construction). Czechoslovakia would like to exclude 'sub-subsidiaries' from the effect of the Agreement, since in fact this is an enterprise set up by a Czechoslovakian legal entity and since it was specifically not intended to grant transfer rights to such an enterprise. It is possible to overcome this restriction by setting up a new enterprise directly from the Netherlands. Since the restriction therefore does not have great practical import, the Netherlands delegation agreed to it. The desire of the Czechoslovakian side to use the term 'investor' instead of 'national' was honored by the Netherlands.[481]

264. The Explanatory Note is somewhat cryptic in that the distinction it seeks to make is not clearly reflected in the language of the Treaty. It also appears to confuse the definitions of "investment" and "investor;" the wish of the Czechoslovakian (as it then was) side to exclude "sub-subsidiaries" outside the Treaty would be understandable if the intention was to exclude the possibility that an enterprise incorporated in the Czech Republic (but controlled by Dutch interests) could bring an international claim against the Czech Republic. It is less clear why "sub-subsidiaries" should be excluded as a form of qualifying investment as the Treaty does not allow the controlling entities of such sub-subsidiaries (*i.e.*, entities incorporated in the host State) to bring claims, and as such investments are not "indirect" investments in the sense that they are not made through a third State. The Tribunal notes that the *HICEE* tribunal considered the background and the relevance of the Explanatory Note to the interpretation of Article 1(a) at length and found that the Note qualified as a "supplementary means" for treaty interpretation within the meaning of Article 32

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[481] Dutch Explanatory Note on the Netherlands-Czech Republic BIT, 31 March 1992, p. 3 (**Ex. R-174**) (emphasis in original).

of the Vienna Convention.[482] In the circumstances, the *HICEE* tribunal found that it could not disregard the Note and concluded that the Treaty did not protect investments made by a locally incorporated entity in other local corporate entities.[483]

265. The Tribunal has considered the issue, in light of the argument made by the Parties in this arbitration, and finds that, on balance, there is no basis to deviate from the findings of the *HICEE* tribunal.

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 a made a claim that relates to a protected investment (*i.e.*, Energy 21) to the merits, specifically quantum. (See also above in Section VI.A the Tribunal's determination as to whether Natland Group and Natland Investment may claim "collectively" for the same loss, which the Tribunal also referred to the merits.)

D. THE TRIBUNAL'S JURISDICTION TO HEAR THE "NON-IMPAIRMENT" CLAIMS UNDER THE CYPRUS-CZECH REPUBLIC BIT

267. The Parties disagree on whether the two Claimants incorporated in Cyprus, Natland Group, and GIHG, are entitled to benefit from the Non-Impairment clause in the Netherlands-Czech Republic

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482 *HICEE B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 May 2011, para. 135 (**Ex. RL-6**).

483 *HICEE B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 May 2011, paras. 146-47, 152(a) (**Ex. RL-6**).

BIT by virtue of the MFN clause contained in Article 3 of the Cyprus-Czech Republic BIT. Article 3 reads in relevant part:

> Article 3
>
> National and Most-Favoured-Nation Treatment
>
> 1. Once a Contracting Party has admitted an investment in its territory in accordance with its laws and regulations, it shall accord to investments and returns of investors of the other Contracting Party, treatment which is fair and equitable and not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favourable.
>
> 2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investment, treatment which is fair and equitable and not less favourable than that which it accords to its own investors or investors of any third State, whichever is more favourable.
>
> [. . .]
>
> 4. The treatment referred to in paragraphs 1 and 2 of this Article will be granted on the basis of reciprocity.

268. The disagreement between the Parties boils down to the issue of interpretation of the reciprocity clause in Article 3(4) of the Cyprus-Czech Republic BIT, which provides that the treatment referred to in Article 3(1) and (2) "will be granted on the basis of reciprocity."[484] According to the Respondent, the Claimants have not proven that the reciprocity condition has been met, whereas the Claimants argue that the *travaux préparatoires* show that the reciprocity condition was inserted in the BIT at Cyprus' request and was meant to apply only to the national treatment standard. In any event, according to the Claimants, the reciprocity requirement is met.

269. The Tribunal is unable to agree with the Respondent's position that the reciprocity requirement means that "the granting party is not required to provide MFN treatment to investors of the other Contracting Party unless and until that other Contracting Party accords equivalent treatment to investors of the granting party."[485] This reading would effectively suspend the Contracting States' obligation to provide MFN *ab initio* – neither Contracting State would be required to provide MFN to the investors of the other Contracting State unless and until the other Contracting State has provided such treatment. A more reasonable and practical reading of the clause is that, if a Contracting State has agreed to provide more favorable treatment to investors of a third State (and therefore, by virtue of the MFN clause in the BIT, must also provide similar treatment to the investor of the other Contracting State), the latter Contracting State must provide similar treatment to the investors of the former State. In other words, for example, if the Czech Republic concludes

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484 Statement of Defense, para. 668; Hearing Transcript, Day 5, p. 121:6-14.

485 Respondent's Rejoinder, para. 462.

a bilateral investment treaty with a third State in which it agrees to provide more favorable treatment to investors of such third State than it has agreed to provide to Cypriot investors under the Cyprus-Czech Republic BIT, the MFN clause in Article 3(1) and (2) of the Cyprus-Czech Republic BIT requires it to provide equally favorable treatment to Cypriot investors, whereas Article 3(4) of the Cyprus-Czech Republic BIT requires Cyprus to provide similarly favorable treatment to Czech investors. The same reasoning obviously applies to a more favorable investment treaty concluded by Cyprus with a third State.

270. At the same time, since Article 3(4) provides for MFN and national treatment on the basis of reciprocity, investors of third States cannot claim, even if the applicable investment treaty contains an MFN clause (but no national treatment clause), that they are entitled to national treatment in Cyprus or the Czech Republic, as the case may be, by virtue of the MFN clause as the national treatment obligation in the Cyprus-Czech Republic BIT is only granted on the basis of reciprocity. This reading is supported by the *travaux préparatoires* (the Cypriot delegation's note) which state, in relevant part:

> Cyprus has in the past signed some Agreements with the Most Favoured Nation Treatment (MFN) clause only. Now if Cyprus signs an Agreement with the National Treatment (NT) clause with the Czech Republic (without the clause of reciprocity) but at the same time it also has MFN Agreements still in force, there could be the case where a foreign investor investing in Cyprus from country XXX (with which Cyprus has a MFN Investment Agreement), will demand and secure NT in Cyprus on the basis of the MFN clause contained in the XXX-Cyprus Agreement while the Cypriot investor investing in XXX may not enjoy NT treatment because XXX country does not offer NT treatment to any country.[486]

271. The purpose of the reciprocity is therefore to ensure, on the one hand, that MFN treatment is reciprocal (and not only provided by the contracting State that has entered into a more favorable arrangement with a third State) and, on the other hand, that investors of third parties cannot claim (through an MFN clause contained in the applicable treaty) more favorable treatment or national treatment putatively granted under the Cyprus-Czech Republic BIT because the Cyprus-Czech Republic BIT specifically limits such treatment to the relationship *inter partes* (by way of the reciprocity requirement). (The Tribunal takes no view on whether such a limitation would be effective in any proceedings between a third country investor and either of the two contracting States; this issue falls outside its jurisdiction).

272. The Tribunal is also unable to accept the Claimants' argument that Article 3(4) of the Cyprus-Czech Republic BIT only applies to the national treatment standard, but not to MFN treatment.

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[486] The Cypriot delegation's note, dated 20 September 2000 (**Ex. C-439**), enclosing a document containing the comments/views of the Cypriot side on the changes proposed by the Czech side to the draft text of the Cyprus-Czech Republic BIT, p. 1.

While the Cypriot side used the national treatment standard as an example in its note, the same reasoning applies to the MFN standard, as noted above. Consequently, Article 3(4) of the Cyprus-Czech Republic BIT allows Cypriot investors to claim MFN treatment in the Czech Republic in circumstances where the Czech Republic has concluded an investment treaty with a third State which provides for more favorable treatment for investors than the Cyprus-Czech Republic BIT. The reciprocity requirement in Article 3(4) of the Cyprus-Czech Republic BIT does not affect the Czech Republic's obligation to provide MFN; it simply means that, in such circumstances, Cyprus is *also* required to provide Czech investors similarly favorable treatment under the MFN clause of the Cyprus-Czech Republic BIT, even if Cyprus may not have entered into an investment treaty with a third State requiring such treatment.

273. The Tribunal notes that the Respondent does not raise any other objections to the Claimants' argument and therefore concludes that it has jurisdiction to determine the Claimants' non-impairment claim by virtue of the MFN clause in the Cyprus-Czech Republic BIT.

E. The Tribunal's Jurisdiction over GIHG and Natland Group as "Investors" Under the Cyprus-Czech Republic BIT

274. The Parties disagree on whether GIHG and Natland Group, which have brought their claims under the Cyprus-Czech Republic BIT, qualify as protected investors under Article 1(2)(b) of the BIT. According to Article 1(2)(b),

> [t]he term 'legal person' shall mean, with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as legal person by its laws, having the permanent seat in the territory of that Contracting Party.

275. The Respondent submits that, under this provision, the term "permanent seat" is governed by international law and not domestic law and that, when interpreted in accordance with international law, the provision requires that the two Claimants have their place of actual or effective management in Cyprus. According to the Respondent, both GIHG and Natland Group fail to meet this requirement. Under Cypriot law, every legal entity incorporated in Cyprus must have a registered office there, and interpreting the seat requirement as being satisfied by proving the existence of a registered office, which is what the Claimants assert, would render the "permanent seat" requirement redundant as it would overlap directly with the requirement of incorporation.[487]

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[487] The Respondent also notes that when Cyprus and the Czech Republic were negotiating the BIT, the Cypriot delegation proposed using the phrase 'registered office' (rather than 'permanent seat'). However, this proposal was not incorporated into the treaty.

The Claimants have also failed to establish that GIHG and Natland Group were effectively managed from Cyprus.

276. The Claimants argue, by contrast, that the term "permanent seat" is a formal requirement equivalent to "registered office," and that it must be interpreted in accordance with Cypriot law, which does not recognize the "real seat" theory adopted in certain other countries. According to the Claimants, identifying the nationality of the Claimants' investments has no basis in the definitions of investment of the relevant treaties; the Czech nationality of Natland Group's and Natland Investment's shareholders cannot have any impact on the Claimants' standing as protected investors. The Respondent's jurisdictional objection is in fact an attempt to camouflage an objection *ratione personae* concerning the existence of protected "investors" as an objection *ratione materiae* concerning the existence of protected "investments."

277. The crux of the dispute between the Parties is whether the clause "having the permanent seat in the territory of that Contracting Party" establishes a formal or substantive requirement, that is, whether it is sufficient that GIHG and Natland Group have their registered office in Cyprus, or whether they must also establish that the place of their actual or effective management is in Cyprus. The Parties also disagree on whether this determination is to be made under international law or Cypriot law.

278. The Tribunal notes at the outset that Article 1(2)(b) is a provision embedded in an international treaty and that therefore its interpretation is ultimately a matter of international law. While this does not necessarily mean that the Tribunal should not and cannot refer to the domestic Cypriot law, the Tribunal notes that, based on its wording, the reference in Article 1(2)(b) to Cypriot law is made in the context of incorporation and legal personality and does not appear to apply to the requirement of "permanent seat" ("[t]he term 'legal person' shall mean, with respect to either Contracting Party, *any entity incorporated or constituted in accordance with, and recognized as legal person by its laws,* having the permanent seat in the territory of that Contracting Party") (emphasis added).[488] In other words, while Cypriot law is relevant in determining whether GIHG and Natland Group are validly incorporated in Cyprus and recognized as legal persons under Cypriot law, the determination of whether GIHG and Natland Group have their *permanent seat* in Cyprus is a matter of fact and not a matter of Cypriot law.

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488 Art. 1(2)(b) of the Cyprus-Czech Republic BIT (emphasis added).

279. The Respondent argues that the clause "having the permanent seat in the territory of [a] Contracting Party," when interpreted in accordance with the ordinary meaning of its terms and in their context, requires that GIHG and Natland Group demonstrate that they have their actual or effective place of management in Cyprus. The Tribunal notes that the language of the Article 1(2)(b) does not support the Respondent's argument. The provision merely requires that an investor be a legal person "having the permanent seat in the territory" of the relevant Contracting Party; it does not require that the place of actual or effective management be located in that jurisdiction. In this connection, the Tribunal notes that, while Cypriot law, which has apparently been influenced by English law, requires that every company incorporated in Cyprus maintain a registered office in Cyprus, it does not use the term "real seat" or *siège réel*.[489] The Tribunal is therefore unable to accept the Respondent's position.

280. The Claimants argue that the presence of a registered office in Cyprus is sufficient to meet the requirement of permanent seat, and both GIHG and Natland Group have produced evidence to show that they maintain a registered office in Cyprus. However, the Respondent contends that Cypriot law requires that a legal entity incorporated in Cyprus must have its registered office in the country; consequently, if the permanent seat requirement is met by the existence of a registered office, this would render the "permanent seat" requirement redundant as it would effectively overlap directly with the requirement of incorporation. The Tribunal agrees and notes that the Claimants' reading would effectively deprive the requirement of permanent seat from independent meaning and would thus be contrary to the requirement of *effet utile*.

281. The Tribunal must therefore determine whether GIHG and Natland Group have, as a matter of fact, a permanent seat in Cyprus. While the two Claimants need not show that their place of actual or effective management is in Cyprus – this could be elsewhere – they must establish that they had, as a matter of fact, a "permanent seat" in Cyprus, which must be something more than the mere existence of a registered office. In this connection, the Tribunal notes that both GIHG and Natland Group have produced a certificate issued by the Registrar of Companies showing that both companies had their registered office in Cyprus. However, as noted above, this is not sufficient to establish that the two companies also had a "permanent seat" in Cyprus, as every company incorporated in Cyprus must have a registered office in the country. The Tribunal further notes that the certificates submitted by GIHG and Natland Group merely confirm the location of the registered office of the two companies "in accordance with the records of kept by this Department," *i.e.*, the certificate merely confirms what is found in the records of the Registrar of

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[489] Cypriot Company Law, Art. 102(1) (**Ex. RLA-256**).

Companies, without any further verification. The Tribunal therefore must determine whether there is any evidence on record that would show that GIHG and Natland Group *as a matter of fact* had a permanent seat in Cyprus.

282. As to Natland Group, the Claimants have produced documentary evidence which shows that at least some of its directors' meetings were held at the company's registered office in Cyprus,[490] that the company had a Cypriot director,[491] and that it was audited by Cypriot accountants.[492] The Claimants also allege that the company held a bank account in Cyprus and paid taxes in Cyprus, however there is no evidence to support this assertion. Mr Tomáš Raška, the controlling beneficial shareholder of Natland Group further testified at the hearing that the company rented office space in Cyprus at the address of its registered office, and that it was "outsourcing" staff from a daughter company.[493]

283. As to GIHG, the certificate issued by the Registrar of Companies shows that the company had a registered address in Nicosia and a Cypriot director, but there is no further documentary evidence of the company's activities in Cyprus. Mr Igor Wollner, one of the two beneficial owners of the company testified at the hearing that the company did not own any property in Cyprus and did not have any employees in Cyprus. He also stated that he visited Cyprus once, but did not visit the GIHG office[494].

284. Based on the evidence before it, the Tribunal is satisfied that Natland Group has presented sufficient evidence to show that it had, as a matter of fact, a "permanent seat" in Cyprus. In this connection, the Tribunal notes that the case of Natland Group is clearly distinguishable from *CEAC v. Montenegro*,[495] a case involving a provision in the Cyprus-Montenegro BIT that was similar to Article 1(2)(b) of the Cyprus-Czech Republic BIT. In *CEAC,* the tribunal found that, even if the claimant had presented a certificate confirming that the company had a registered office at an address in Nicosia, it did not in fact have its seat in Cyprus because the evidence showed that the property located at the given address appeared to be unoccupied and there was no evidence of any business or other activity in that or any other address. However, in the present

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490 Natland's minutes of the meetings held on 31 October 2009, 1 July 2011 and 12 March 2012 (**Ex. C-438)**.

491 Natland Group's commercial register (**Ex. C-11**).

492 Natland Group's report and financial statement for 2012 (**Ex. C-437**).

493 Hearing Transcript, Day 2, pp. 82-83.

494 Hearing Transcript, Day 2, pp. 122:1-25, 123:1.

495 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, paras. 147-148 (**Ex. CLA-154**). *See also* Respondent's Rejoinder, paras. 478-507.

there is evidence, as summarized above, that Natland Group conducted actual business activities at its seat in Cyprus.

285. Consequently, the Tribunal finds that it has jurisdiction to deal with Natland Group's claims under the Cyprus-Czech Republic BIT.

286. However, in view of the limited evidence before it, the Tribunal is unable to accept that GIHG has met its burden of proof. Apart from the two certificates issued by the Registrar of Companies, one showing that the company had a Cypriot director and secretary and the other stating the address of the company in Nicosia, "in accordance with the records of kept by this Department," there is no evidence of any kind of corporate activity of the company in Cyprus. In the circumstances, GIHG has failed to establish that it had a "permanent seat" in Cyprus. The Tribunal concludes that it has no jurisdiction over GIHG's claims under the Cyprus-Czech Republic BIT.

F. The Tribunal's Jurisdiction over Radiance's Claims Under the Luxembourg-Czech Republic BIT

287. The Parties disagree on whether the Tribunal has jurisdiction over the claims of Radiance under the dispute resolution clause in Article 8(1) of the Luxembourg-Czech Republic BIT. Article 8(1) of the BIT provides:

> 1. Disputes between one Contracting Party and an investor of the other Contracting Party concerning compensation due pursuant to article 3 paragraphs 1 and 3, shall be the subject of a written notification, accompanied by a detailed report, addressed by the investor to the Contrary Party [sic] concerned. As far as possible, such disputes shall be settled amicably.

288. Article 3(1) and (3) of the Treaty provides in turn as follows:

> 1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party may not be expropriated or subjected to other measures of direct or indirect dispossession, whether total or partial, having a similar effect, unless the measures:
>
> (a) Are taken in accordance with a legal procedure and are not discriminatory;
>
> (b) Are accompanied by provisions for the payment of compensation, which shall be paid to investors in convertible currency without delay. Its amount shall be correspond [sic] to the real value of the investments on the day prior to their adoption or publication.
>
> . . .
>
> 3. The provisions of paragraphs 1 and 2 shall apply to investors of either Contracting Party possessing any form of interest in any company whatsoever in the territory of the other Contracting Party.

289. Article 3(1) and (3) of the Luxembourg-Czech Republic BIT thus only deal with expropriation, whereas other investment protection standards such as protection against "illicit or discriminatory measures" and free transfer of assets relating to the investments are covered by Article 2(3) and

Article 4, respectively. The dispute resolution clause in Article 8 of the BIT thus only applies, *prima facie*, to claims for expropriation.

290. The Claimants are not making an expropriation claim in this arbitration, however, they argue that they are entitled to bring an FET claim through the MFN clause in Article 2(4) of the Luxembourg-Czech Republic BIT, which provides that "[s]ubject to the measures required for the maintenance of public order, such investments shall be safeguarded and protected at all times, in the same manner as investments belonging to investors of the most favoured nation." According to the Claimants, although Article 2(4) deals with FPS rather than FET, it allows Radiance to bring an FET claim because the obligation to provide FPS and the obligation to ensure FET "substantially overlap."[496] Moreover, because FET encompasses access to arbitration, Radiance is entitled to invoke the more favorable dispute resolution provisions in the Cyprus-Czech Republic BIT and the Netherlands-Czech Republic BIT.

291. The Claimants' reading of the relevant provisions of the Luxembourg-Czech Republic BIT is far-fetched. Even assuming Article 2(4) of the Treaty dealt with FPS (which is not entirely clear, given the language of the provision), it is clear from the language of Article 8(1) that the jurisdiction *ratione voluntatis* of an arbitral tribunal constituted under the provision is limited to claims for "compensation due pursuant to article 3, paragraphs 1 and 3," that is, claims for expropriation. While it is not excluded that in certain circumstances the scope of a dispute resolution clause in an investment treaty may be extended by virtue of an MFN clause contained in the same treaty, depending on the scope of the MFN clause, this cannot be the case here. The States parties to the Luxembourg-Czech Republic BIT clearly intended to limit, and did limit, the jurisdiction of arbitral tribunals constituted under Article 8 of the Treaty to claims for compensation due to expropriation. The Tribunal cannot disregard the clear language of the BIT and finds that it has no jurisdiction over Radiance's claims, insofar as they are asserted under the Luxembourg-Czech Republic BIT.

G. The Tribunal's Jurisdiction over Natland Group and Natland Investment as Protected Investors Under the Cyprus-Czech Republic BIT, the Netherlands-Czech Republic BIT and the ECT

292. The Respondent argues that the Tribunal has no jurisdiction under the Cyprus-Czech Republic BIT, the Netherlands-Czech Republic BIT and the ECT over the claims of Natland Group and Natland Investment. According to the Respondent, both Claimants are ultimately controlled by

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[496] Claimants' Rejoinder, para. 203.

Czech nationals and therefore have not made a *foreign* investment. The Respondent also contends that Natland Group and Natland Investment have engaged in impermissible "forum shopping" as it was foreseeable at the time when the two companies restructured their investments that a dispute would arise with the Czech Republic in relation to the such investments. According to the Respondent, a prospect of a future dispute emerged from the dramatically altered market conditions in the Czech solar sector as a result of the unanticipated fall in panel costs, which compelled a response by the Czech government to address the solar power market distortion.

293. The Claimants argue, in response, that the beneficial owners of Natland Group and Natland Investment did not engage in impermissible forum shopping, but in "perfectly legitimate 'treaty shopping.'"[497] The Claimants note that Natland Group and Natland Investment were established in October and December 2009, respectively, which is "about *one year* before the Solar Levy was announced and when the Czech Government had publicly announced that it would abolish the 5% Break-Out Rule effective as of January 2011."[498] The Claimants rely on *Philip Morris v. Australia*, in which the tribunal held that a specific dispute is foreseeable when there is a "reasonable prospect" that a measure that may give rise to a treaty claim will materialize.[499]

294. There is no evidence before the Tribunal that the dispute between the Claimants and the Czech Republic was foreseeable at the time Natland Group and Natland Investment were incorporated in Cyprus and in the Netherlands, on 29 October 2009 and 8 December 2009, respectively. While the prices of solar panels were rapidly falling as of 2009, there is no evidence before the Tribunal, nor a reasonable basis to assume, that either Natland Group or Natland Investment, or the Czech Republic, considered at the time that, even if the prices of solar panels were decreasing, a dispute was likely to arise between the two Claimants and the Czech Republic in relation to the Claimants' investments. Indeed, the Respondent itself argues, and its expert [redacted] testified, that the "solar boom" could not have been predicted with accuracy before mid-2010;[500] and even if the "boom" could have been predicted, it does not necessarily follow from this that the Parties could predict that measures such as the Solar Levy would be adopted in response. The Tribunal therefore cannot accept the Respondent's argument that the Claimants engaged in impermissible forum shopping when incorporating Natland Group and Natland Investment.

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497 Claimants' Reply, para. 698.

498 Claimants' Rejoinder, para. 237 (emphasis in original).

499 Claimants' Rejoinder, para. 236, *citing Philip Morris v. Australia*, paras. 539, 554, and 585.

500 Respondent's Rejoinder, para. 109, *citing* **RER-[redacted] 2**, paras. 6.69(d) and 7.11.

295. As to the Respondent's argument that the Tribunal has no jurisdiction because the investments made by Natland Group and Natland Investment cannot be considered foreign investments, the Tribunal notes that neither the Cyprus-Czech Republic BIT nor the Netherlands-Czech Republic BIT contains a requirement relating to the source of the funds invested or the nationality of the investor at the time the investment was made. Consequently, under the terms of the two Treaties, an investment may become a "foreign" investment subsequent to its making, either as a result of a transaction or as a result of change of nationality of the investor, whether a natural person or a corporate entity. The Tribunal therefore finds that its jurisdictional field covers claims filed by Natland Group and Natland Investment, and the Respondent's jurisdictional objection stands to be dismissed.

VII. THE PARTIES' POSITIONS ON THE MERITS

296. The Claimants submit that the Respondent breached the ECT, the Cyprus-Czech Republic BIT, the Netherlands-Czech Republic BIT and the Luxembourg-Czech Republic BIT by engaging in "three behaviors which seriously damaged" the Claimants and gave rise to the following three specific claims: (a) the Respondent failed to provide a stable and predictable legal framework for the Claimants' investments, in breach of its fair and equitable treatment and full protection and security obligations; (b) the Respondent frustrated the Claimants' legitimate expectations protected by the fair and equitable treatment standard; and (c) the Respondent acted unreasonably by adopting the Measures, in contravention of the non-impairment and fair and equitable treatment protections.[501]

297. The Claimants acknowledge that two of their claims are based on a combination of causes of action.[502] The Respondent asserts that there is "extensive overlap between the first and second claims" of the Claimants and addresses these two claims together,[503] describing them as an improper attempt to turn Czech laws into immutable international law obligations owed personally to them. The Respondent further submits that the "Claimants have not established that the Czech Republic violated the so-called 'non-impairment' obligation."[504]

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[501] *See* Claimants' Reply, paras. 723-730.

[502] Claimants' Reply, paras. 724-725.

[503] Respondent's Rejoinder, para. 565.

[504] Respondent's Rejoinder, paras. 565-566, 618.

298. As determined above, the Tribunal has no jurisdiction over the Claimants' claims based on the repeal of the Income Tax Holiday and the modification of the Original Depreciation Provisions, over Radiance's claims under the Luxembourg-Czech Republic BIT and over GIHG's claims under the Cyprus-Czech Republic BIT, and accordingly it will not consider them further below.

A. Fair and Equitable Treatment and Full Protection and Security

1. The Claimants' Arguments

(a) Failure to Provide Stability and Predictability Protections under the Fair and Equitable Treatment and Full Protection and Security Standards

299. The Claimants have brought their claims for breach of the FET and FPS standards under the relevant treaties, as extracted below.

300. Article 10(1) of the ECT provides:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security [. . .]

301. Article 2(2) of the Cyprus-Czech Republic BIT provides:

> Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

302. Article 3(1)-(2) of the Netherlands-Czech Republic BIT states:

> Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party [. . .]
>
> More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.

303. The Claimants argue that the RES Regime has an "intrinsic attribute of stability."[505] The Claimants note that the Respondent argues that the Claimants only "had a legitimate expectation of a 15-year payback period and of a reasonable rate of return." According to the Claimants, the Respondent's own argument implies "that there was a promise of stability embedded in the

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[505] Claimants' Reply, para. 738.

Incentive Regime, *i.e.*, that the [RES] Regime would not be modified until the investors obtained what had been promised to them."[506] The Claimants disagree with the Respondent's argument that an expectation of stability cannot arise in the absence of a stabilization clause. Arguing that "stability protection inherent in FET and FPS . . . must be given a precise meaning based on the context,"[507] the Claimants assert that "expectations and promises on which investors are entitled to rely can arise not only from specific commitments, such as stabilization clauses, but also from rules 'put in place with a specific aim to induce foreign investment.'"[508] The Claimants also argue that stabilization clauses are not appropriate for governing RES investments and that, "stabilization of the incentives could only come in the form of legislation, which by definition cannot contain a stabilization clause." [509] The Claimants point to an inherent contradiction in the Respondent's position that there need be express declarations of stability, when the Respondent admits that such a promise can also be implicit.[510] The Claimants argue that the Respondent admits that a stabilization clause does not shield investors from legislative change, and therefore the pertinent question is whether the relevant investment treaties can give rise to obligations of stability.[511]

304. Relying on *dicta* of the *Tecmed* tribunal, articulating a standard endorsed by subsequent tribunals, the Claimants submit that "[a]rbitral tribunals have consistently found that stability and investors' basic expectations are protected by the FET standard."[512] According to the Claimants, "[a]n

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506 Claimants' Reply, para. 743, *referring to* Statement of Defense, para. 634.

507 Claimants' Reply, para. 748, *citing AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.30 (**Ex**. **CLA-62**) (hereinafter "**AES**").

508 Claimants' Reply, para. 749, *citing* Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, 2012, p. 69 (**Ex. CLA-109)**.

509 *See* Claimants' Reply, paras. 751-753.

510 Hearing Transcript, Day 5, p. 9-10 *referring to* Day 1, p. 204:19-21; Day 1 p. 205:10-11.

511 Hearing Transcript, Day 5, p. 13-14, 15:19-25.

512 *See* Claimants' Reply, paras. 760-761, *citing Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID case No. ARB (AF)/00/2, 29 May 2003, para. 154 (**Ex. CLA-57**); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, 25 May 2004, para. 114 (**Ex. CLA-51**); *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA No. UN 3467, Final Award, para. 183 (**Ex. CLA-28**) (hereinafter "**Occidental**"). *See also* Claimants' Reply, paras. 762-766, citing *CMS Gas Transmission Company v. The Argentine Republic,* ICSID case no. ARB/01/8, Award 12 May 2005, para. 276 (**Ex. CLA-48**); *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v. The Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 124 (**Ex. CLA-53**); *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 259-260 (**Ex. CLA-56**) (hereinafter "**Enron**"); *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic*, PCA Case No. 2008-13, Partial Award, 26 October 2010, para. 231-235 (**Ex. CLA-5)**; *Bayindir Insaat Turizm Ticaret ve Sanayi a.ş.v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, para. 240 (**Ex. CLA-34**).

obligation to maintain the stability of the legal environment derives also from the specific treaties invoked by the Claimants in this case, the object and purpose of which was precisely to promote investments and encourage regulatory and business stability."[513] They also note that the German Constitutional Court recently held that not even the paramount public interest can trump the legitimate expectations of stability generated in investors.[514]

305. The Claimants submit that the FET and FPS standards are broad, which is why tribunals examine legitimate expectations on a case-by-case basis.[515] A formal stabilization clause is only "one of the possible sources of a legitimate expectation of stability" that "can also arise in the absence of a formal clause . . . if there are other elements."[516] Legitimate expectations as to the stability of a legislative or regulatory framework can derive from the context, in particular "that a given treatment is assured by the state to certain categories of investors to attract their investments on the assumption that the treatment is extended to them for a given period of time."[517]

306. The Claimants argue that the violation of the obligation of legal stability depends on an objective test and may consist of the alteration of a legal framework that investors view as stable and non-modifiable because of its intrinsic features.[518] In this case, these include the aim of creating a RES sector to meet EU targets and the investments' lifespan.[519] The violation of legitimate expectations depends on the specific assurances the State has given as to the stability of the legal regime, even if these were not directed to individual investors.[520] Furthermore, "[a] violation of this standard can occur independently of an assessment of the reasonableness of the state's conduct."[521]

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513 Claimants' Reply, paras. 768-775.

514 Hearing Transcript, Day 1, 27:96 *referring to* (**Ex. CLA-166**).

515 Hearing Transcript, Day 5 p. 17-18

516 Hearing Transcript, Day 5 p. 19.

517 Hearing Transcript, Day 5 p. 20-21.

518 Hearing Transcript, Day 1, p. 76:20-25.

519 Hearing Transcript, Day 1, p. 78-79.

520 Hearing Transcript, Day 1, p. 77:4-9.

521 Hearing Transcript, Day 1, 77:14-16 *referring to Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 259 (**Ex. CLA-108**): "An action or inaction of a State may fall short of fairness and equity without being discriminatory and arbitrary; Hearing Transcript, Day 1, p. 77:17-20 *referring to Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 669 (**Ex. CLA-3**) (hereinafter "**Micula**"): "where the tribunal found a breach of legitimate expectations despite having found that Romania has acted reasonably in repealing the incentives."

307. The Claimants argue that the Respondent also violated the obligation of transparency mentioned in Article 10(1) of the ECT as this "can be read to indicate an obligation to be forthcoming with information about intended changes in policy and regulations that may significantly affect investment, so that the investor can adequately plan its investment and, if needed, engage the host State in dialogue about protecting its legitimate expectations."[522]

308. Applying these principles to the present case, the Claimants argue that a "stability undertaking was inherent in the nature of the commitments and in the purpose of the RES legislation which unmistakably promised investors stability of the [RES] Regime, *i.e.*, stable incentives over a given period of time."[523] According to the Claimants, in this case, stability was inherent to the business because these investments are exposed to regulatory opportunism; they are upfront, long-lasting and impossible to demobilize and relocate if conditions change.[524] This is complemented by the Czech Republic's "reaffirmed confirmation" of its intention to maintain the stability of the regime, and its objectively unreasonable behavior.[525] Accordingly, the Claimants submit that RES investors "had a legitimate expectation of stabilization" and that the fair and equitable treatment and full protection and security obligations of the ECT, the Cyprus-Czech Republic BIT, the Netherlands-Czech Republic BIT, and the Luxembourg-Czech Republic BIT prevented the Respondent from modifying the RES Regime.[526] According to the Claimants, "[t]he facts of this case justify a finding of breach of FET and FPS even without a specific consideration of the individual investors' expectations."[527] The Claimants' second claim pertains to the analysis of the "violation of [their] legitimate expectation to the stability of the FiT and Tax Incentives."[528]

(b) Breach of Legitimate Expectations under the Fair and Equitable Treatment Standard

309. Having argued that stability was inherent in the RES Regime, the Claimants contend that the Respondent breached their legitimate expectation to this stability. The Claimants note the Parties'

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522 Hearing Transcript, Day 1, p. 96-97 (internal quotation marks omitted).

523 Claimants' Reply, paras. 754-755, *citing* "Report on the Fulfilment of the Indicative Target for Electricity Production from Renewable Energy Sources for 2008", Ministry of Industry and Trade, 1 November, 2009, p. 22, para. 5.1 (**Ex. C-335**).

524 Hearing Transcript, Day 1, p. 93:6-12.

525 Hearing Transcript, Day 1, p. 78:7-10.

526 Claimants' Reply, paras. 738, 750.

527 Claimants' Reply, para. 738.

528 Claimants' Reply, para. 779.

agreement that "a tribunal must make an objective determination of the claimed expectations," having regard to all the circumstances, and that the relevant expectations must be formed at the time the investment was made.[529] Applying the three elements of the *Micula* test, the Claimants argue that (a) the Respondent promised regulatory stability; (b) the Claimants relied on the promise; and (c) their reliance was reasonable.[530]

310. With respect to the first element of this test, the Claimants note that they had the following expectations at the time they invested in the Czech Republic: "(a) the FiT level would remain stable over the lifetime of the project (*i.e.*, 20 years); (b) the Income Tax Exemption would last for six years (*i.e.*, the first calendar year of operation of the plant plus the following five years); and (c) the Shortened Depreciation would range between 5 to 10 years."[531] According to the Claimants, these expectations stemmed from the Respondent's promises "resulting from" the following sources: (a) the legislation establishing the RES Regime (described as the primary source by the Claimants, who argue that "an investor may derive legitimate expectations of stability . . . from general legislation containing clear promises");[532] (b) the purpose and context of the RES Regime (which the Claimants note "was designed specifically to enable the Czech Republic to reach its EU targets for the contribution of electricity produced from RES and

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[529] Claimants' Reply, para. 785, *referring to* Statement of Defense, para. 619.

[530] Claimants' Reply, paras. 786-787, *citing*

[531] Statement of Claim, para. 429; Claimants' Reply, para. 789, *citing* Act on RES Promotion, Article 6(1)(b)(2) (**Ex. C-26**); 2007 Technical Regulation; 2009 Pricing Regulation; Letter from CMS Cameron McKenna to the ERO, 29 July 2009, together with the ERO's reply, 7 August 2009 (**Ex. C-77**); Act on Income Tax, Articles 19 (1)(d), 30 (**Ex. R-61**).

[532] *See* Claimants' Reply, paras. 792-807, *citing Charanne B.V. Construction Investments S.A.R.L. v. The Kingdom of Spain,* SCC Case No. 062/2012, Arbitration Institute of the Stockholm Chamber of Commerce, Final Award, 21 January 2016 (**Ex. CLA-66)**; *Charanne and Construction Investments v. The Kingdom of Spain*, Case No. 062/2012, Arbitration Institute of the Stockholm Chamber of Commerce, Dissenting Opinion of Professor G. S. Tawil, 21 January 2016, para. 5 (**Ex. CLA-111**); R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford, 2008, p. 134-135 (**Ex. CLA-42)**; *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 155 (**Ex. CLA-112**); *Enron*, Award, paras. 264-266 (**Ex. CLA-56**); *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v. The Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 130 (**Ex. CLA-53**); *CMS Gas Transmission Company v. The Argentine Republic*, ICSID case no. ARB/01/8, Award 12 May 2005, para. 275 (**Ex. CLA-48**); *Binder v. The Czech Republic*, ad-hoc arbitration, Award 15 July 2011, para. 443 (**Ex. RLA-31)**; M. Téllez, "Conditions and Criteria For The Protection of Legitimate Expectations Under International Investment Law", in *ICSID Review*, Vol. 27, No. 2, 2012, p. 436 (**Ex. CLA-113)**; "Fair and Equitable Treatment", UNCTAD Series on Issues in International Investment Agreements II, 2012, p. 69 (**Ex. CLA-109)**. *See also* **CWS-Raška-1**, para. 18; **CWS-Raška-2**, paras. 28-29; **CWS-Wollner-1**, para. 12; **CWS-[redacted]-1**, para. 23; **CWS-[redacted] 2**, para. 5; **CWS-Kunz-1**, paras. 18-19; and **CWS-Kunz-2**, paras. 21-25.

therefore to attract RES investments by means of long-term incentives");[533] (c) the "intense public promotion" of the Act on RES Promotion and the promotion of the RES Regime more generally by the Respondent;[534] and (d) the licensing process to build and operate the photovoltaic installations (which the Claimants argue transformed the Respondent's general promises to investors to specific promises).[535]

311. As to the second element of the *Micula* test the Claimants argue that they "heavily relied" on the Respondent's promises outlined in the paragraph immediately above, which they argue "were crucial to their understanding of what they could expect if they invested in the Czech Republic and to their decision to make the investments." In support of their argument, the Claimants provide statements from Mr Igor Wollner, shareholder of GIHG; Mr Tomáš Raška, shareholder of Natland; [redacted] shareholder of MEP and Radiance; and Mr Daniel Kunz, the former CEO of Energy 21.[536]

312. In his first witness statement, Mr Raška states that:

> When Natland decided to invest in the Czech Republic by incorporating E21, we were therefore well acquainted with the incentive regime and we specifically relied on the guarantees provided for by the Act on Income Tax, the Act on [RES] Promotion and the related implementing regulations issued by the ERO . . . [537]

313. In his first witness statement, [redacted] states that:

> We have relied on the existing legislative framework, mainly on Act No. 180/2005 Coll. (the "Act on [RES] Promotion"), which clearly stated that one of its objectives was to establish a secure, stable and predictable investment environment for RES producers. The several mechanisms for promotion of RES producers set forth in the Act on Promotion together with other pieces of legislation (19) were presented by the deal team to the IAC and considered by the IAC as the Czech Republic's legally binding commitments for a stable and transparent regulatory framework.[538]

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533 *See* Claimants' Reply, paras. 808-813, *citing* Explanatory Report on the bill of the Act on Promotion of November 12, 2003, p. 2-4 (**Ex. C-27**). *See also* **CWS-[redacted]-1**, para. 16, 22, and 25; **CWS-Kunz-2**, para. 22; **CWS-Raška-1**, para. 12-13; **CWS-Raška-2**, para. 21-24; **CWS-Wollner-1**, para. 11.

534 *See* Statement of Claim, paras. 85-95, 444-447; Claimants' Reply, paras. 814-816. *See also* **CWS-Raška**, paras. 16-17; **CWS-Raška-2**, paras. 26-27; **CWS-Wollner-1**, paras. 13-15; **CWS-[redacted]-1**, paras. 24-25; Second **CWS-[redacted] 1**, paras. 4-5; **CWS-Kunz-1**, para. 21 and **CWS-Kunz-2**, para. 64.

535 *See* Statement of Claim, paras. 442-443; Claimants' Reply, para. 817-819.

536 Claimants' Reply, para. 820; **CWS-Wollner-1**, para. 12 ff.; **CWS-Raška-1**, para. 18; **CWS-Raška-2**, para. 28; **CWS-[redacted]-1**, para. 22 ff.; **CWS-Kunz-1**, para. 18 ff.; **CWS-Kunz-2**, para. 27.

537 **CWS-Raška-1**, para. 18.

538 **CWS-[redacted] 1**, para. 22.

314. In his first witness statement, Mr Kunz states:

> The fundamental assumptions of the Base Case derived from the legal framework existing at that time. In particular the model took into account (i) the guarantee of stable feed in tariffs ("FiT") payable over the expected lifetime of solar plants of new installation (*i.e.*, 20 years); (ii) the exemption of the income from photovoltaic power plants from income tax for the year in which the plant was put into operation and for the following five calendar years; and (iii) the possibility to depreciate for tax purposes certain technological components of photovoltaic plants over a period between 5 to 10 years.[539]

315. With respect to the third element, reasonable reliance, the Claimants argue that their reliance on the Respondent's promises was reasonable because it stemmed from the following: (a) the stability that was inherent in the RES Regime; (b) the Respondent's "continuing reassurances that the Incentive Regime would be changed only in relation to new investors commissioning their plants from January 1, 2011 onwards;" and (c) "the widespread trust in the system on the part of the Czech banks, which were ready to grant large financings to investments completed within 2010."[540]

316. The Claimants address the Respondent's defense that, even if the Tribunal finds that it did create expectations, under the Act on RES Promotion it did not repudiate such expectations.[541] The Claimants argue that "if the Tribunal finds that there were legitimate expectations as to the Tax Incentives, no inquiry into their repudiation is necessary."[542] Replying to the Respondent's argument that "the Taxation Measures did not change the level of the FiT,"[543] the Claimants argue that "the Solar Levy deducted by the grid operators from the revenues from the sale of electricity *directly* impacts on [those] guaranteed 'revenues,' which is precisely the FiT level."[544] Noting that "revenues are the first factor in the formula of profitability," the Claimants argue that the Solar Levy "also affects the plant's profitability."[545] The Claimants point to examples in the

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539 **CWS-Kunz-1**, para. 18.

540 Claimants' Reply, para. 825.

541 Claimants' Reply, para. 847, referring to Statement of Defense, para. Sub-Section IV.C.2, p. 253.

542 Claimants' Reply, para. 847.

543 Statement of Defense, para. 626.

544 Claimants' Reply, para. 849, *citing* ERO to the Ministry of Industry and Trade of December 30, 2010, p. 2, (emphasis in original) (**Ex. C-359)**.

545 Claimants' Reply, para. 849.

Respondent's pleadings and the expert report of [redacted] in which the Solar Levy is described as reducing revenue.[546]

317. In response to the Respondent's argument that investors could only reasonably expect to achieve a 15-year payback together with a 7% rate of return under the Act on RES Promotion, the Claimants assert that "[t]his is not the parameter on which to measure the Claimants' expectation under the Act on [RES] Promotion, which centered on a stable FiT for the 20-year lifetime of the projects."[547] The Claimants also distinguish the case law relied on by the Respondent as being dissimilar to the present case or too connected with the particular circumstances underlying those cases.[548] The Claimants also note that the assurance as characterized by the Respondent "would have been completely useless" as "[n]o investor would have invested in the Czech Solar market on the assumption of such a low return."[549]

318. While the Respondent points to the press release of the Ministry of Industry and Trade of 24 August 2009 as a warning to investors that the system was no longer reliable, the Claimants point out that "just four days later" the government realized it had to adopt a more prudent approach and the ERO acknowledged that "a reasonable *vacatio legis*" was required.[550] The Claimants claim that the Czech government clearly spelled out that the incentives needed to be phased out but that this would only apply to future investors. It did so through legislative acts, official documents and public declarations, which were relied upon by investors.[551] For example, Mr Kunz said that in 2010, the Czech government made assurances that "the regime of support

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546 Claimants' Reply, paras. 851-852, *referring to* Statement of Defense, paras. 3(ff), 4(g), 4(k); **CER-[redacted] 1**, paras. 1.3.1(a), 3.3.1, 3.3.2, 3.3.3 and Figure 1 at p. 14; Appendix 5.2 to **CER-[redacted] 1**, pp. 5-6.

547 Claimants' Reply, paras. 853-855, *referring to* Statement of Defense, para. 626 ff.

548 Claimants' Reply, paras. 856-859, *citing Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, para. 242-244 (**Ex. RLA-24**); *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 7.10 and 7.140 (**Ex. CLA-112**); *Electrabel S.A. v. Hungary* ICSID Case No. ARB/07/19, Decision on Jurisdiction, 30 November 2012, para. 7.139 and 7.38 (**Ex. CLA-4**); *EDF v. Hungary cited in* L. E. Peterson, Intra-EU treaty claims controversy: new decisions and developments in claims brought by EU investors vs. Spain and Hungary, IAReporter, 24 December 2014 (**Ex. CLA-114**).

549 Hearing Transcript, Day 1, 15:8-11.

550 Hearing Transcript, Day 5, pp. 31-32 *referring to* Letter from [redacted] to B. Němeček of 28 August 2009 (English translation), p. 1 (**Ex. R-145**); Letter from J. Fiřt to O. Vojír of 8 September 2009 (English translation), p. 2 (**Ex. R-161**)

551 Hearing Transcript, Day 5, p. 32-35, *referring to* Explanatory Report to Draft Act No. 137/2010, p.5 (**Ex. R-147**); Press conference following the government session, 16 November 2009, p.2 (**Ex. C-324**); National Renewable Energy Action Plan of the Czech Republic (**Ex. C-80**); Act 320/2010, p. 8 (**Ex. R-172**). *See also* Claimants' Closing Statements, slides 23-28.

will remain unchanged."[552] The Claimants assert that this view is confirmed by the testimony of the Respondent's own witnesses [redacted] and Mr Minčič , who stated that Act 137/2010, which provided for the abolition of the 5% Limit only from 2011, was respectful of investors' expectations.[553] The Claimants also recall that the lead time between the initiation of the investment and the moment the plant comes online is between nine months and one year.[554] Consequently, the Claimants advance that "this makes it very difficult to see how the Czech Republic can run its theory that investors who were in the process of making their investments had been forewarned that these investments could be jeopardized at any moment."[555]

319. In response to the Tribunal's questions, the Claimants also addressed the relevance of their awareness of imminent legislative changes and the Respondent's argument that there was a caretaker government in the Czech Republic from June 2009 to July 2010.[556] The Claimants agree that "the awareness of imminent changes to the RES scheme and the political context" are relevant circumstances.[557] However, while investors knew the incentives would end at a certain point in time, the Respondent gave clear assurances of stability until then.[558] The Claimants argue that caretaker governments are common in European parliamentary systems and while there was a political crisis in the Czech Republic at the time, it was not tantamount to a breakdown of the rule of law. The Claimants point out that the Respondent's own witness conceded that Prime Minster Fischer was considered a popular Prime Minister "[a]ccording to the data in the press at that time."[559]

320. Finally, the Claimants argue that, contrary to the Respondent's assertion, Radiance "did not expect a retroactive measure like the Solar Levy to be implemented at all, irrespective of its duration" when it "acquired Natland Investment's and GIHG's remaining participations in E21

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552 Hearing Transcript, Day 2, p. 109:4-17.

553 Hearing Transcript, Day 5, pp. 32-35 *referring to* Hearing Transcript, Day 4, p. 144:15-23; Hearing Transcript Day 3, p. 34:4-7; Hearing Transcript, Day 3 p. 61:13-14.

554 Hearing Transcript, Day 5, p. 32:15-19.

555 Hearing Transcript, Day 5, p. 36:8-12.

556 Hearing Transcript, Day 5, p. 38:9-13.

557 Hearing Transcript, Day 5, p. 20-23.

558 Hearing Transcript, Day 5, pp. 38-39.

559 Hearing Transcript, Day 3, p. 12:13-16. *See also* Hearing Transcript, Day 5, p. 40.

through the 2011 Transaction" and that the transaction "was dictated by specific and compelling reasons."[560]

2. The Respondent's Arguments

321. The Respondent addresses the Claimants' two claims – "for failure to provide a stable and predictable legal framework" and "for violation of legitimate expectations" – together, arguing that they "are an improper attempt to turn Czech laws into immutable international law obligations owed personally to [the Claimants]."[561] The Respondent characterizes the Claimants' claims as follows: (a) the "Claimants define the 'stability' obligation to mean that the 'Incentive Regime' . . . could not be modified after Claimants initiated their investment;" and (b) "the 'legitimate expectations' that Claimants allege are that the Czech Republic would abide by specific provisions of the Act on [RES] Promotion and Income Tax Act."[562] The Respondent further contends that, if the Claimants' position is accepted, "the fair and equitable treatment and full protection and security provisions of the ECT, the Netherlands BIT, and the Cyprus BIT function in effect as 'stabilization' clauses to protect them from any modification of Section 19(d) and the Original Depreciation Provisions of the Income Tax Act and from any new legislation that (according to them) violates Section 6(1)(b)(2) of the Act on Promotion."[563]

322. The Respondent argues that "[i]nvestment treaties do not require perfectly consistent and perpetual application of domestic laws"[564] and that something more than a change in or violation of a domestic law is required for a State to breach an investment treaty.[565] Applying the

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560 Claimants' Reply, para. 860, *referring to* Statement of Defense, para. 839-840 and *citing* **CWS-[redacted] 2**, paras. 8-9. *See also* **CWS-Kunz-2**, paras. 98-99.

561 Respondent's Rejoinder, para. 566, *referring to* Claimants' Reply, para. 725.

562 Respondent's Rejoinder, para. 566, *referring to* Statement of Claim, paras. 420, 429; Claimants' Reply, paras. 732, 738, 743, 789.

563 Respondent's Rejoinder, para. 568, *citing* ECT, Article 10(1) (**Ex. RLA-4**); Netherlands BIT, Article 3(1) (**Ex. C-4**); Cyprus BIT, Article 2(2) (**Ex. C-2**).

564 Respondent's Rejoinder, para. 569, *citing Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability 27 December 2010, para. 115 (**Ex. RLA-8)**; *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 219 (**Ex. CLA-60**); *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 315, 332 (**Ex. RLA-9)**; *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Arbitration Institute of the Stockholm Chamber of Commerce, Partial Award, 27 March 2007, para. 272 (**Ex. CLA-7**); *Iberdrola Energía S.A. v. Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012 (**Ex. RLA-227)**; *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 174 (**Ex. CLA-105**); *GAMI Investments Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004, para. 97 (**Ex. RLA-21**).

565 Respondent's Rejoinder, para. 570, *referring to* Statement of Claim, paras. 405, 462; Claimants' Reply, paras. 715, 746.

jurisprudence to the present case, the Respondent argues that "an alleged violation of local law (such as the alleged . . . failure to abide by the supposed 'guarantee' in Section 6(1)(2)(b) of the Act on Promotion) does not, in and of itself, automatically violate the ECT or the BITs,"[566] nor does "mere change to domestic law (such as the repeal of Section 19(d) and modification of the Original Depreciation Provisions of the Income Tax Act)," absent a "stabilization" guarantee.[567] Put differently, "domestic laws do not automatically generate legitimate expectations that they will not change"[568] and "'stability' does not mean stability from legislative change." The Respondent emphasizes that "the terms 'stabilization' and 'stability' carry different meanings under international law."[569]

323. With respect to "stabilization" guarantees and the Act on RES Promotion, the Respondent argues "in order to genuinely constitute a stabilization guarantee, a law has to be explicit about the stabilization aspect."[570] A State must do more than use the word 'maintain' or 'stable' in an explanatory report, "or indicate in a secondary regulation the amount of time that a benefit will apply," to "stabilize" legislation.[571] In the absence of "explicit recognition that existing laws

566 Respondent's Rejoinder, para. 572(a), *citing Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB06/3, Award, 6 May 2013, para. 174 (**Ex. CLA-105**); *Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8*, Award, 11 September 2007, para. 315 (**Ex. RLA-9**); *GAMI Investments Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004, para. 97 (**Ex. RLA-21**); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, NAFTA Chapter 11, Award, 9 January 2003, para. 190 (**Ex. RLA-228)**.

567 Respondent's Rejoinder, para. 572(b), *citing Philip Morris Brands SÀRL et al. v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 423 (**Ex. RLA-230**) (hereinafter "**Philip Morris v. Uruguay**"); *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, para. 629 (**Ex. CLA-75**); *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 164 (**Ex. RLA-8**); *Micula*, Award, para. 529 (**Ex. CLA-3**); *Parkerings-Compagniet AS v. Lithuania,* ICSID Case No. ARB/05/8*,* Award, 11 September 2007, para. 332 (**Ex. RLA-9**); *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Remaining Issues of Jurisdiction and Liability, 12 September 2014, para. 586 (**Ex. RLA-219**) (hereinafter referred to "**Perenco**"); J. Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) Arbitration International 351 (2008), p. 369 (**Ex. RLA-11**).

568 Respondent's Rejoinder, para. 572(c), *citing Philip Morris v. Uruguay*, Award, para. 426 (**Ex. RLA-230**); *Crystallex International Corporation v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 552 (**Ex. RLA-231**); Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) Arbitration International 351 (2008), p. 369 (**Ex. RLA-11**); *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 335 (**Ex. RLA-193**).

569 Respondent's Rejoinder, para. 572(d), *citing Micula*, Award, para. 529 (**Ex. CLA-3**); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 218 (**Ex. RLA-12**); *Continental Casualty Company v. Argentina*, ICSID Case No. Arb/03/9, Award, 5 September 2008, para. 258 (**Ex RLA-13**); *AES* Award, para. 9.3.29 (**Ex. CLA-62**); see also Statement of Defense, para. 611–15, *referring to* Claimants' Reply, para. 746.

570 Hearing Transcript, Day 1, p. 205:8-12.

571 Respondent's Rejoinder, para. 576, *referring to* Report on the Fulfilment of the Indicative Target for Electricity Production from Renewable Energy Sources for 2008, Ministry of Industry and Trade,

would continue to apply to the beneficiary even in the face of legislative or regulatory change" and having not followed the processes and mechanisms that other States have employed,[572] the Respondent submits that "no stabilization guarantee . . . was ever provided to the investors in the solar power sector."[573] Moreover, the Respondent recalls that the provisions for a 15-year simple return (provided for in the Act on RES Promotion) and the provisions for a 7% rate of return for investments complying with specified technical and economic parameters (provided for in the ERO regulations) continue to apply.[574] The Respondent further recalls that the Czech Constitutional Court determined that these provisions were not breached as a matter of domestic law and that the Claimants "conceded that the relevant parameters were not breached in their particular case and that . . . the Czech Republic 'did respect the 15-year simple payback and the 7% return.'"[575]

324. With respect to "stabilization" guarantees and the legislative taxation changes, the Respondent submits that "the only way the repeal of the Income Tax Holiday and the modification of the Original Depreciation Provisions (*i.e.*, changes to a domestic law) could be considered automatic violations of the ECT or the BITs would be if Claimants could show that the Income Tax Holiday and Original Depreciation Provisions had been the subject of a stabilization guarantee from the State."[576] The Respondent argues that the Claimants have not established this. It notes that the only document cited by the Claimants to support this argument is the 2003 Explanatory Report to an early draft of the Act on RES Promotion, which contains a "single sentence" stating that "the support system is based . . . on maintaining tax reliefs set out in the Act on Income Tax," which does not contain the language "States typically use when entering into a stabilization arrangement."[577] The Respondent observes that there is no evidence that the Claimants actually

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November 1, 2009, p. 22 (**Ex. C-335**) and *citing Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 101 (**Ex. RLA-8**); *Duke*, Award, para. 189-190 (**Ex. RLA-15**); *Noble Energy et al. v. Ecuador*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 May 2008, para. 161 (**Ex. RLA-16**).

572 Respondent's Statement of Defense, para. 614, *citing* Peter D. Cameron, *International Energy Investment Law: The pursuit of stability*, (2010), p. 246–47 (**Ex. RLA-14**). The Respondent cites the examples of states (Chile, Colombia, Ecuador, Panama, Peru, and Venezuela) where governments passed legislation that authorized the use of contracts (or contractual clauses) that froze specific legislation for a specified period of time.

573 Statement of Defense, paras. 614-615; Respondent's Rejoinder, paras. 576-579.

574 Respondent's Rejoinder, para. 581.

575 Respondent's Rejoinder, para. 581, *citing* May 2012 Constitutional Court Judgment, para. 68 (**Ex. R-29**), and *referring to* Claimants' Reply, para. 19.

576 Respondent's Rejoinder, para. 589.

577 Respondent's Rejoinder, para. 593.

relied on the Report.[578] Citing the *Charanne v. Spain* award, the Respondent notes that "much more [evidence] is needed in order to render domestic law immutable."[579] The Respondent notes that the claimants in the *Charanne* case cited evidence from various government sources that Spain could meet its renewable energy targets if it created a suitable and stable legal framework; developers were confident of its permanence; and it would be maintained for the long term. There was also evidence that the intent of the regulatory framework included minimizing regulatory uncertainty; offering lifetime guarantees to ensure that economic incentives are stable and predictable; and tariff adjustment reviews that only concern new facilities.[580]

325. In response to the Tribunal's request for clarification, the Respondent argued that a legislative stabilization guarantee has three elements: (a) "it refers … to the concept of stabilization; (b) it acknowledges "that circumstances may change;" and (c) "it expressly exempts the beneficiaries of this mechanism from any change."[581] The Respondent contends that the Claimants have not presented any Czech law or regulation that has language meeting these requirements, and are basing their claim of a stabilization guarantee on a single sentence in two reports.[582] For the same reasons the Respondent rejects the Claimants' contention that there is no intrinsic stability in the incentive regime and argues that a stabilization guarantee "must almost by definition be explicit."[583] The Respondent argues that there is a "strong presumption that governments will change their laws" to adapt to changing circumstances, to act in the public good and the serious implications for the state in making such a commitment.[584]

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578 Respondent's Rejoinder, paras. 589-593.

579 Respondent's Rejoinder, para. 594.

580 Respondent's Rejoinder, paras. 593-595 *citing Charanne B.V. and Construction Investment S.à.r.l. v. The Kingdom of Spain,* Case No. 062/2012, Arbitration Institute of the Stockholm Chamber of Commerce, Final Award, 21 January 2016, paras. 98 and 106 (**Ex. CLA-66**).

581 Hearing Transcript, Day 1, p. 210 *relying on* Peruvian Investment Regulation quoted *in Duke,* Award, para. 190 (**Ex. RLA-15**); Uzbek Decree No. 477 quoted in *Oxus Gold v. The Republic of Uzbekistan,* Final Award, 17 December 2015, para. 823 (**Ex. RLA-232**); Panamanian Law on Legal Stability of Investments, Art. 10 (**Ex. RLA-234**); Nigerian LNG (Fiscal incentives, Guarantees and Assurances) Act of 1990, as amended in 1993, (**Ex. RLA-289**); Law No. 4/2003 on the Petroleum Development of Timor Sea, Tax Stability, (**Ex. RLA-290**); Chilean Foreign Investment Law, Decree Law 600, Arts 6, 11 (**Ex. RLA-288**). *See also* Respondent's Opening Statement, slides 152-154; Respondent's Closing Statement, slides 78-91.

582 Hearing Transcript, Day 1, P. 217-218; referring to ERO report of 2009, p.22 (**Ex. C-335**); Explanatory Report to the Draft Bill of the Act on Promotion, p. 4 (**Ex. C-72**).

583 Hearing Transcript, Day 1, p. 221.

584 Hearing Transcript, Day 1, p. 221.

326. The Respondent disagrees that the Measures in this case were retroactive and that this case therefore differs from cases where claims based on legislative immutability have been rejected.[585] According to the Respondent, the Claimants agree that the Measures were prospective, and it argues that "the mere fact that [a measure] affects an existing investment doesn't render a law retroactive."[586] The Respondent also recalls that all of the Claimants' plants connected to the grid before the end of 2010 received the incentives for the entire period and will continue to receive the FiT for the 20 year period.[587] Additionally, "the fact that a government announces certain legislative changes will take place doesn't necessarily imply that other legislative changes won't take place."[588] As to the Claimants' "perverse" contention that legislative changes would not affect existing investments, and that investments that were made before 2010 were therefore somehow safer, the Respondent emphasizes that it was in part due to the "massive" lobbying initiated by the solar industry after the August 2009 announcement on eliminating the 5% Limit that caused the delay. This meant, in the Respondent's view, that the State, "which initially had the intention of not affecting existing investors," faced a "perverse and paradoxical situation, namely, that under the pressure of lobbying the State delayed acting, which then led to "an additional influx of people coming to take advantage of the higher FiT," which in turn meant that "the volume of subsidies" was so high that the State had to react to the situation differently.[589] Had the State been able to eliminate the 5% Limit as of 1 January 2010, the problem would have been addressed. The Claimants exploited the higher tariffs for another year, and in doing so, "paradoxically . . . aggravated the crisis." The proof of this rush to install new capacity while the programme was unchanged resulted in the fact that "half of the entire solar capacity in the Czech Republic went online in the last quarter of 2010."[590]

327. The Respondent also counters the Claimants' argument that these laws were special because they contemplated specific benefits that would apply for a definite period of time, arguing that "the fact that a law specifies how long a benefit will apply does not mean that the law itself has been stabilized."[591] They cite Judge Crawford's treatise, which states:

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585 Hearing Transcript, Day 1, p. 202.

586 Hearing Transcript, Day 1, p. 203.

587 Hearing Transcript, Day 1, p. 223:7-13.

588 Hearing Transcript, Day 1, p. 223:14-20.

589 Hearing Transcript, Day 1, pp. 224-227.

590 Hearing Transcript, Day 1, pp. 224-226; p. 226:20-23.

591 Hearing Transcript, Day 1, p. 206:16-20.

> The enactment of a law by the enactment of a law by a state, whether it is specific or general, is not the entry by the state into an obligation distinct from the law itself. No doubt a state is obliged by its own laws, but only for so long they are in force. In the absence of express stabilisation, investors take the risk that the obligations of the host State under its own law may change.[592]

328. The Respondent argues that, in principle, a law that confers a benefit for an indefinite period is more favourable than one that confers a benefit for a specific period of time. If the repeal of a law that confers a benefit for an indefinite period of time is not automatically a violation of an investment treaty then the repeal of a law that is limited in time cannot violate an investment treaty either.[593]

329. The Respondent also argues that an international tribunal "ha[s] to defer to some extent to how a state characterizes its own laws" and draws the Tribunal's attention to the Decision of the Czech Constitutional Court that specifically addressed the issue of whether the Act on RES Promotion amounted to a legislative stabilization guarantee and held that it did not.[594]

330. With respect to the Claimants' allegation that the Respondent breached and modified Article 6(1)(b)(2) of the Act on RES Promotion by means of the Solar Levy, the Respondent argues that "the Solar Levy did not in fact alter the level of the FIT or the level of Claimants' gross revenues."[595] It relies, in this respect, on the expert report of [redacted], which notes that the expert report of [redacted] assumes identical revenues in both the Counterfactual and Actual scenarios, thereby accepting that the Amending Measures did not impact revenues but impacted costs and other cash flows.[596] In the Respondent's view, "[t]he fact that . . . the Solar Levy had a similar economic impact – in terms of profitability – to a FIT reduction does not mean that the Solar Levy is inconsistent with Section 6(1)(b)(2) of the Act on Promotion."[597] Furthermore, the Respondent notes that the Czech Constitutional Court determined that the Solar Levy was not inconsistent with Article 6(1)(b)(2) of the Act on RES Promotion and that, as the tribunal in *Perenco* stated, "[a]n international tribunal cannot second-guess [a domestic] court's

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592 Hearing Transcript, Day 1, pp. 206-207 *citing* J. Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) Arbitration International 351, (2008), p. 369 (**Ex. RLA-11**). *See also* Respondent's Opening Statements, slide 151.

593 Hearing Transcript, Day 1, p. 207:8-19.

594 Hearing Transcript, Day 5, pp. 127-128.

595 Respondent's Rejoinder, para. 587; **RER-[redacted]-2**, fn. 25.

596 **RER-[redacted]-2**, para. 2.3.1, fn. 25.

597 Respondent's Rejoinder, para. 587.

interpretation and application of local law."[598] In the alternative, the Respondent argues that even if the Solar Levy had reduced the FiT, the allegation that the Czech Republic breached Article 6(1)(b)(2) of the Act on RES Promotion (a local law) would be "insufficient to establish a fair and equitable treatment or full protection and security violation."[599]

331. The Respondent argues that the Claimants use the term "retroactivity" when describing the Measures to mean affecting investments already made.[600] It argues that, "because investment treaty protection typically only applies once there has been an investment, it is hard to imagine an investment treaty claim based on legislative or regulatory changes which did *not* allegedly affect investments already made" and thereby this argument is merely a "red-herring."[601]

332. In response to the Claimants' claims about their expectations "that they would be free from the Taxation Measures," the Respondent submits that "'all the circumstances' show that Claimants could not have reasonably expected that the law applicable to their investments would remain fixed or that legislative changes would not affect the financial performance of their investments."[602] In support of its position, the Respondent argues that legitimate expectations derived from legislation must be based on the provisions in question.[603] According to the Respondent, "the original Act on Promotion which Claimants invoke as the source of their expectations contained no provisions whatsoever concerning taxation."[604]

333. The Respondent further argues that the Claimants either knew or should have known that (a) "the RES regime was based on the principle of minimum cost and reasonable (but not excessive)

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598 Respondent's Rejoinder, para. 587, *citing Perenco*, Remaining Issues of Jurisdiction and Liability, para. 583 (**Ex. RLA-219**); *Philip Morris v. Uruguay,* Award, para. 418 (**Ex. RLA-230**); *Mobil Investments Canada Inc. et al. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 167 (**Ex. RLA-17)**; *ECE Projektmanagement International GMBH, Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft GmbH & Co v. The Czech Republic*, PCA Case No. 2010- 5, Award, 19 September 2013, para. 4.764 (**Ex. CLA-104**).

599 Respondent's Rejoinder, para. 588, *citing Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB06/3, Award, 6 May 2013, para. 174 (**Ex. CLA-105**); *Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8*, Award, 11 September 2007, para. 315 (**Ex. RLA-9**); *GAMI Investments Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004, para. 97 (**Ex. RLA-21**); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, NAFTA Chapter 11, Award, 9 January 2003, para. 190 (**Ex. RLA-228**).

600 Respondent's Rejoinder, para. 583, referring to Statement of Claim, para. 462

601 Respondent's Rejoinder, para. 583 (emphasis in original).

602 Respondent's Rejoinder, para. 602.

603 Respondent's Rejoinder, para. 603, *citing Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 535 (**Ex. RLA-18**).

604 Respondent's Rejoinder, para. 603.

return, as defined by the [Weighted Average Cost of Capital ("**WACC**")];"[605] and that (b) "by mid-2009 . . . the Czech Republic was in fact seeking ways to limit [solar] investment and stop the impending solar boom."[606] Noting that investors must take into account regulatory risk, the Respondent argues that "[t]he impact resulting from the Taxation Measures was within the bounds of such regulatory risk because . . . the Measures were tailored to respect the key parameters of the Act on [RES] Promotion, and, as the Czech courts confirmed, left its fundamental aspects unchanged."[607] The Respondent concludes that, in light of the circumstances "actually or constructively known to Claimants, it is clear that they cannot have legitimately expected to be shielded from [the relevant] changes."[608]

334. Finally, the Respondent argues that "an investor that completes an investment after a measure is announced cannot claim that at the time of investment, it had a legitimate expectation that such measure would not be adopted."[609] The Respondent further argues that this is legally relevant "because it goes to the legitimacy of any expectations [the Claimants] may have had that the legislative regime would not change."[610] Relying on the *Ulysseas* tribunal's findings, "the reference date for examining [an investor's] legitimate expectations" is the date when the investor makes "some kind of commitment ensuring the effectiveness of the contribution."[611] As applied

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605 Respondent's Rejoinder, para. 604, *citing* Technical Regulation, para. 4(1)(a); ERO Methodology for Determination of Purchasing Prices and Green Bonuses, para. 1.3 (**Ex. R-62**).

606 Respondent's Rejoinder, paras. 605-607, *citing* **RWS-Fiřt**, para. 18; Minutes of the meeting regarding the proposal of the changes in technical economic parameters of small hydroelectric power plants and photovoltaic power plants for 2010, ERO, 14 July 2009 (**Ex. R-126**); "Legislative environment and the promotion of the electricity produced from photovoltaic power plants in 2009," ERO Presentation, 15 October 2009 (**Ex. R-156**); "Support of photovoltaic power generation from the viewpoint of ERO," ERO Presentation, 17 March 2010 (**Ex. R-164**); "Legal Aspects of Photovoltaic Power Plant Implementation," Schönherr, 25 June 2009, p. 9 (**Ex. R-104**); L. Klett, P. Chmelíček, "An 'all-clear' for Investors," *Prager Zeitung*, 16 December 2009 (**Ex. R-279**); "Ministry of Industry and Trade wants to reduce support of solar power plants," Pravo, 25 August 2009 (**Ex. R-139**); P. Gabal, "Is there any danger of reduction of support for solar power plants?," Radio Praha – Ekonomika, 3 September 2009 (**Ex. R-140**); "Super income from the sun," Ekonom, 1 July 2009 (**Ex. R-142**); M. Petříček, "Solar boom is slightly excessive," Hospodářské Noviny, 13 August 2009 (**Ex. R-143**); "We will pay dearly for the Sun," Ekonom, 7 October 2009, p. 1 (**Ex. R-144**); "Additional payments for solar energy reached three billion; the state may curtail their boom" (Novinky.cz), 2 November 2009 (**Ex. R-181**); P. Honzejk, "'Growing' solar panels in fields is utter nonsense," *Hospodářské Noviny*, 11 December 2009 (**Ex. R-150**); K. Murtinger, "Solar energy 2010: no solution to the crisis in sight" (nazeleno.cz), 24 March 2010 (**Ex. R-155**); L. Klett, P. Chmelíček, "An 'all-clear' for Investors," *Prager Zeitung*, 16 December 2009 (**Ex. R-279**).

607 Respondent's Rejoinder, para. 609, *citing* **CER-Compass**, para. 3.26.

608 Respondent's Rejoinder, para. 609.

609 Respondent's Rejoinder, para. 612.

610 Hearing Transcript, Day 5, p. 133:22-24.

611 Respondent's Rejoinder, para. 612, *citing Ulysseas, Inc. v. Ecuador*, UNCITRAL, Final Award, 12 June 2012, para. 252 (**Ex. RLA-287**).

to this case, the Respondent notes that the "Claimants apparently did not even begin supplying electricity or sign the relevant FiT agreement with the distribution company for many of their plants until 2011, when the Taxation Measures were not only known but were already in force," and "many of Claimants' projects had no ERO license when the Taxation Measures were announced."[612] Additionally the Respondent submits that the Claimants "began new projects because they knew the changes were imminent" and rushed to meet the deadline.[613] It also submits that the prevailing political and economic circumstances are also relevant to the reasonableness of the Claimants' expectations.[614] The Respondent concludes that the "Claimants have utterly failed to meet their burden of proving their 'stability and predictability' and 'legitimate expectations' claims."[615]

B. NON-IMPAIRMENT

335. The Claimants' further claim on the merits is that the Respondent "impaired the Claimants' investments by acting unreasonably in violation of FET and Non-Impairment protection."[616] The Claimants disagree with the Respondent's two "threshold objections." As to the first objection relating to the entitlement of the two Cypriot claimants, Natland Group and GIHG, to non-impairment protection under the Cyprus-Czech Republic BIT, the Claimants acknowledge that "the Cyprus BIT does not expressly provide for Non-Impairment protection" but argues that "it is irrefutable that FET protection, which is expressly accorded by the Cyprus BIT, obliged the Czech Republic not to act unreasonably towards GIHG and Natland Group."[617]

336. As to the second objection that the Claimants cannot assert breach of non-impairment because there is no evidence that their investments were significantly impaired, the Claimants argue that they "suffered significant losses" when they sold their investments and the Measures had "serious negative effects on the Claimants' investments."[618] In support of their claim the Claimants present

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612 Respondent's Rejoinder, para. 613 (emphasis in original).

613 Hearing Transcript, Day 5, p. 134:13-18, *relying on* **CWS-Raška-1**, paras. 22-23; **CWS-Kunz-1**, paras. 88-92; **RER-[redacted]-2**, para. 7.11 fn. 169.

614 Hearing Transcript, Day 5, p. 134:3-10.

615 Respondent's Rejoinder, para. 617.

616 Claimants' Reply, para. 861.

617 Claimants' Reply, paras. 862-863. *See also* paras. 203 to 207 above.

618 Claimants' Reply, paras. 865-866.

the expert reports of [redacted] quantifying their losses.[619] They note that "any negative impact or effect" meets the definition of "impairment" according to *Saluka*.[620]

1. The Claimants' Arguments

337. The Claimants argue that the Respondent's conduct was unreasonable, thereby breaching the Cyprus-Czech Republic BIT. According to the Claimants, the Measures were "intrinsic[ally] unreasonable[]" due to "the withdrawal of the Czech Republic's undertakings to induce the investments and the alteration of the essential features of the Incentive Regime."[621] According to the Claimants, the Respondent gave "clear undertakings" to RES investors (including the Claimants) "which allowed it to attain its 8% target of electricity production from RES by 2010."[622] The Claimants submit that the Respondent "reneged on its commitments to the investors who had already invested based on those commitments" "when it was certain of achieving its goal."[623] Quoting from the *Charanne v. Spain* final award, the Claimants submit that "the existence of a guaranteed tariff throughout the life of the facility" is an essential characteristic of an existing regulatory framework and that any sudden and unpredictable elimination of essential characteristics would violate the principle of proportionality.[624]

338. The Claimants argue that the Measures are "the product of an utterly inconsistent behavior" by the Respondent towards the investors and in relation to its policy goal to promote RES.[625] In the Claimants' view, the Respondent acted inconsistently vis-à-vis the investors by first announcing that the RES Regime would change only for investments made after 1 January 2011 and then "abruptly chang[ing]" this to include investments made in reliance on the RES Regime from 1 January 2009 to 31 December 2010.[626] The Claimants note that the Respondent was aware of the increase in RES investments and that "[i]t is not credible that in few months the situation of

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619 Claimants' Reply, para. 1031, *referring to* Second Expert Report of [redacted] dated 4 May 2016 (hereinafter "**CER-[redacted]-2**"), Table 14 at para. 5.4.4 and para. 1040 *referring to* **CER-[redacted] 2**, Table 18 at para. 6.3.5.

620 Claimants' Reply, para. 866, *citing Saluka*,Partial Award, para. 458 (**Ex. CLA-52**).

621 Claimants' Reply, p. 299.

622 Claimants' Reply, para. 868.

623 Claimants' Reply, para. 868.

624 Claimants' Reply, paras. 871, 875, 877.

625 Claimants' Reply, para. 878.

626 Claimants' Reply, para. 879.

solar investments suddenly and unpredictably changed for the worse."[627] According to the Claimants, the Respondent also acted inconsistently with its long-term goals to promote RES.[628]

339. The Claimants note that the Parties agree that "investment tribunals commonly apply a two-prong 'reasonableness test' entailing an inquiry into whether (a) the State pursued a rational policy and (b) acted reasonably in its pursuit. If either of these elements is not present, the State's measure is unreasonable."[629] First, the Claimants do not agree that the Measures were "dictated by genuine concerns of 'windfall profits' or excessive costs on consumers," as advanced by the Respondent as being rational bases for the Measures.[630] The Claimants highlight that the cost of incentives per unit of electricity was lower in the Czech Republic than in many other EU states and that Czech electricity prices were 19% lower than the EU average in 2011.[631] Investor returns were also within the range considered reasonable by the Commission and therefore there was no overcompensation.[632] Second, even if the Respondent were found to have acted to further a rational policy, the Claimants argue that the Measures "fail the 'proportionality requirement' of the reasonableness test because they were adopted without due regard for their consequences for the Claimant[s]."[633] According to the Claimants, "proportionality concerns 'the appropriate correlation between the state's policy objective and the measure adopted to achieve it'" and "due regard for the consequences imposed on investors."[634] In this case, the Claimants argue that "the Solar Levy had practically no effect on the increase in electricity prices that it purported to cure" and "the Income Tax Exemption and the Shortened Depreciation cannot in any way be justified by the need to mitigate electricity prices."[635] Rather, the Claimants assert that the Measures placed

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627 Claimants' Reply, para. 881.

628 *See* Claimants' Reply, paras. 882-884.

629 Claimants' Reply, para. 885.

630 *See* Claimants' Reply, paras. 886-890.

631 Hearing Transcript (13 March 2017) 29:101, *referring to* Claimants Opening Statements slide 66 *citing* **CER-Compass** p. 70.

632 Hearing Transcript, Day 1, p. 102:3-9.

633 Claimants' Reply, para. 891.

634 Claimants' Reply, para. 892, *citing AES,* Award, para. 10.3.9 (**Ex. CLA-62**); *Micula*, Award, para. 525 (**Ex. CLA-3**); *Electrabel S.A. v. Hunga*ry, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 179 (**Ex. CLA-112**); *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 158 (**Ex. CLA-14**).

635 Claimants' Reply, paras. 893-894, *citing* Electricity Prices Study, pp. 11-12 (**Ex. C-110**).

"an unfair burden on the investors," and that their "disproportionate character . . . was enhanced by their abrupt enactment."[636]

340. Finally, even if the Measures were necessary in the circumstances due to the solar boom, the Claimants argue that "the 'solar boom' occurred only as a result of the Czech Republic's mismanagement of the Incentive Regime."[637] In the Claimants' view, the Respondent "cannot justify its damaging actions . . . on the grounds that they were necessary to right the consequences of problems of its own making."[638] To support this argument, the Claimants refer to Article 25.2(b) of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Draft Articles**"), according to which necessity cannot be invoked by a State to preclude wrongfulness of an act if "the State has contributed to the situation of necessity."[639] The Claimants dispute all the arguments advanced by the Respondent, noting that (a) the Respondent did not make a "good-faith mistake" in relation to the 5% Limit but a policy mistake;[640] (b) the "solar boom" was not unanticipated;[641] (c) the Respondent "cannot hide behind the excuse of the inherent slowness of the legislative process;"[642] and (d) it was not up to the investors "to act as regulators" and "make their own judgement as to whether the costs of the Incentive Regime would adversely affect the Czech Republic."[643] In particular, the Claimants point to the Czech police report of 2009, which concluded that the Respondent had enough information to react to the solar boom but failed to do so for political reasons. They also recall that at the outset the Czech Republic had decided to shoulder the burden of the incentives itself.[644]

341. The Claimants deny that they should have understood that the RES Regime was unstable, asserting that only the government had information on the overall market and the costs of the

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636 Claimants' Reply, para. 895, *citing Occidental*, Final Award, para. 163 (**Ex. CLA-28**).

637 Claimants' Reply, para. 896.

638 Claimants' Reply, para. 896.

639 Claimants' Reply, para. 897.

640 Claimants' Reply, para. 898, *referring to* Statement of Defense, para. 697.

641 Claimants' Reply, para. 899, *referring to* Statement of Defense, para. 696 and *citing* Statement of Claim, Sub-Section X.B; **CER-Compass**, paras. 6.78; 7.23-7.24, 7.58; Resolution of the Police of the Czech Republic of October 3, 2013, pp. 14-15 (**Ex. C-73**).

642 Claimants' Reply, para. 900.

643 Claimants' Reply, para. 901.

644 Hearing Transcript, Day 1, p. 105:1-11.

incentives.[645] The Claimants claim that "there was no windfall for the investors," and note that this was not a concern when the Measures were adopted – this reason only arose as an ex-post justification.[646] The Claimants posit that the Respondent had other solutions available but resorted to a "convoluted scheme" to reduce the fixed FiT because it knew that this was the only meaningful guarantee for investors and thus introduced a FiT reduction "dressed-up" as a (non-*bona fide*) tax.[647]

342. The Claimants also address the Respondent's "flawed" defenses. First, as to the Respondent's defense that the only relevant guarantee was the 15-year payback and 7% return, the Claimants counter that this intentionally confuses the main guarantee of the Act on Promotion, which was stability and the non-binding indicative parameters used by the ERO to fix the FiT.[648] Second, they address the Respondent's defense that the Claimants are still receiving the same revenues, when the grid operators withhold a percentage of the FiT revenues effectively reducing the revenues per unit of electricity below the amount set by the ERO.[649] The Claimants observe that this defense was based on the Respondent's implication that because the actual and counter-factual scenarios in [redacted] report had identical figures, there was no damage; which does not consider the economic effect.[650] Third, in response to the Respondent's defense that the solar boom could not be predicted, the Claimants point out that the ERO knew of this and the resulting capacity only slightly overshot the Respondent's own targets.[651] Fourth, in response to the defense that investors should have expected retroactive measures due to the system imbalance, the Claimants observe that investors had no warning that the system was out of balance in 2009 and in 2010 received clear reassurances that FiT reductions would only apply to plant connected in 2011.[652] Furthermore, the Respondent's own State-owned power company, CEZ, continued to invest in building PV capacity in 2009 and 2010.[653] Additionally, the Claimants argue that the

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645 Hearing Transcript, Day 1, pp. 16-17.

646 Hearing Transcript, Day 1, p. 18:3-13.

647 Hearing Transcript, Day 1, p. 21.

648 Hearing Transcript, Day 1, p. 53.

649 Hearing Transcript, Day 1, p. 54.

650 Hearing Transcript, Day 5, pp. 44-45.

651 Hearing Transcript, Day 1, pp. 55-57.

652 Hearing Transcript, Day 1, pp. 56-57.

653 Hearing Transcript, Day 1, p. 58.

retroactive Measures are an example of regulatory opportunism that is criticized in many quarters.[654]

343. The Claimants argue that there is no evidence to support the Respondent's defense that the extent of the boom and its consequences only became clear in the second half of 2010.[655] They argue that the Respondent could have implemented a moratorium on projects sooner, modified the Act on Promotion so the phasing-out strategy would kick in sooner by "simply calculating the lead time" as it did for large plants six months earlier.[656] The Claimants reject the Respondent's argument that it was the intervention of the solar lobby that prevented changes, arguing that it is not clear what this lobby did, and that there was no threat of lawsuits and the lobbying was legitimate.[657]

344. The Claimants respond to the Respondent's argument that "the state can make mistakes" as there is no standard of perfection under the FET, by distinguishing between "striv[ing] for perfection" and "systematically and negligently disregard[ing] warnings."[658] Furthermore, the government only considered lawsuits because it realized that it might be doing something it should not due to the expectations it created.[659]

345. Concerning the Respondent's claim that a 7% WACC was a reasonable rate of return and that returns of 8.4% and 11.4% were indicative of imbalance, the Claimants recall that the 7% return was indicative and not meant to be a cap on profits.[660] The Claimants also note that they were the second largest PV investors, which allowed them to realize economies of scale and efficiencies that their competitors could not.[661]

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654 Hearing Transcript, Day 1, p. 61-62 *referring to* Ex. Letter of January 11, 2011 from Ms. Hedegaard and Mr Oettinger (European Commissioners) to Mr Kocourek (Czech Minister of Trade and Industry) (**Ex. C-337**), 2020 Keep on Track "Policy paper on Retrospective Changes to RES Legislations and National Moratoria" (**Ex. C-387**); International Renewable Energy Agency CLEX-109,.

655 Hearing Transcript, Day 5, pp. 41-42 *referring to* 2005 CTU Study, study of the Czech Technical University (English Translation) p. 41 (**Ex. C-356**); Czech Police's Resolution (English Translation) p. 10 (**Ex. C-73**); Hearing Transcript, Day 2 p. 205:9-17. *See also* Claimants' Closing Statements, slide 40.

656 Hearing Transcript, Day 5, p. 42.

657 Hearing Transcript, Day 5, p. 43:3-12.

658 Hearing Transcript, Day 5, p. 43:15-21.

659 Hearing Transcript, Day 5, p. 44:1-7.

660 Hearing Transcript, Day 5, p. 45.

661 Hearing Transcript, Day 5, p. 46.

346. As to the Respondent's reliance on the Czech Constitutional Court's decision of May 2012 on the constitutionality of the Measures, the Claimants argue that the decisions of domestic courts cannot provide protection from violations of international law and investment tribunals have accepted that a declaration of constitutionality is not dispositive of the issues in an international arbitration.[662] The Claimants further argue that the Respondent's reliance on this domestic case is misplaced because the Court assessed legitimate expectations under a different standard than in international law, finding that there was no expropriation, which the Claimants do not plead in the present case.[663]

2. The Respondent's Arguments

347. The Respondent argues that the Claimants have not established that the Czech Republic violated the "non-impairment" obligation.[664] The Respondent recalls that the Cyprus-Czech Republic BIT, invoked by Claimants Natland Group and GIHG, does not contain a non-impairment clause and argues that "there is no basis for allowing GIHG or Natland Group to 'borrow' such a clause from the Netherlands BIT."[665] Accordingly, the Respondent submits that neither Natland Group nor GIHG can assert a non-impairment claim unless the Tribunal concludes that it has jurisdiction over the claims of Natland Group and GIHG under the ECT.[666] Even if Natland Group and GIHG "*could* advance 'non-impairment' claims, such claims would fail" because, according to the Respondent, the Claimants have not met "their burden of proving a breach of the so-called 'non-impairment standards.'" The Claimants have failed to demonstrate (a) "that the Taxation Measures resulted in some form of prohibited impairment;" and (b) "that the Taxation Measures were arbitrary or unreasonable within the meaning of the ECT and the BIT."[667]

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662 Hearing Transcript, Day 1, p. 106:2-25 *citing Teco Gutemala Holdings v. The Republic of Guatemala,* Award, ICSID Case No. ARB/10/17, 19 December 2013, para. 517 (**Ex. CLA-75**); *United States of America v. Italy* (ELSI case), ICJ Judgement of 20 July 1989, para. 73 (**Ex. CLA-69**); May 2012 Constitutional Court Judgment, (**R-29**). *See also* Claimants'Opening Statements, slides 109-111.

663 Hearing Transcript, Day 1, p. 107:1-25.

664 Respondent's Rejoinder, para. 618, *referring to* Statement of Claim, paras. 379, 470-498, and *citing* ECT Article 10(1) (**Ex. RLA-4**); Netherlands-Czech BIT, Article 3(1) (**Ex. C-4**); Luxembourg-Czech BIT, Article 2(3) (**Ex. C-5**); *European Media Ventures S.A. v. The Czech Republic*, UNCITRAL, Award on Jurisdiction, 15 May 2007, para. 12 (**Ex. RLA-141**). The Respondent notes that Paragraph 12 of RLA-141 contains an English translation of Article 2(3) of the Luxembourg-Czech Republic BIT and, that "[a]lthough Claimants have submitted an English translation of the Luxembourg BIT as Exhibit C-62, that translation does not precisely accord with the original French text of Article 2(3)" (submitted as **Ex. C-5**).

665 Respondent's Rejoinder, para. 619

666 Respondent's Rejoinder, para. 619. *See also* Respondent's Rejoinder, paras. 460-464.

667 Respondent's Rejoinder, para. 620.

348. First, the Respondent submits that the "Claimants have not established that the Czech Republic impaired the management, maintenance, use, enjoyment, or disposal of their alleged investments."[668] The Respondent asserts that "it is not just '*any* negative impact or effect' that implicates the non-impairment standard."[669] Instead, in the Respondent's view, "there must be a '*significant*' impact or effect," which it describes as "a high bar, not met by the mere imposition of a tax, or the simple denial of a tax exemption."[670] Applying this to the present case, the Respondent argues that the "Claimants have not demonstrated any effect or impact that rises to the level of 'impairment.'"[671] Relying on *Perenco*, the Respondent notes that the "Claimants were free to use – and in fact used – the purported 'investments' to generate substantial revenues."[672] The Respondent further argues that "the solar plants at issue continue to earn returns that are above the benchmark of 'adequate return' established under the Act on Promotion, and Claimants have failed to demonstrate that such returns are inadequate for a regulated investment."[673] In the Respondent's view, the fact that the Claimants allegedly "desired higher profits than they obtained . . . does not demonstrate 'impairment.'"[674]

349. According to the Respondent, even if the "Claimants *could* demonstrate 'impairment,' Claimants still would have to prove that such impairment relates to the management, maintenance, use, enjoyment, or disposal of the purported investments," based on "the plain text of the relevant ECT and BIT provisions and the interpretive principles of *effet utile* and *expressio unius est exclusio alterius*."[675] The Respondent asserts that the Claimants have not attempted to argue that "the Taxation Measures impaired one of the relevant activities."[676] Instead, according to the

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668 Respondent's Rejoinder, p. 296.

669 Respondent's Rejoinder, para. 624, *referring to* Claimants' Reply, para. 866, *citing Saluka*, Partial Award, para. 458 (emphasis in original) (**Ex. CLA-52**).

670 Respondent's Rejoinder, para. 624, *citing Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, 30 November 2012, para. 7.152 (**Ex. CLA-4**); Kenneth J. Vandevelde, Bilateral Investment Treaties (Oxford University Press, 2010), p. 215 (**Ex. RLA-40**); *Occidental,* Final Award, paras. 2-3, 161 (**Ex. CLA-28**); *Perenco*, Remaining Issues of Jurisdiction and Liability, paras. 596-599 (**Ex. RLA-219**). *See also* Statement of Defense, para. 675.

671 Respondent's Rejoinder, para. 625.

672 Respondent's Rejoinder, para. 625, *referring to* Claimants' Reply, para. 865.

673 Respondent's Rejoinder, para. 625.

674 Respondent's Rejoinder, para. 625, *referring to* Claimants' Reply, para. 865.

675 Respondent's Rejoinder, para. 626, *citing Perenco*, Remaining Issues of Jurisdiction and Liability, para. 596 (**Ex. RLA-219**); Kenneth J. Vandevelde, Bilateral Investment Treaties (Oxford University Press, 2010), p. 215 (**Ex. RLA-40**); ECT, Article 10(1) (**Ex. RLA-4**); Luxembourg-Czech BIT, Article 2(3) (**Ex. C-5)**; Netherlands-Czech BIT, Article 3(1) (**Ex. C-4**); *Saluka*, Partial Award, para. 461 (**Ex**. **CLA-52**).

676 Respondent's Rejoinder, para. 627.

Respondent, the Claimants' case rests on "the vague and general contention that, as a result of the Taxation Measures, their purported investments suffered 'negative effects,'" which, along with the Claimants' argument that the Measures reduced the respective rates of return of the solar plants, it asserts "is not enough."[677]

350. Second, the Respondent submits that its conduct was not arbitrary or unreasonable. As to the applicable standard for establishing that actions are "arbitrary" or "unreasonable," the Respondent argues that the terms used in the relevant treaties – "unreasonable" in the ECT and the Netherlands-Czech Republic BIT and "illegitimate" in the Luxembourg-Czech Republic BIT[678] – "impose a standard that requires manifest impropriety" or requires that the State has "acted capriciously (*i.e.*, without justification or reason)."[679] In the Respondent's view, the "Claimants have failed to show that the Taxation Measures were driven by impropriety or caprice."[680] Citing *TECO v. Guatemala*, the Respondent notes the Parties' agreement that a two-part test is applied to determine "whether the State's conduct has *objectively* been arbitrary:" (a) "whether there was a rational policy objective underlying the challenged measures;" and (b) "whether the challenged measures were reasonably correlated to such objective."[681] In undertaking this assessment, the Respondent suggests that the Tribunal:

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677 Respondent's Rejoinder, para. 627, *referring to* Claimants' Reply, para. 866, and *citing Occidental,* Final Award, para. 161 (**Ex. CLA-28**); *Perenco* , Remaining Issues of Jurisdiction and Liability, paras. 597-599 (**Ex. RLA-219**); *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 458 (**Ex. CLA-130**).

678 ECT, Article 10(1) (**Ex. RLA-4**); Netherlands-Czech BIT, Article 3(1) (**Ex. C-4**); Luxembourg-Czech BIT, Article 2(3) **(Ex. C-5**); *European Media Ventures S.A. v. The Czech Republic*, UNCITRAL, Award on Jurisdiction, 15 May 2007, paras. 12, 74 (**RLA-141**).

679 Respondent's Rejoinder, para. 630, *citing Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 318 (**Ex. RLA-177**); *Enron*, Award, para. 281 (**Ex. CLA-56**); *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 184 (**Ex. CLA-60**); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 303 **(Ex. RLA-12**); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 263 (**Ex. CLA-108**); *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras. 7.4.22, 7.4.31, 7.4.33, 7.5.8 (**Ex. CLA-44**), and *referring to* Statement of Claim, para. 402.

680 Respondent's Rejoinder, para. 631.

681 Respondent's Rejoinder, para. 632, *citing Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, para. 621 (**Ex. CLA-75**), and *referring to* Statement of Claim, paras. 476-478; Statement of Defense, paras. 680-682; Claimants' Reply, para. 885 (emphasis in original).

be alert to potential hindsight bias;[682] consider the circumstances prevailing when the Taxation Measures were adopted;[683] resist any urge to evaluate the Czech Republic's conduct on the basis of whether its objectives were in fact achieved;[684] bear in mind that its role is not to second-guess the State or to take a view on whether the State's policies and programs are "good" or "bad;"[685] recall that State authorities "must make often difficult, multi-variable decisions that do not necessarily admit of clear right or wrong answers;"[686] and consider that "[s]ome attempt to balance the interests of the various constituents within a country, some measure of inefficiency, a degree of trial and error, [and] a modicum of human imperfection must be overstepped before a party may complain of a violation of a BIT."[687]

351. The Respondent submits that the Measures are "reasonable" because they were "appropriately correlated to a rational policy objective."[688] As regards the first part of the two-part test for "reasonableness," the Respondent notes that the Parties agree on the applicable standard as stated by the *AES* tribunal, namely a policy will be considered "rational" if it has been adopted "following a logical (good sense) explanation and with the aim of addressing a public interest matter."[689] The Respondent notes that the Measures "were promulgated in the context of a severe economic and budgetary crisis relating to the global economic meltdown of 2008–09."[690] The Respondent states that the "fiscally responsible" and "rational" objective of repealing the Income Tax Holiday and modifying the Original Depreciation Provisions "was to try to shore up the national budget and avoid the fate suffered by Greece and other European countries whose budget deficits had soared to an unsustainable level."[691] The Respondent notes that the Income Tax

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682 Respondent's Rejoinder, para. 633, *citing Gemplus S.A. et al. v. Mexico*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, paras. 6-26 (**Ex. CLA-129**); Daniel Kahneman, Thinking, Fast and Slow (Farrar, Straus, and Girous, 2011), p. 218 (**Ex. RLA-238**); Christopher R. Drahozal, A Behavioral Analysis of Private Judging, Law and Contemporary Problems, Vol. 67:105, 108 (2004) (**Ex. RLA-239**).

683 Respondent's Rejoinder, para. 633, *citing Perenco*, Remaining Issues of Jurisdiction and Liability, paras. 582, 591 (**Ex. RLA-219**); *Charanne B.V. Construction Investments S.A.R.L. v. The Kingdom of Spain*, SCC Case No. 062/2012, Arbitration Institute of the Stockholm Chamber of Commerce, Final Award, 21 January 2016, para. 536 (**Ex. CLA-66**).

684 Respondent's Rejoinder, para. 633, *citing Mesa Power Group, LLC v. Canada*, UNCITRAL, Award, 24 March 2016), paras. 573, 587 (**Ex. RLA-240**).

685 Respondent's Rejoinder, para. 633, *citing Invesmart B.V. v. Czech Republic,* UNCITRAL, Award, 26 June 2009, para. 454 (**Ex. RLA-241**); *Mesa Power Group, LLC v. Canada*, UNCITRAL, Award, 24 March 2016, para. 570 (**Ex. RLA-240**).

686 Respondent's Rejoinder, para. 633, *citing Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, para. 484 (**Ex. RLA-241**).

687 Respondent's Rejoinder, para. 633, *citing Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Arbitration Institute of the Stockholm Chamber of Commerce, Partial Award, 27 March 2007, para. 272 (**Ex. CLA-7**).

688 Respondent's Rejoinder, para. 629.

689 Respondent's Rejoinder, para. 635, *citing AES,* Award, para. 10.3.8 (**Ex. CLA-62**), and *referring to* Statement of Claim, paras. 476-478; Statement of Defense, paras. 680-682; Claimants' Reply, para. 885.

690 Respondent's Rejoinder, para. 637.

691 Statement of Defense, para. 51; Respondent's Rejoinder, para. 637.

Holiday was "one of many austerity measures that the Czech Republic adopted at the time,"[692] and that "withdrawal of tax exemptions (generally) was a major government priority at the time."[693] As to the Solar Levy, the Respondent argues that it "was adopted as part of a package of measures which (1) introduced a State budget subsidy to limit the rise in consumer electricity prices caused, in large part, by the solar boom, and (2) sought to offset this new budget expenditure with new tax revenues."[694] According to the Respondent:

> The Solar Levy was specifically targeted at those [photovoltaic] installations that received a FIT that — due to the constraint imposed by the 5% Limit in the context of rapid price decreases — was originally set without applying the adequate return methodology. Indeed, it was calibrated to reduce returns to a level that was more in line with the methodology.[695]

352. The Respondent concludes that "[t]he objectives of reducing excessive profits, balancing the budget, and sheltering consumers from excessive electricity price rises are eminently rational."[696] The Respondent also disagrees with the Claimants' arguments that the incentives did not impose an excessive burden on customers and that there were no excessive profits.[697] It refers to the expert report of [redacted] in which he considers the profits of Czech solar power installations economically excessive and unjustified in a subsidy-based regime.[698]

353. As regards the second part of the two-part test for "reasonableness," the Respondent notes that a "measure is 'reasonable' when there is an appropriate correlation between the state's public policy objective and the measures adopted to achieve it," and that this includes "the nature of the measure and the way it is implemented."[699] The Respondent argues that this "does not have to do with

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692 Statement of Defense, paras. 125-126; Respondent's Rejoinder, para. 637, *citing* Nečas Government Policy Statement, pp. 4, 5, 6, 7, 37 (**Ex. R-179)**; **RWS-Minčič**, para. 3; Explanatory Report to Draft Act No. 346/2010 Coll., 26 October 2010, pp. 27, 29, 50 (**Ex. R-114**); P. Nečas, Statement to the Constitutional Court, 24 October 2011, p. 14 of the English translation (**Ex. R-112**); Czech Ministry of Finance, "Detailed Statement on the Proposal to Initiate Proceedings for Partial Annulment of Act No. 402/2010 Coll. and Act No. 346/2010 Coll.," paras. 210-212 (**Ex. R-464**).

693 Respondent's Rejoinder, para. 643.

694 Respondent's Rejoinder, para. 638.

695 Respondent's Rejoinder, para. 638.

696 Respondent's Rejoinder, para. 639, *citing* ECT, Article 6 (**Ex. RLA-4**); *AES,* Award, paras. 10.3.31, 10.3.34 (**Ex. CLA-62**).

697 Respondent's Rejoinder, para. 639, *referring to* Claimants' Reply, paras. 887, 889. *See also* Respondent's Rejoinder, paras. 113-159; **RER-[redacted] 2**.

698 Respondent's Rejoinder, para. 147, *referring to* **RER-[redacted] 1**, paras. 6.52.53; **RER-[redacted] 2**, paras. 7.20-7.21, 7.28.

699 Respondent's Rejoinder, para. 640, *citing*, *AES*, Award, para. 10.3.9 (**Ex. CLA-62**).

whether a measure's impact on investors outweighs its benefits to the State."[700] The Respondent submits that the Measures were "reasonable" because "the Solar Levy was calibrated precisely to respect the return parameters of the Act on Promotion and the Technical Regulation" – by "preserv[ing] the 15 year payback for virtually all plants and a 7% return for plants that meet the benchmark technical parameters" – while partly alleviating "the negative budgetary impact of additional RES support costs, which were predominantly caused by newly constructed solar installations."[701] In response to the Claimants' argument that the Solar Levy altered the "essential features" of the RES Regime, the Respondent asserts that (a) the Claimants (wrongly) "presume an entitlement to legislative and regulatory stasis"; (b) their argument is "irrelevant on the facts because the Czech Republic continues to have a fixed feed-in tariff and that tariff applies throughout the facility's lifetime;" and (c) "the Constitutional Court has also specifically found that the essential features of the RES Scheme have *not* been altered by the Solar Levy."[702]

354. The Respondent further recalls that "the Original Depreciation Provisions were never intended as a benefit or incentive for solar producers, and they never *specifically* created a shortened depreciation period for solar panels.[703] Finally, the Respondent argues that "it was entirely foreseeable that the depreciation period for solar panels could, and even would, change."[704]

355. The Respondent asks the Tribunal to bear in mind four factors in evaluating the Claimants' allegation that the Respondent acted unreasonably. First, "the exercise of the State's regulatory and administrative power has a presumption of legitimacy" and therefore the Claimants bear the burden of proving that the Measures were unreasonable.[705] Second, "the reasonableness enquiry is not simply whether a policy decision is right or wrong." Reasonableness is different from the merits (*i.e.*, the advisability of the policy) of the measure and States often make difficult and

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700 Statement of Defense, paras. 688-689; Respondent's Rejoinder, para. 640, *referring to* Claimants' Reply, paras. 892-893.

701 Respondent's Rejoinder, para. 641, *citing* **RWS-Minčič**, paras. 15-17.

702 Respondent's Rejoinder, para. 646, *citing* May 2012 Constitutional Court Judgment, para. 68 (emphasis in original) (**Ex. R-29**).

703 Respondent's Rejoinder, para. 644 (emphasis in original); May 2012 Constitutional Court Judgment, (**Ex. R-29**).

704 Statement of Defense, paras. 53-54; Respondent's Rejoinder, para. 644, *citing* Czech Technical University (Faculty of Electrical Engineering) study, "Technical and Economic Parameters and the Proposal of Purchase Prices of Electricity for Individual Categories of Renewable and Secondary Sources — stage 2," September 2007, p. 10 (**Ex. R-27**); "Assumptions for Purchase Prices Calculations Methodology," Presentation, 2 August 2007, p. 5 (emphasis in original) (**Ex. R-22**).

705 Hearing Transcript, Day 1, p. 235:10-14.

complex decisions that do not have a right or wrong answer.[706] Third, "it is no proof of unreasonableness that other States have taken different approaches."[707] Finally, "states are entitled to a certain measure of deference in their policy decisions."[708] The Respondent proffers that it tried to establish a regulatory system, in good faith, that worked for all stakeholders and sought to rectify an imbalance in the system. The Claimants' argument that increasing the budget deficit was an alternative is unacceptable to the Respondent: "[a]n investment treaty cannot require a state to go into debt simply to avoid impacting foreign investors."[709]

356. In response to the Claimants' argument that "the 'solar boom' occurred only as a result of the Czech Republic's mismanagement of the Incentive Regime," the Respondent explains that, rather than resulting from mismanagement, "the problems that the Taxation Measures were intended to fix arose:"

> because the specific terms of the Act on Promotion prevented ERO from resolving the problem directly and early efforts to amend that Act, even in a purely prospective manner, had been met with threats of investment arbitration. Acting in good faith, the Czech Republic opted to delay abolition of the 5% Limit until 2011 to avoid affecting on-going investment projects. Unfortunately, numerous investors —including Claimants—took advantage of the delay to initiate new projects, thereby greatly exacerbating the crisis and leading to an unsustainable increase in electricity costs for Czech consumers.[710]

357. As to the Claimants' argument that the Czech Republic could have acted sooner to cut support, the Respondent counters that it initially decided to proceed with less drastic measures because it did not realize the scale of the problem, but this "cannot be understood as a promise that more drastic measures would not be required if the situation deteriorated."[711] The Respondent argues that it did not ask solar investors to foresee the Solar Levy, but that they should have foreseen some kind of clawback when the government had expressly warned that the returns were contrary to the intent of the law; and the regulatory risk resulting from overgenerous tariffs that caused the bubble was known.[712]

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706 Hearing Transcript, Day 1, p. 235:15-24.

707 Hearing Transcript, Day 1, p. 236:19-21.

708 Hearing Transcript, Day 1, p. 237:20-21.

709 Hearing Transcript, Day 1, pp. 237-238.

710 Respondent's Rejoinder, para. 650, *referring to* Claimants' Reply, para. 896; **RER-[redacted] 2**, paras. 6.45, 6.56.

711 Hearing Transcript, Day 1, p. 154.

712 Hearing Transcript, Day 1, pp. 154-156 *referring to* Mlada Fronta "Wind plants fight for connection" (English Translation) p.1 (**Ex. R-200**); EMIS "Solar boom is slightly excessive" p. 3 (**Ex. R-143**); EMIS "Ministry of Industry and Trade wants to reduce support of power plants" 25 August 2009 (English

358. In respect of the Claimants' argument that the Czech Republic could just reduce the FiT, the Respondent argues that it wanted a more balanced measure and a FiT reduction was less suited to reducing the budget deficit: a temporary problem that affected only some producers of one RES source.[713] It was also impossible to implement before the year-end as it required complex legislative changes.[714] The Respondent contends that "all four taxation measures combined reduced overall average returns of Claimants' power plants from 12.9% to 10.28%," which is a "mild adjustment."[715]

359. Finally, contrary to the Claimants' arguments that the Measures were unprecedented, bad practice, and ineffective, the Respondent submits that they "were effective, reasonable from an economic perspective, and comparable to actions taken in other countries, such as Germany and the United Kingdom."[716] The Respondent also submits that these arguments have no "bearing on the reasonableness analysis."[717] In response to the Claimants' reference to Article 25.2(b) of the ILC Draft Articles, the Respondent notes that it has not invoked this doctrine in defense of the Measures.[718]

360. The Respondent concludes that the Tribunal must "dismiss Claimants' claims for breach of the 'non-impairment' clauses of the ECT and Luxembourg and Netherlands BITs, and for breach of the fair and equitable treatment clauses of the ECT and the Netherlands and Cyprus BITs"

Translation), p.2 (**Ex. R-139**); Zprávy "Libor Matira: photovoltaics can be profitable" 10 August 2010 (**Ex. R-357**). *See also* Respondent's Opening Statements, slides 43-44.

[713] Hearing Transcript, Day 1, p.167:2-19.

[714] Hearing Transcript, Day 1, p.167:20-23.

[715] Hearing Transcript, Day 1, p.169:13-16.

[716] *See* Respondent's Rejoinder, paras. 651-657, *referring to* Claimants' Reply, paras. 271, 304, 889.

[717] *See* Respondent's Rejoinder, paras. 652-657, citing *Philip Morris v. Uruguay*, Award, para. 430 (**Ex. RLA-230**); *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 180 (**Ex. CLA-112**); *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, para. 459 (**Ex. RLA-241**); *Micula*, Award, para. 825 (**Ex. CLA-3**); *Saluka*, Partial Award, para. 411 (**Ex. CLA-52**); *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 162 (**Ex. CLA-53**); *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Arbitration Institute of the Stockholm Chamber of Commerce, Partial Award, 27 March 2007, para. 272 (**Ex. CLA-7**); *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 261 (**Ex. RLA-41**); *Sempra Energy International v. The Argentine Republic,* ICSID Case No. ARB/02/16*,* Award, 28 September 2007, para. 318 (**Ex. RLA-177**); *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, 30 November 2012, para. 8.35 (**Ex. CLA-4**); *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, paras. 454, 462, 501 (**Ex. RLA-241**); *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 292 (**Ex. RLA-245**); *Mesa Power Group, LLC v. Canada*, UNCITRAL, Award, 24 March 2016, para. 587 (**Ex. RLA-240**); *Philip Morris v. Uruguay*, para. 409 (**Ex. RLA-230**).

[718] Respondent's Rejoinder, para. 649.

because, in the Respondent's view, the "Claimants have failed to prove that the Taxation Measures impaired the management, maintenance, use, enjoyment, or disposal of their purported investments or that they constituted arbitrary or unreasonable measures."[719]

C. EU STATE AID RULES

1. The Claimants' Arguments

361. The Claimants argue that (a) the Respondent's about-face on whether the incentives for RES producers constitute State aid is a tactic;[720] (b) the incentive regime they relied upon did not constitute State aid, even after the amendments in 2010 and 2012, which in any case were enacted after the Claimants' investments;[721] (c) "[i]n the alternative, even if they did constitute State aid," "they were compatible with the applicable Environmental [Aid] Guidelines;"[722] (d) "should the Measures be found to be incompatible with State aid," the Claimants can "rely on the EU law principle of legitimate expectations and would not be subject to any recovery;"[723] and (e) the enforcement issues after the *Micula* award will "not materialize" in this case and should not concern the Tribunal.[724]

362. The Claimants argue that the Respondent's notification of December 2014 to the Commission regarding RES installations connected before 2013 was tactical. They recall that State aid concerns over the Czech RES incentives regime were first raised in a December 2003 complaint to the Commission about the draft Act on RES Promotion.[725] In July 2004 the Commission informed the complainants that it did not consider the proposed incentive scheme to be State aid.[726] Even after the implementation of the Act on RES Promotion, the Czech Republic continued

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[719] Respondent's Rejoinder, para. 658.

[720] Claimants' Reply, para. 412.

[721] Claimants' Reply, para. 413.

[722] Claimants' Reply, para. 414.

[723] Claimants' Reply, para. 415.

[724] Claimants' Reply, para. 416.

[725] Claimants' Reply, para. 418, *referring to* 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 of 16 December 2003 (**Ex. C-69**).

[726] Claimants' Reply, para. 418, *referring to* Letter from the Commission to EUROSOLAR of 27 July 2014, p. 1 (**Ex.C-70**).

to assure the Commission that its RES incentive scheme did not constitute State aid.[727] The Claimants argue that these explanations "fully satisfied the [Commission], which never raised objections to the incentives set forth by the Act on [RES] Promotion."[728] It was only after amendments to the Act in 2010 that the Commission raised concerns, because the funding mechanism was changed "to a hybrid one involving direct use of State resources."[729] The Claimants note that in 2012 the New RES Act was adopted and notified to the Commission (*ex post*), which issued a decision in June 2014, that financial support under the new Act was State aid, yet compatible with the internal market under the 2008 Environmental Aid Guidelines.[730] The Claimants allege that the Respondent's U-turn and "insistence on notifying something the [Commission] had already examined" is a tactic in this arbitration and in bad faith.[731] They argue that Czech officials lobbied the Commission to reopen the case in respect of installations connected to the grid before 2013, despite the Commission's disinterest in doing so.[732] They further argue that their suspicions are confirmed by the statement of a government Minister that the Commission "took no decision and sent a signal that we should not go on with the notification. But we, in order not to undermine the position of the Finance Ministry in solar arbitrations, in which CZK 20 billion is at stake, decided to demand the notification just the same."[733]

363. Relying on the *PreussenElektra* judgment of the European Court of Justice (now CJEU), the Claimants argue that the Act on RES Promotion did not constitute State aid because "the funding mechanism did not involve State resources, either directly or indirectly."[734] The Claimants maintain that "it is simply not true," as Respondent argues, that *PreussenElektra* has been

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727 Claimants' Reply, para. 420, *referring to* Czech Republic's reply to the Commission's letter of 3 April 2009, pp. 2-4 (**Ex. C-357**).

728 Claimants' Reply, para. 421.

729 Claimants' Reply, para. 422. *See also* Claimants' Reply, para. 205.

730 Claimants' Reply, para. 423, *referring to* Commission's Communication of May 8, 2012 on EU State Aid Modernisation (**Ex. R-83**).

731 Claimants' Reply, paras. 425, 429, 432.

732 Claimants' Reply, paras. 426-428, *referring to* Minutes of a meeting between the Czech Republic and the EC's DG Competition of 21 October 2014, p.3 (**Ex. C-434**).

733 Claimants' Reply, para. 430, *referring to* Mlada fronta daily's article of 18 November 2015, "Vitásková sulks: J. Mládek urges ERÚ boss to grant subsidy for renewables" (Claimants' emphasis removed) (**Ex. C-380**).

734 Claimants' Reply, para. 435, referring to *PreussenElektra AG v. Schleswag AG*, ECJ, Case C-378/98, 13 March 2001, (hereinafter "**PreussenElektra**") (**Ex. CLA-1**).

overtaken by subsequent judgements.[735] They point to the statement of their expert, [redacted] that: [736]

> The basic principle remains that an economic advantage benefiting certain undertakings does not constitute State aid within the meaning and scope of Article 107(1) TFEU where the advantage in question is not financed through State resources but is instead financed by private undertakings pursuant to a purchase obligation imposed by the State.

Based on this principle, [redacted] finds that the funding mechanism under the Act on RES Promotion "does not give rise to State aid" because it "does not involve the use of State resources."[737] With regard to the FiT, "'the only financial resources that are used in purchasing electricity from producers . . . are those of the grid and transmission system operators.'" Thus, the Claimants argue that there was no transfer of State resources within the meaning of Article 107(1) of the TFEU as interpreted by the *PreussenElektra* criterion because the grid and transmission system operators paid from their own resources.[738] This funding mechanism also remained unaffected by the ERO's implementing regulations which merely identified factors to be considered in fixing the levels.[739]

364. As to the Respondent's claims on the effects of Act No 402/2010 and the New RES Act, the Claimants argue (a) that the Respondent "disregard[s] the fundamental differences" between the new legislation and "the mechanisms provided for under the original Act on [RES] Promotion;"[740] (b) that the beneficiaries of aid under the new laws "were not the RES producers, but the transmission and grid system operators;"[741] and (c) even then these new laws are not relevant to the case at hand, because they are not the ones under which the incentives were granted to the Claimants."[742] Relying on [redacted] opinion, the Claimants argue that the introduction of Act 402/2010 did not alter the relationship between the grid operators and consumers, who were now invoiced the costs of the incentives reduced by the amounts the operators received from the State

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735 Claimants' Reply, paras. 436-437, *referring to* Statement of Defense, para. 312; **RER-[redacted] 1**, paras. 24 ff.

736 Claimants' Reply, para. 438; **CER-[redacted]** para. 7 (Claimants' emphasis added).

737 Claimants' Reply, para. 439; **CER-[redacted]** para. 74 (Claimants' emphasis removed).

738 Claimants' Reply, para. 441.

739 Claimants' Reply, para. 441; **CER-[redacted]** para. 78.

740 Claimants' Reply, para. 445 *referring to* Statement of Defense, para. 319; **RER-[redacted] 1**, para. 23.

741 Claimants' Reply, para. 446.

742 Claimants' Reply, para. 444.

budget.[743] The subsidy was not paid to the producers.[744] The funding mechanism under the New RES Act and the Act on RES Promotion also "differs in material respects."[745] Green Bonuses are now paid directly by the State-owned company OTE to RES producers and OTE also pays the difference between the FiT and the market price to transmission and grid system operators.[746] This produces a complicated matrix of payments, some of which may be classified as State resources.[747] However, insofar as the purchasing agreements between the RES producers and mandatory purchasers are at above-market prices, any economic advantage obtained by the producers remains funded by private resources and therefore is not State aid under the *PreussenElektra* standard.[748] Finally, the New RES Act is irrelevant as it was introduced well after the Claimants' investments and their plants that are the subject of this arbitration continue to receive payments under the amended Act on RES Promotion.[749]

365. In their Reply, the Claimants submitted arguments that even if the Act on RES Promotion constituted State aid, it would be found compatible under the applicable Environmental Aid Guidelines.[750] Those submissions were overtaken by the Commission's Decision on the conformity of the incentives granted by the Act on RES Promotion to photovoltaic power installation commissioned before January 2013 (the "**Decision**").[751] The Claimants submitted additional comments arguing that the Commission's Decision "completely debunk[s] the Respondent's State aid defence in these proceedings."[752] They posit that the Respondent's request that the Tribunal "declare that, but for the Measures, the incentives granted would be incompatible State aid," goes against the Decision.[753] In the Claimants' estimation, the Commission decided that the Act on RES Promotion (a) was compatible with EU State aid rules;[754] and (b) "impli[citly]

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743 Claimants' Reply, para. 449 *relying on* **CER-[redacted]** para. 90.

744 Claimants' Reply, paras. 449-450 *relying on* **CER-[redacted]** para. 91.

745 Claimants' Reply, para. 452 *relying on* **CER-[redacted]** para. 92 ff.

746 Claimants' Reply, para. 453 *referring to* s.12 New RES Act (**Ex. C-39**).

747 Claimants' Reply, para. 454 *relying on* **CER-[redacted]** paras. 106-107.

748 Claimants' Reply, para. 456.

749 Claimants' Reply, para. 457; **CER-[redacted]** para. 109.

750 Claimants' Reply, paras. 462-471.

751 Decision (**Ex. R-367**).

752 Claimants' State Aid Comments, para. 4.

753 Claimants' State Aid Comments, para. 33

754 Claimant's State Aid Comments, para. 11.

endorsed the reasonableness of the returns that photovoltaic producers would have achieved absent the Measures."[755]

366. The Claimants note that although the Commission wrongly characterized the incentives granted to RES producers as State aid, it "did not conclude . . . that the incentives would have been incompatible State aid" without the Measures, and the effect of Solar Levy "was not central to [the Commission's] assessment of compatibility."[756] Notably, "the range of returns approved by the [Commission] [6.3% – 10.6%] essentially implies that the incentives initially granted to photovoltaic producers . . . would be perfectly compatible with the internal market."[757] The Decision approves returns above the 7% regulatory WACC and, in particular, approves a 10.6% return for comparable biogas producers.[758] The attainable return for photovoltaic installations without the Measures is also in line with the 10-13% returns that the Commission considers reasonable in the RES sector in several EU countries.[759]

367. The Claimants argue that even if the Commission holds that payments under the Act on RES Promotion amounted to illegal State aid, they can still rely on the protection of the principle of legitimate expectations.[760] This is a fundamental principle of EU State aid law, extending to a situation where the EU authorities have given assurances, regardless of the form of communication, 'information that is precise, unconditional and consistent and comes from an authorised and reliable source constitutes such assurance."[761] The Claimants recall that the Commission's 27 July 2004 decision, relying on *PreussenElektra*, concluded that the draft Act

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755 Claimants' State Aid Comments, para. 11.

756 Claimants' State Aid Comments, para. 11.

757 Claimants' State Aid Comments, para. 20. *See also* Claimants' State Aid Comments, para. 16 *referring to* the Decision, para. 46, Table 3 (**Ex. R-367)**.

758 Claimant's State Aid Comments, paras. 21-22.

759 Claimants' State Aid Comments, para. 23, *referring to* European Commission (2009) State Aid No. 414/2008 – UK Renewables Obligation – Introducing of a banding mechanism, CLEX-21, Table 6, para. 59; European Commission (2009) State Aid N 143/2009 – Cyprus – Aid scheme to encourage electricity generation from large commercial wind, solar, photovoltaic systems and biomass, CLEX-22, paras. 67, 68, 71; European Commission (2011) State aid SA. 33134 2011/N – RO- Green certificates for promoting electricity from renewable sources, Annex VII to **CER-** Table 5, para. 33.

760 Claimants' Reply, para. 472

761 Claimants' Reply, para. 472, *referring to* **CER-** para. 149.

on RES Promotion did not constitute State aid.[762] Based on that Commission decision, even the Respondent consistently took the same position.[763]

368. The Claimants disagree with the Respondent's argument that the 2004 Decision "(a) was not directed to the Claimants; (b) cannot be considered a formal approval decision; and (c) did not concern the Act on Promotion as subsequently amended, but a draft of that Act."[764] First, Claimants argue, one need not be a direct addressee of a pronouncement to rely on the legitimate expectations, which will arise where the Commission "has taken a decision not to raise objections to a measure or has declared the aid compatible with the internal market and that decision is known to other third parties."[765] The Claimants allege that Commission's decision was widely known in the RES sector, which is sufficient for the Claimants' legitimate expectations.[766] Second, although later overruled by the Court of Justice of the European Union ("**CJEU**"), in 2004 the Commission's practice was to consider a file closed when it rejected a complaint and this "constituted a formal decision to the effect that the proposed measure did not constitute State aid."[767] Third, while the Commission's decision was based on a draft of the Act on RES Promotion, the eventual funding mechanism was unchanged and any additional measures introduced after the Claimants' investments does "not affect the way in which the Claimants were entitled to understand the original measures."[768] They conclude that the 2004 decision was "precise, unconditional and consistent," sufficient to create the legitimate expectation that the funding scheme of the Act on RES Promotion did not constitute State aid.[769]

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762 Claimants' Reply, para. 474, *referring to* Letter from the Commission to EUROSOLAR of 27 July 2014, p. 2 (**Ex. C-70**).

763 Claimants' Reply, para. 475, *referring to* **RER-[redacted] 1**, para. 113.

764 Claimants' Reply, para. 476; **RER-[redacted]-1**, paras. 58-59.

765 Claimants' Reply, para. 478 *referring to* Case C-521/06P, *Athinaiki Techniki v. Commission EU*:C:2008:422, Annex X to **CER-[redacted]**

766 Claimants' Reply, para. 478 *referring to* **CER-[redacted]** para. 153.

767 Claimants' Reply, para. 479 *referring to* **CER-[redacted]** para. 152.

768 Claimants' Reply, para. 480 *referring to* **CER-[redacted]** para. 154.

769 Claimants' Reply, para. 481 *referring to Belgium and Forum 187 v Commission EU*:C; 2016:416, Annex IX to **CER-[redacted]**, para. 163. The Commission initially notified decisions to Belgium in 1984 and 1987 that a particular measure within its tax regime did not constitute State aid. Subsequently, the Commission reappraised the measure and decided that it did constitute an aid scheme after all. The CJEU held that the EC's earlier decisions created legitimate expectations for the undertakings that had taken advantage of the measure.

369. The Claimants also challenge the Respondent's argument, based on *Micula*, that an award of damages would itself constitute illegal aid and therefore be unenforceable in the EU.[770] The Claimants highlight that, unlike the measures in *Micula*, the Act on RES promotion and its subsequent amendments have not been declared illegal State aid and if the incentive regime complies, there is no basis for the Tribunal's award to be considered State aid.[771] Here, the rate of return available to photovoltaic investors, even without the measures, lies within the range considered reasonable in the Commission Decision, implying compatibility with the internal market.[772] In *Micula* the claims related to incompatible State aid under EU law whereas, in this case, the aid "was not declared incompatible by the Commission and remains compatible in light of the Decision's approval of returns up to 10.6%."[773] The Claimants also underscore that the *Micula* decision was appealed to the General Court of the EU "which can reasonably be expected to overturn . . . its controversial findings."[774] In any event, the Claimants are no longer in the RES business and an award cannot be State aid because it could not distort competition.[775]

370. As to the remarks in the Decision that an award would constitute State aid and that investors' reliance on the ECT or the German-Czech Republic BIT would violate EU law principles,[776] the Claimants assure the Tribunal that it "should not be concerned with the risk that its award might not be enforced everywhere" as it could be enforced outside the EU, including at the arbitral seat.[777] Based on *Micula*, "it would also be inappropriate for the Tribunal to speculate of the enforcement of its award on grounds of a supposed conflict with EU law."[778] Even if there is

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770 Claimants' Reply, paras. 482-483 *referring to* Statement of Defense, paras. 392 ff; Commission Decision 2015/1470 Arbitral award *Micula v. Romania* [2015] OJ L232/43, 30 March 2015 (**Ex. RLA-91**); **RER-[redacted]-1**, para. 127.

771 Claimants' Reply, para. 486 *relying on* **CER-[redacted]** para. 160. *See also*, Claimants' State Aid Comments, para. 29 *referring to* **CER-[redacted]** para. 158 ff.

772 Claimants' State Aid Comments, para. 28

773 Claimants' State Aid Comments paras. 20-30 *referring to* **CER-[redacted]** para. 158 ff.

774 Claimant's State Aid Comments, para. 31. The Claimants argue that these controversial findings include: the inapplicability of the principle that damages based on a general rule of compensation are not State aid was inapplicable because the tribunal awarded damages under an intra-EU BIT that the Commission considers invalid; and that the payment of the award would be imputable to the respondent state.

775 Claimants' State Aid Comments, para. 32, fn. 45 *referring to* Commission Decision 2015/1470 Arbitral award *Micula v. Romania* [2015] OJ L232/43, 30 March 2015, para. 122 (**Ex. RLA-91**). Distortion of competition is a necessary requirement for a payment to qualify as State aid.

776 Claimants' State Aid Comments, para. 35.

777 Claimants' State Aid Comments, para. 34 *referring to* Claimants' Reply paras. 491-492.

778 Claimants' State Aid Comments, para. 34 *referring to* Claimants' Reply para. 493.

actual conflict with EU law the Tribunal can award damages under its public international law obligations.[779]

371. The Claimants also note several flaws in the Decision's conclusions, arguing that the Commission "(a) supinely adhered to the *ex post* interpretation of the Act on Promotion and of the Solar Levy concocted by the Czech Republic for the cause of these arbitrations;" "(b) erred in finding that the incentives under the Act on Promotion constitute State aid, albeit acknowledging their compatibility;" "(c) engaged in an untenable and totally inapposite analysis of the investors' legitimate expectations under EU law;" and "(d) made a superficial, unreasoned and completely unwarranted foray into international law, going so far as to state that the Measures did not violate the FET protection."[780]

372. First, the Claimants allege the Decision contains assertions on facts that it did not "study adequately."[781] For example, the Decision states that the Solar Levy was introduced to avoid overcompensation whereas the official explanatory report on its introduction only concerned the costs of the RES system, which, even the Respondent concedes, were not specifically introduced to comply with State aid law.[782] The Claimants also submit that the Commission now makes a "startling shift of position" that the Measures were not retroactive and did not violate legitimate expectations when it had previously warned of their retroactive nature.[783] Investors' legitimate expectations, as defined by the Commission (*i.e.*, a 15-year payback period), would also not provide sufficient investment incentives as was required by EU law.[784]

373. Second, the classification of incentives under the Act on RES Promotion as State aid under EU law is erroneous and contrary to the Commission's view before the adoption of the RES incentives.[785] The Claimants maintain that Commission "is wrong" to distinguish the present case from *PreussenElektra* where, similarly private entities (distributors) were obliged to pay the

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779 Claimants' State Aid Comments, para. 34 *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. 87 (**Ex. CLA-163**).

780 Claimants' State Aid Comments, para. 37.

781 Claimants' State Aid Comments, para. 38.

782 Claimants' State Aid Comments, para. 39 *referring to* the Decision, para. 51 (**Ex. R-367**); Explanatory report on Act No. 402/2010 introducing the Solar Levy, Exhibit R-14; Statement of Defence para. 333.

783 Claimants' State Aid Comments para. 40; Letter of 11 January 2011 from Ms. Hedegaard and Mr Oettinger (Commissioners of the EC) to Mr Kocourek (Czech Minister of Trade and Industry) (**Ex. C-337**).

784 Claimants' State Aid Comments para. 41, *referring to* the Decision, para. 135 (**Ex. R-367**).

785 Claimants' State Aid Comments, paras. 43-44.

incentives. Since the distributors then passed the costs onto consumers, it is those entities that received State aid. However, the relation between the distributors and RES producers was solely a private law matter and therefore not State aid according to the principle laid down in *PreussenElektra*.[786]

374. Third, the Decision erred "in its refusal to admit that the Commission's assessment of the draft Act on [RES] Promotion generated expectations protected by EU law" and is contrary to its own letter of 27 July 2004 that held that the Act involved no State resources.[787] It overlooks that "(i) the legislation ultimately enacted did not alter the main features of the draft assessed by the Commission; (ii) the CJEU held that the Commission's practice of the time, despite its procedural shortcomings, amounted to a formal decision on the existence of State aid; and (iii) the Commission did not further investigate the matter, thereby generating expectations as to the finality of its assessment."[788]

375. Finally, regarding the Commission's "unwarranted discussion of international law," the Claimants assert that it "merely rehashes its arguments against intra-EU investment arbitrations on the grounds that intra-EU investment treaties are contrary to EU law;" arguments consistently rejected by arbitral tribunals including the present Tribunal.[789] Furthermore, beside the Commission lacking competence on international law, its stated opinion – that the Measures did not violate FET – "lacks sound legal analysis" and is "purely politically motivated."[790]

376. The Claimants reject the Respondent's argument that an award on damages would be unenforceable, because the Tribunal need not concern itself that the award would not be enforceable everywhere.[791] It could be enforced outside the EU and at the arbitral seat and in any event the Claimants bear the risk.[792] The Claimants remind the Tribunal that it is also obliged to comply with the UNCITRAL Rules, the applicable BITs and the ECT.[793] The Claimants argue

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786 Claimants' State Aid Comments, para. 46; **CER-**[redacted], paras. 83-84.

787 Claimants' State Aid Comments, para. 49.

788 Claimants' State Aid Comments, para. 50, *referring to* **CER-**[redacted] paras. 152-154.

789 Claimants' State Aid Comments, paras. 51-52, *referring to* the Decision, paras. 143-148 (**Ex. R-367**); Procedural Order No. 4 of 24 November 2014.

790 Claimants' State Aid Comments, para. 53, *referring to* the Decision, para. 149 (**Ex. R-367**).

791 Claimants' Reply, para. 491.

792 Claimants' Reply, para. 491.

793 Claimants' Reply, para. 492 *referring to* Article 32(2) of the 1976 UNCITRAL Rules; ECT, Article 26(8) (**Ex. RLA-4**); Cyprus BIT, Article 8(3) (**Ex. C-2**); The Netherlands BIT, Article 8(7) (**Ex. C-4**); Luxembourg BIT, Article 8(6) (**Ex. C-5**).

that "it would be inappropriate for the Arbitral Tribunal to embark on speculations as to the enforceability of its award, especially if these are in turn grounded on pure suppositions as to a conflict with EU law."[794]

2. The Respondent's Arguments

377. The Respondent argues that (a) the Claimants misrepresent the Czech Republic's notifications to the Commission on State aid;[795] (b) the Claimants misrepresent the notion of State aid;[796] (c) excess State aid is incompatible with the internal market and the Solar Levy was required to avoid overcompensation; (d) as a matter of EU law, which is the applicable law, there is "no right to State aid" and no legitimate expectation to receive unapproved State aid; (e) any investor-State award in favor of photovoltaic generators would itself constitute unlawful State aid as a matter of EU law; and (f) an award of damages would be unenforceable. In support of its argument, the Respondent filed an expert opinion of

378. As to the notifications to the Commission, the Respondent recalls that the Czech Republic adopted Act 402/2010 providing subsidies for RES directly from the State budget to control the solar boom.[797] Once this subsidy was introduced there was "no doubt whatsoever" that State aid was involved.[798] This was a temporary measure until a new law established a permanent funding mechanism (also partially funded by the State budget) which was then notified to the Commission.[799] The Commission issued its first formal decision sixteen months after this first notification and confirmed that the subsidies were compatible State aid under the applicable 2008 Environmental Aid Guidelines.[800] The Respondent concludes that the Commission approved the

794 Claimants' Reply, para. 493 *referring to Micula*, Award, para. 340 (**Ex. CLA-3**).

795 Statement of Defense, para. 331.

796 Statement of Defense, para. 311.

797 Statement of Defense, paras. 331-332.

798 Statement of Defense, para. 333 *referring to* **RER-** **-1**, paras. 90, 116

799 Statement of Defense, paras. 335-*336 referring to* New RES Act, paras. 55, 62 (**Ex. C-39**); Letter from B. Renner-Loquenz to the Permanent Representation of the Czech Republic of the European Union, 18 November 2011 (**Ex. R-59**); Czech Republic's SANI notification in State Aid Case No SA.351777 (**Ex. R-7**).

800 Statement of Defense, paras. 338-339 *referring to* European Commission Decision in Case SA.35177 Czech Republic – Promotion of electricity production from renewable energy sources, 11 June 2014 (**Ex. RLA-79**).

subsidies "only with strict conditions designed to guard against overcompensation," including, "the complete abolition of the 5% Limit."[801]

379. The Respondent notes that the Commission's response to the Czech Republic's first notification only addressed RES installations after January 2013 and the Respondent, wanting to avoid uncertainty, sent another notification with regard to plants put in operation before that date.[802] This was "not meant to provoke a negative decision or to interfere in any manner with Claimants' rights;" rather it was in the interest of both parties, as a negative opinion could force the Respondent to recover past subsidies.[803] In particular the Respondent takes issue with the Claimants' characterization of the minutes of an October 2014 meeting between the Czech Republic and the Commission as evidence that the second notification was to gain an advantage in this arbitration.[804] Rather, there were "very compelling reasons" for the notification including the threat of litigation.[805] Although ongoing arbitrations were discussed with the Commission, there was never any suggestion that it should find against the Claimants.[806] The Respondent argues that the Claimants' sole evidence to support their claims – a remark by a government Minister that the notification was necessary to be consistent with the Czech Republic's own legal conclusions in the arbitration proceedings – is "hardly an indication of bad faith."[807] Regardless, the Respondent has simply complied with its obligation under Article 108(3) TFEU to obtain the Commission's permission for known State aid.[808]

380. State aid law is aimed at maintaining a common market between EU Member States and Article 107(1) TFEU provides that:

> any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the

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801 Statement of Defense, para. 343 *referring to* Commission's Submission, para. 24 (**Ex. R-3**).

802 Statement of Defense, para. 345.

803 Statement of Defense, para. 349. *See also*, Respondent's rejoinder paras. 299-303; Minutes of a meeting between the Czech Republic and the EC's DG Competition, 21 October 2014, pp. 2–3 of the English translation (**Ex. C-434**).

804 Respondent's Rejoinder, para. 298 *referring to* Claimants' Reply, para. 425

805 Respondent's Rejoinder, para. 303 *referring to* Minutes of a meeting between the Czech Republic and the EC's DG Competition, 21 October 2014, pp. 2–3 of the English translation (**Ex. C-434**).

806 Respondent's Rejoinder, para. 304 *referring to* Minutes of a meeting between the Czech Republic and the EC's DG Competition, 21 October 2014, pp. 2–3 of the English translation (**Ex. C-434**).

807 Respondent's Rejoinder, paras. 306-307, *referring to* Claimants' Reply paras. 430-431, *citing* "Vitásková sulks: J. Mládek urges ERÚ boss to grant subsidy for renewables," Mlada Fronta Dnes, p. 2 (**Ex. C-380**).

808 Respondent's Rejoinder, para. 308.

> production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.[809]

381. The Respondent argues that the broad definition of State aid under Article 107(1) TFEU includes any public support, unless it is permitted by other TFEU provisions and even in such exceptional cases, State aid is only permissible if it is "'limited to the amount that is strictly necessary to achieve the relevant objective.'" The relevant aid must be (a) justified by reference to an objective that is specifically identified in the TFEU; and (b) proportionate to achieving this objective.[810] Under Article 108 TFEU any proposed aid must first be notified to and approved by the Commission.[811] The Respondent argues that because the compatibility of State aid is within the exclusive competence of the Commission, only a clear approval by the Commission can give rise to legitimate expectations by an investor that the aid is permitted by EU law.[812]

382. The Respondent argues that the Claimants are mistaken in presuming that the excessive returns from the RES scheme would be compatible with State aid.[813] According to the Respondent this is based on an outdated reading of *PreussenElektra,* which decided that "the German RES support did not constitute State aid for the purposes of Article 107(1) TFEU because it was financed by private undertakings rather than through 'state resources.'"[814] The Act on RES Promotion was developed with the *PreussenElektra* decision in mind and the Respondent was able to provide subsidies at tax payers expense without engaging the public purse. It was administered by the grid operators under the ERO's supervision and because public funds were not involved, the Respondent did not notify it to the Commission as State aid.[815] However, over time, the EC's approach changed, limiting the application of *PreussenElektra*, which was also supported by several European Court decisions.[816] The Respondent maintains that the *PreussenElektra*

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809 Treaty on the Functioning of the European Union (Consolidated Version), OJ C 83/47, Article 107(1) (**Ex. RLA-48**).

810 Statement of Defense, para. 301 *referring to* **RER-[redacted]-1** para. 99.

811 Statement of Defense, para. 301 *referring to* **RER-[redacted]-1** paras. 14-16.

812 Statement of Defense, para. 306.

813 Statement of Defense, para. 311 *referring to* Statement of Claim, paras. 45-46.

814 *PreussenElektra* (**Ex. CLA-1**). A German law required electricity suppliers to purchase RES electricity at above-market prices, which could then be recovered from upstream conventional energy supplies. A regional electricity supplier invoiced such costs to the upstream provider PreussenElektra on the grounds that this was illegal State aid.

815 Statement of Defense, para. 317.

816 Respondent's Defense, para. 319 *referring to* Case C-206/06 *Essent Netwerk Noord* ECLI:EU:C:2008:413 (**Ex. RLA-66**); Case C-262/12 *Association Vent De Colère!* ECLI:EU:C:2013:851 (**Ex. RLA-67**); Case T-251/11 *Austria v. Commission* ECLI:EU:T:2014:1060 (**Ex. RLA-68**). *See also* Respondent's

reasoning only applies where "the purchase obligation in question was financed entirely from the *private* resources of the grid operators themselves."[817] The Commission's position was summarized in its Draft Notice of January 2014:

> [S]urcharges imposed by law on private persons can be qualified as State resources. It is the case even where a private company is appointed by law to collect such charges on behalf of the State and to channel them to the beneficiaries, without allowing the collecting company to use the proceeds from the charges for purposes other than those provided for by the law. In this case, the sums in question remain under public control and are therefore available to the national authorities, which is sufficient reason for them to be considered State resources.[818]

383. The Respondent challenges the Claimants' denial – that State resources (and therefore State aid) are always involved where purchase obligations are financed by levies on electricity consumers or electricity suppliers and paid by a designated State entity – as being unsupported by its jurisprudence.[819] On the contrary, a Commission notice and the recent *Germany* decision support the principle that the beneficiaries of State aid are the generators.[820] The Respondent also defends the Commission's conclusions in the *Germany* decision as consistent with CJEU case law and upheld in court.[821]

384. The Respondent notes that the Claimants' position that "no State resources were engaged to pay Claimants' subsidies, even after Act 402/2010 introduced a direct budgetary subsidy to finance RES support," is contradicted by case law and the Claimants' own tax expert.[822] The Commission's 2014 decision also "unequivocally stated that the 'mixed' financing mechanism introduced by that Act was State aid, and furthermore that this aid flowed to RES generators and

Rejoinder, paras. 284-285; Case T-47/15 *Germany v. Commission* ECLI:EU:T:2016:281, Judgment, 10 May 2016 (**Ex. RLA-206**).

817 Respondent's Rejoinder, para. 284.

818 Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, 17 January 2014, para. 66 (**Ex. RLA-69**).

819 Respondent's Rejoinder, paras. 286-289 *referring to* Claimants' Reply, para. 438; **CER-[redacted]** paras. 13-55.

820 Respondent's Rejoinder, paras. 289-291 *referring to* **CER-[redacted]-2**, paras. 26, 40 *citing* Notice on the notion of State aid, note 179 (**Ex. RLA-207**); Commission Decision 2015/1585 of 25 November 2014 on the aid scheme SA.33995 implemented by Germany for the support of renewable electricity and of energy-intensive users [2015] OJ L250/122 (**Ex. RLA-70**).

821 Respondent's Rejoinder, para. 291 *referring to* **CER-[redacted]** para. 121; **RER-[redacted] 2**, paras. 38, 44-50.

822 Respondent's' Rejoinder, para. 292 *referring to* **CER-[redacted] 1**, para. 31. [redacted] states, "solar producers receiving FiT or Green bonuses effectively receive subsidy from the state budget."

nobody else."[823] The Respondent also rejects the Claimants' assertion that Act 402/2010 and the New RES Act are irrelevant "because they are not the ones under which the incentives were granted" noting that subsidies were paid and continue to be paid under these laws.[824]

385. As to the existence of State aid in the present case, the Respondent finds that the Commission Decision's findings are consistent with its own practice and CJEU case-law of the past decade.[825] Thus the Act on RES Promotion constituted State aid within the meaning of Article 107(1) of the TFEU.[826] The Respondent notes that the Decision enumerated important differences between the present case and *PreussenElektra*, while finding that the financing mechanism was similar to decisions cited by the Respondent and its expert on State aid.[827]

386. The Respondent argues that "'precise, unconditional and consistent assurances, originating from authorised, reliable sources . . . by the competent authorities of the European Union'" are required to invoke legitimate expectations.[828] It also alleges that it is undisputed, in principle, that there is no "legitimate expectation to receive State aid that has not been notified to the Commission and approved by it as compatible with the internal market."[829] Instead, the Respondent argues, the Claimants, relying on the *Athinaïki* decision, base their alleged legitimate expectations (that the subsidies were not State aid) "on a letter written twelve years ago by the Commission to the Czech branch of a German NGO" and that "the Claimants now argue must be treated as a formal decision . . . that the proposed measure did not constitute State aid."[830]

387. The Respondent describes as a misrepresentation the Claimants' assertion that the Commission already investigated and approved the RES scheme based on the Commission's 27 July 2004 letter.[831] The Respondent argues that the 2004 decision was "far from being a blanket approval"

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823 Respondent's Rejoinder, paras. 292-293, *referring to* European Commission Decision in Case SA.35177 Czech Republic – Promotion of electricity production from renewable energy sources, 11 June 2014, para. 9 (**Ex. RLA-79**).

824 Respondent's Rejoinder, paras. 295-296, *referring to* Claimants' Reply, para. 444

825 Respondent's State Aid Comments, para. 9.

826 Respondents' State Aid Comments, para. 7; **RER-[redacted]-1**, para. 89.

827 Respondents' State Aid Comments, para. 8 *referring to* the Decision (**Ex. R-367**); **RER-[redacted] 1**, para. 24; **RER-[redacted]-1-2**, paras. 18–27, 34–37, 61, 67.

828 Respondent's Rejoinder, para. 319 *referring to* **RER-[redacted]-1**, para. 121, citing Case C-630–633/11 P *HGA v. Commission* ECLI:EU:C:2013:387, para. 132 (**Ex. RLA-90**).

829 Respondent's Rejoinder, para. 320 *referring to* **RER-[redacted] 1**, para. 113.

830 Respondent's Rejoinder, paras. 321, 325 *referring to* Claimants' Reply paras, 474-481.

831 Statement of Defense, para. 322, *referring to* Statement of Claim, paras. 48-50.

and was a "decision by the Commission not to open a formal investigation with respect to a specific complaint, on the basis of specific information that had been made available to the Commission at the time," even before the funding mechanism for RES subsides was in place.[832] The Respondent alleges that the letter, which the Claimants claim was "sufficiently 'precise' and 'unconditional' to give rise to legitimate expectations,[833] "'does not come close to satisfying'" the test.[834] In that letter, based on a draft of the future Act on RES Promotion, the Commission found that "the proposed support system d[id] not constitute State aid within the meaning of Article [107(1) of the TFEU]" and declined further investigation.[835] The Respondent argues that the letter was not a formal decision as the CJEU found a similar letter was a "'preliminary'" act by the Commission, for regulatory purposes, "'to inform the interested party that it did not intend to take a view on the case.'"[836] Even if the letter were to be treated as a final decision, it remains insufficient to create legitimate expectations.[837]

388. In addition, while the Claimants allege that the "final Act on [RES] Promotion 'did not differ substantially from the draft, the Respondents argue that it envisaged "a significantly different support scheme" and this does not meet the standard of legitimate expectations.[838] The draft law did not mention the financing mechanism, which ultimately brought the RES incentives within the scope of Article 107(1) TFEU.[839] Most significantly, the letter was not addressed to the Claimants, nor was it likely seen by them prior to this arbitration and cannot raise any legitimate expectations.[840] The Respondent further argues that the Claimants make unsubstantiated claims that the letter was well known in the RES industry or that they relied upon it indirectly.[841]

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832 Statement of Defense, para. 326, *citing* **RER-[redacted] 1**, paras. 58-60.

833 Respondent's Rejoinder, para. 325 *referring to* Claimants' Reply para. 479.

834 Respondent's Rejoinder, para. 321, *citing* **RER-[redacted]-2**, para. 104.

835 Respondent's Rejoinder, para. 323 *referring to* Letter from the H. Drabbe to [redacted], 27 July 2004, p. 1 (**Ex. C-70**).

836 Respondent's Rejoinder, para. 326 *referring to* Council Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU [2015] OJ L248/9, Art. 24(2) (**Ex. RLA-78**); **CER-[redacted]** *citing*, Annex X, Case C-521/06 *Athinaïki Techniki v. Commission* ECLI:EU:C:2008:422 para. 50.

837 Respondent's Rejoinder, para. 327 *relying on Athinaïki Techniki v. Commission* ECLI:EU:C:2008:422.

838 Respondent's Rejoinder, para. 328 *referring to* Claimants' Reply, para. 480.

839 Respondent's Rejoinder, para. 329, *citing* Letter from the H. Drabbe to [redacted] 27 July 2004, note 1 (**Ex. C-70**).

840 Respondent's Rejoinder, para. 329; **RER-[redacted]-1**, para. 104.

841 Respondent's Rejoinder, paras. 332-333 *referring to* Claimants' Reply, para. 478; **CER-[redacted]** para. 153.

389. The Respondent argues that beneficiaries of the RES incentives did not have a right to State aid beyond the level the Commission determined compatible with the internal market. Substantively this means no overcompensation, *i.e.*, no subsidies beyond a reasonable return on investments, which was reflected in the 7% WACC estimated by the ERO.[842] This rate was used to set the FiT in all years except 2009 and 2010 when the 5% Limit prevented the ERO from doing so due to a sharp drop in investment costs.[843] Thus returns for plants commissioned in these two years would exceed reasonable levels.[844] The Respondent finds the Claimants' hypothesis "highly unlikely"— that a notification of the RES scheme to the Commission in 2005 would have found that the support measures were compatible with the internal market and the Claimants would have received their accrued returns without violating State aid law – when the Commission has always emphasized the importance of cost monitoring and overcompensation control in its decisions on RES support.[845] Additionally, in its Decision, under the 2001 Environmental Aid Guidelines, the Commission found that "aid can only be granted until plant depreciation and can include a fair return on capital;" and, based on the Czech Republic's evidence on risk factors and comparable rates of return, the "Commission consider[ed] the rates of return observed under the notified scheme reasonable."[846] Similarly, under the 2008 Environmental Aid Guidelines the Commission found that, based on the rates of return between April 2008 and December 2012, the applicable FiT "resulted in normal rates of return."[847] The Decision also emphasized the Solar Levy's importance in limiting return to an appropriate level.[848]

390. The Respondent argues that the Tribunal must apply the rules and principles of international law, which include EU law.[849] Where there is a conflict the Tribunal should interpret the BIT and the ECT harmoniously with EU law.[850] Consequently any award of damages in compensation for the Solar Levy, resulting in the Claimants' receiving support in excess of normal returns, would be contrary to EU State aid law and unenforceable in the EU.[851] The Respondent points to

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842 Respondent's Rejoinder, paras. 310-312; Respondent's State Aid Comments, para. 10.

843 Respondent's Rejoinder, para. 312.

844 Respondent's Rejoinder, para. 312.

845 Respondent's Rejoinder, paras. 314-316, *referring to* Claimants' Reply, paras. 462-471.

846 Respondent's State Aid Comments, para. 11, *referring to* the Decision, paras. 96-99 (**Ex. R-367**).

847 Respondent's State Aid Comments, para. 12, *referring to* the Decision, para. 115 (**Ex. R-367**).

848 Respondent's State Aid Comments, para. 13, *referring to* the Decision, paras. 116-117 (**Ex. R-367**).

849 Statement of Defense, paras. 358, 364.

850 Statement of Defense, para. 385.

851 Statement of Defense, III.C.1; paras. 400, 415.

Article 26(6) of the ECT which provides that disputes arising under the ECT must be decided "'in accordance with the [ECT] and applicable rules and principles of international law.'"[852] The Czech Republic and other EU Member States are parties to the Treaty of Accession to the European Union and have accordingly "agreed that the entire body of EU law would henceforth be mutually binding on them, qua international treaty obligation."[853] Furthermore all the relevant BITs provide that arbitral tribunals shall, *inter alia*, take into account principles of international law.[854] The Respondent concludes that the "Tribunal must apply international law, including relevant international agreements in force between the Contracting Parties, in relation to the dispute under all four investment agreements before it."[855]

391. The Respondent submits that EU law is applicable to intra-EU investor-State disputes, as supported by several arbitral decisions.[856] The *sui generis* nature of EU law (*i.e.*, it also produces effects in Member States' domestic law) in no way detracts from its international law nature[857] and its special features should not dissuade the Tribunal from applying it, rather the "profound legal effects" of EU Treaties in EU Member States, "compels particular defence and attention to those treaties."[858] The Respondent reminds the Tribunal that "investment tribunals have dismissed attempts by claimants to argue that only the black letter of EU Treaties qualifies as international law" and have confirmed that all norms of EU law are applicable in investment disputes.[859] The Respondent urges that the Tribunal must disregard the Claimants' attempts to dismiss the relevance of EU law as it forms part of the law applicable to this dispute and is a source of international obligations that all the States concerned must respect.[860]

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852 Statement of Defense, para. 358 *citing*, ECT, Art. 26(6) (**Ex. RLA-4**).

853 Statement of Defense, para. 365.

854 Statement of Defense, para. 361 *citing* Netherlands-Czech Republic BIT, Art. 8(6) (**Ex. C-4**); Luxembourg Czech Republic BIT, Art. 8(5) (**Ex. C-62**). under the interpretive principles of Article 31(3)(c) VCLT, principles of international law also apply to the Cyprus-Czech Republic BIT.

855 Statement of Defense, para. 363.

856 Statement of Defense, para. 366, *citing Electrabel*, para. 4.195 (**Ex. CLA-4**); *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award, 26 October 2010, para. (**Ex. CLA-5**). *European American Investment Bank v. Slovakia*, UNCITRAL, Award on Jurisdiction, 22 October 2012, para. 69 (**Ex. RLA-151**).

857 Statement of Defense, para. 367, referring to **CER-[redacted] 1**, paras. 149-453.

858 Statement of Defense, para. 370.

859 Statement of Defense, para. 371 *referring to Electrabel,* para. 4.122 (**Ex. CLA-4**); *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award, 26 October 2010, para. 289 (**Ex. CLA-5**).

860 Statement of Defense, paras. 373-374.

392. The Respondent proposes that the relevant BITs and the ECT be interpreted in harmony with EU law.[861] According to the Respondent, two principles form the basis of EU law: (1) the principle of primacy according to which EU law overrides norms of domestic law in cases of conflict; and (2) the principle of effectiveness according to which Member States shall fully and effectively apply EU law.[862] In the Respondent's view, it follows from the two principles that norms should, as far as possible, be interpreted harmoniously with EU law; and that norms incompatible with EU law must not be applied if a harmonious interpretation is impossible.[863] Primacy is the central constitutional principle that is unconditionally and irrevocably accepted by Member States intended to have legal force everywhere it applies.[864]

393. The Respondent posits that the principle of primacy also applies to international agreements concluded between Member States and to multilateral treaties as long as the application of EU law does not affect non-Member States' rights towards Member States.[865] According to the Respondent, this principle is confirmed by the decision in *Electrabel* and in line with the principle of *lex posterior derogat legi priori* as codified in Articles 30(3) and 30(4) VCLT. Thus the BITs and the ECT are fully subject to the primacy of EU law.[866]

394. The Respondent argues that the Decision, which states that "any treaty conflict is to be solved, in line with the case-law of the [CJEU], on the basis of the principle of primacy in favour of Union law" is entirely consistent with its own reasoning.[867] It confirms that EU law therefore has primacy over all pre-accession treaties between EU Member States including the BIT and the ECT, and Article 31(3) of the VCLT requires the Tribunal to take this principle into account when interpreting and applying the ECT and BIT.[868] Thus even if the Tribunal were to find that the FET

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861 Statement of Defense, paras. 374-378.

862 Statement of Defense, para. 376, *citing* **RER-[redacted] 1**, para. 142.

863 Statement of Defense, para. 376, *citing* Case C-106/77 *Administrazione delle Finanze v. Simmenthal* EU:C:1978:49, 29 August 1977, para. 21 (**Ex. RLA-98**).

864 Statement of Defense, paras. 377-378, *citing* Case C-106/77 *Administrazione delle Finanze v. Simmenthal* EU:C:1978:49, 29 August 1977, para. 18 (**Ex. RLA-98**).

865 Statement of Defense, paras. 380-381 *citing Case 10/61, Commission v. Italy* [1962] ECR 1, p. 10 (**Ex. RLA-94**); *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award, 26 October 2010, para. 180 (**Ex. CLA-5**); **RER-[redacted] 1**, para. 143.

866 Statement of Defense, para. 383, *citing* **RER-[redacted] 1.**

867 Respondent's State Aid Comments, para. 28, *referring to* the Decision, para. 146 (**Ex. R-367**).

868 Respondent's State Aid Comments, para. 29.

standard under the BITs and ECT entitles the Claimants to subsidies, the TFEU, which prohibits subsidies, must override the FET standard.[869]

395. The Respondent argues that the ECT and BITs are to be interpreted harmoniously with EU law and that such interpretation is possible under Article 31(3) of the VCLT, which provides that, in interpreting a treaty, "[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "any relevant rules of international law applicable in the relations between the parties" shall be taken into account."[870] In the present case, the Respondent states that the principle of primacy of EU law is a "relevant rule of international law" and that the EU Treaties constitute a "subsequent agreement" on the interpretation of the ECT and the BIT.[871] The Respondent also points to arbitral decisions of in support of its position.[872]

396. The Respondent argues that a damages award would be illegal under EU law and therefore not enforceable in the EU.[873] According to Article 107(1) of the TFEU State aid "shall, in so far as it affects trade between Member States, be incompatible with the internal market."[874] The Respondent argues that from at least 2011 onwards the RES scheme could only satisfy the proportionality requirement under the exception of the Environmental Aid Guidelines, which demands a normal return on capital.[875] Since the Environmental Aid Guidelines prohibit supernormal returns, bringing them back to normal levels was a matter of compliance with European Treaties for the Czech Republic.[876] The Respondent maintains that its point of view is supported by the Decision which stated that, under the 2001 Environmental Aid Guidelines, "aid can only be grated until plant depreciation and can include a fair return on capital" and that the based on risk factors it found the rates of return "reasonable."[877] Similarly under the 2008 Environmental Aid Guidelines covering installations dating from April 2008 – December 2012,

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[869] Respondent's State Aid Comments, para. 31.

[870] Statement of Defense, para. 386; VCLT, Art. 31(3) (**Ex. RLA-145**).

[871] Statement of Defense, paras. 387-388.

[872] Statement of Defense, para. 390 *referring to Electrabel*, paras. 4.134−4.141, 4.143−4.145. 4.167, 4.189 (**Ex. CLA-4**); *Oostergetel*, para. 100. (**Ex. CLA-6**); *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (Award, 26 October 2010), para. 273 (**Ex. CLA-5**).

[873] Statement of Defense, paras. 392-415.

[874] TFEU, Art. 107(1) (**Ex. RLA-48**).

[875] Statement of Defense, para. 394.

[876] Statement of Defense, para. 398, *referring to* 2008 Environmental Aid Guidelines, para. 174 (**Ex. R-43**).

[877] Respondent's State Aid Comments, para. 11.

the applicable FiTs "'result in normal rates of return.'"[878] The Respondent further argues that the Commission Decision emphasizes the importance of limiting returns to an appropriate level, which was only possible because the Solar Levy ensured that returns for producers remained within benchmark parameters.[879] As regards the depreciation period, the Respondent argues that this only met with the EC's approval because it corresponded to the service life of the installations and not a shortened period.[880]

397. The Respondent additionally argues that if the Tribunal finds that the Solar Levy violated the ECT or the BIT, it would have to resolve a conflict between the Czech Republic's obligations under the BITs and ECT, and Article 107(1) TFEU.[881] If the Tribunal disregards the primacy of EU law and, as in *Micula*, issues a damage award, the award itself would constitute new State aid.[882] The Respondent notes that the Commission has found that the *Micula* award constituted State aid and has issued an injunction prohibiting compliance with the award.[883] The Respondent argues that the same would be true for damages awarded for the withdrawal of the Tax Holiday and even if the Income Tax Exemption were allowed under EU law as existing aid, "a future damages award for withdrawing them (which would reinstate to Claimant the underlying "economic advantage") will be new aid, and so prohibited under Article 107(1) of the TFEU.[884]

398. In response to the Claimants' argument that it is irrelevant that the Commission considered the *Micula* award as State aid, because the Act on RES Promotion has not been declared State aid, the Respondents contend that the Claimants "overlook the fact that the Commission found the *Micula* award to constitute new aid, independent of the underlying aid measures."[885] A grant of damages due to the Solar Levy would independently meet the conditions of Article 107(1) TFEU and would require the Commission's permission (which it will only grant if the award results in

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878 Respondent's State Aid Comments, para. 12 *citing* the Decision, para. 102 (**Ex. R-367**).

879 Respondent's State Aid Comments, paras. 13-14 *citing* the Decision, paras. 116-117 (**Ex. R-367**).

880 Respondent's State Aid Comments, para. 16 *citing* the Decision, para. 96 (**Ex. R-367**).

881 Statement of Defense, para. 401.

882 Statement of Defense, para. 409 *relying on* **RER-[redacted] 1**, para. 139.

883 Statement of Defense, para. 405 *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**).

884 Statement of Defense, paras. 410-411 *citing* **RER-[redacted] 1**, paras. 93-94, 139.

885 Respondent's Rejoinder, para. 336 *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), paras. 130−140 (**Ex. RLA-91**).

reasonable returns) under Article 108 TFEU.[886] The Respondent argues that the Claimants cannot explain how an award granting them an economic advantage would be compatible with the internal market and therefore it is unlikely to be enforced by an EU court. Additionally, "any enforcement outside the EU would likely be nullified by an obligation to disgorge unlawfully obtained State aid."[887]

399. The Respondent argues that if the Tribunal disregards EU law and follows *Micula* it would render an unenforceable award.[888] According to the Respondent's expert "any payment of the award by the Czech Republic would be a breach of EU law."[889] This remains the case even if a payment is made as a result of a court order enforcing the award because the actions of an EU Member State's courts are imputable to the State.[890] If the Commission reaches a negative decision on the payment of a damages award, it would order recovery of the aid, and if the Czech Republic failed to comply, it likely faces infringement proceedings and a penalty under Article 206 TFEU. The courts of other Member States would also not be bound to enforce the award; it being contrary to a mandatory rule of EU law.[891] Even if the award is enforced outside the EU, the Respondent would be obliged to recover sums executed in favor of the Claimants inside the EU and the Commission would treat forced execution in another State as a voluntary grant of State aid by the Czech Republic.[892]

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[886] Respondent's Rejoinder, para. 337 *referring to* **RER-[redacted] 1**, para. 137.

[887] Respondent's Rejoinder, para. 338 *referring to* Statement of Defense, paras. 415-416.

[888] Statement of Defense, para. 417.

[889] Statement of Defense, para. 415 *citing* **RER-[redacted] 1,** para. 155.

[890] Statement of Defense, para. 415 *citing* **RER-[redacted] 1**, para. 155.

[891] Statement of Defense, para. 415 *citing* **RER-[redacted] 1**, para. 157.

[892] Statement of Defense, para. 417.

VIII. THE TRIBUNAL'S ANALYSIS ON THE MERITS

400. The Claimants have raised claims based on three separate causes of action – breach of the fair and equitable treatment standard, breach of the full protection and security standard and breach of the "non-impairment" standard – under the three investment treaties under which the Tribunal has jurisdiction – the ECT, the Cyprus-Czech Republic BIT and the Netherlands-Czech Republic BIT. The Tribunal notes that the Claimants have pleaded the first two causes of action together, arguing that there is an overlap between them. However, the Tribunal considers it more appropriate to treat each of the three causes of action separately as the Claimants' claims arise under three different investment treaties, which are not identical in their terms, and as the claims have to be determined in light of the specific terms of each applicable treaty.

A. THE FAIR AND EQUITABLE TREATMENT CLAIM

401. The Claimants' principal claim is that the Respondent breached the FET standard under the ECT, the Cyprus-Czech Republic BIT, and the Netherlands-Czech Republic BIT. The Tribunal has determined in Section VI above that it has jurisdiction over the FET claims of all four Claimants – Natland Investment, Natland Group, GIHG and Radiance – under the ECT, while its jurisdiction under the Cyprus-Czech Republic BIT only extends to Natland Group (but not GIHG) and its jurisdiction under the Netherlands-Czech Republic BIT extends to Natland Investment, but only insofar as it invested in Energy 21. Both Natland Group and Natland Investment have brought FET claims under the two BITs, the Cyprus-Czech Republic BIT and the Netherlands-Czech Republic BIT, and the Tribunal has determined above that it has jurisdiction over these claims. As determined above in Section VI, the Tribunal has no jurisdiction under the Luxembourg-Czech Republic BIT.

402. The relevant provision of the ECT dealing with the FET standard is Article 10, which provides, in relevant part:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties **fair and equitable treatment**. Such Investments shall also enjoy the most constant protection and security [. . .] (Emphasis added.)

403. The relevant provision of the Cyprus-Czech Republic BIT is Article 2(2), which provides:

> Investments of investors of either Contracting Party shall at all times be accorded **fair and equitable treatment** and shall enjoy full protection and security in the territory of the other Contracting Party. (Emphasis added.)

404. The relevant provision of the Netherlands-Czech Republic BIT is Article 3(1), which provides:

> Each Contracting Party shall ensure **fair and equitable treatment** to the investments of investors of the other Contracting Party [. . .]. (Emphasis added.)

405. The language of the three provisions is not identical, as Article 10 of the ECT, when establishing the FET standard, specifically refers to the "conditions" set out in the first sentence of the provision ("stable, equitable, favourable and transparent conditions for investors to make investments in the Area of another Contracting Party") and confirms that such conditions "include a commitment to accord . . . fair and equitable treatment." This implies that the assessment of whether such "stable, equitable, favourable and transparent conditions" have been created forms part of the determination of whether a Contracting Party has complied with the FET standard. The Tribunal will take the more specific language of Article 10 into account when determining whether the Respondent has complied with its obligation to accord FET treatment to the Claimants under the ECT. Similarly, the fact that neither the Cyprus-Czech Republic BIT nor the Netherlands-Czech Republic BIT contains such language may be relevant in determining whether the Respondent has complied with the FET standard contained in these two treaties.

406. As summarized above, the Claimants' FET claim is based, in particular, on the Respondent's alleged failure to provide the required legal stability and to protect the Claimants' legitimate expectations under the relevant provisions of the Act on RES Promotion, in particular the tariff incentives in Section 6. Section 6 provides:

> Section 6
>
> **Amounts of Prices for Electricity from Renewable Sources and**
>
> **Amounts of Green Bonuses**
>
> (1) The [ERO] sets, one calendar year in advance, the purchasing prices for electricity from Renewable Sources (the 'Purchasing Prices'), separately for individual kinds of Renewable Sources, and sets green bonuses, so that
>
> a) the conditions are created for the achievement of the indicative target so that the share of electricity produced from Renewable Sources accounts for 8% of gross electricity consumption in 2010 and
>
> b) for facilities commissioned
>
> 1. after the effective date of this Act, there is attained, with the Support consisting of the Purchasing Prices, a fifteen year payback period on capital expenditures, provided technical and economic parameters are met, such parameters consisting of, in particular, cost per unit of installed capacity, exploitation efficiency of the primary energy content in the Renewable Source, and the period of use of the facility, such parameters being stipulated in an implementing legal regulation,
>
> 2. after the effective date of this Act, the amount of revenues per unit of electricity from Renewable Sources, assuming Support in the form of Purchasing Prices, is maintained as the minimum [amount of

> revenues],[893] for a period of 15 years from the commissioning year of the facility, taking into account the industrial producer price index; the commissioning of a facility is also deemed to include cases involving the completion of a rebuild of the technological part of existing equipment, a change of fuel, or the completion of modernization that raises the technical and ecological standard of an existing facility,
>
> 3. prior to the effective date of this Act, there is maintained for a period of 15 years the minimum amount of Purchasing Prices set for the year 2005 in accordance with the legal regulations to date and taking into account the industrial producer price index.
>
> (2) When setting the amounts of green bonuses, the Office also takes into account a heightened degree of risk associated with off-taking electricity from Renewable Sources in the electricity market.
>
> (3) When setting Purchasing Prices and green bonuses, the Office proceeds on the basis of differing costs for the acquisition, connection and operation of individual types of facilities, including the development thereof . . . over time.
>
> (4) Purchasing Prices set by the Office for the following calendar year shall not be less than 95% of the Purchasing Prices in effect in the year for which the setting decision is made. The provision of the first sentence shall not be used for setting the Purchasing Prices for the following calendar year for those types of Renewable Sources where the payback period on capital expenditures is shorter than 11 years in the calendar year in which the Office decides on the setting of the new Purchase Prices; When setting Purchase Prices, the Office proceeds in accordance with subsections 1 through 3.[894]

407. The key provisions of Section 6 in terms of the level of RES support are Section 6(1)(b)(1), which provides that the Purchasing Prices (the FiT) are set, one calendar year in advance, so that, for facilities commissioned, "there is attained, with the Support consisting of the Purchasing Prices, a fifteen year payback period on capital expenditures," and Section 6(1)(b)(2), which provides that "the amount of revenues per unit of electricity from Renewable Sources, assuming Support in the form of Purchasing Prices, is maintained as the minimum [amount of revenues], for a period of [twenty] years from the commissioning year of the facility."[895] Section 6(1)(4) further provides that "[the] Purchasing Prices set by the Office for the following calendar year shall not be less than 95% of the Purchasing Prices in effect in the year for which the setting decision is made."

408. According to the Claimants, the "guarantees" to the investors are established in Section 6(1)(b)(2), which provides for stable FiT revenues – fixed feed-in tariffs for a period of twenty years – and

893 Text in parentheses appears in the Respondent's original translation.

894 Act No. 180/2005 on Promotion of Electricity Production from Renewable Energy Sources and on Amendments to Certain Laws (Act on Promotion of Exploitation of Renewable Energy Sources), 31 March 2005, Section 4(1) (**Ex. R-5**). *See also* Act No. 180/2005 on the promotion of electricity production from renewable energy sources and amending certain acts (Act on Promotion of Use of Renewable Sources), 31 March 2005, Section 4(1) (**Ex. C-26**).

895 The minimum period was extended from 15 to 20 years by Decree No. 364/2007 (**Ex. C-29**).

Section 6(1)(4), which sets the 5% "break-out" rule. The Claimants submit that Section 6(1)(a), which sets the indicative target for the share of electricity production from renewable sources at 8% of gross electricity consumption by 2010, and Section 6(1)(b)(1), which fixes a 15-year payback period for capital expenditures, establish "criteria to fix FiT," but do not provide "guarantees" for investors.[896]

409. The Claimants' case is that the Solar Levy, which was introduced by the Respondent on 28 December 2010, with effect from 1 January 2011, and which applied to investments made in 2009 and 2010, is inconsistent with the stability guarantee in Section 6(1)(b)(2) of the Act on RES Promotion ("after the effective date of this Act, the amount of revenues per unit of electricity from Renewable Sources, assuming Support in the form of Purchasing Prices, is maintained as the minimum [amount of revenues], for a period of [twenty] years from the commissioning year of the facility"). The Claimants do not argue that the Solar Levy breached the 15-year payback period in Section 6(1)(b)(1) of the Act on RES Promotion, or the 5% break-out rule in Section 6(4). Consequently, the issue to be addressed by the Tribunal in this Section is whether the Solar Levy constitutes a breach of the Respondent's obligation to provide fair and equitable treatment in accordance with Article 10 of the ECT, Article 2(2) of the Cyprus-Czech Republic BIT and Article 3(1) of the Netherlands-Czech Republic BIT.

410. The Tribunal will consider each of these alleged treaty breaches separately below.

1. Alleged breach of the Fair and Equitable Treatment standard in Article 10 of the Energy Charter Treaty

411. As noted above, the Claimants' FET claim under the ECT is based on Article 10. According to Article 10,

> [e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.

412. The language of Article 10 suggests that, when determining whether the obligation to provide fair and equitable treatment has been complied with, the Tribunal must consider whether the Respondent has "encourage[d] and create[d] stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area." The

[896] Claimants' Opening Statement, slide 13.

commitment to accord FET to the Claimants is among the "conditions" to be encouraged and created by the Respondent.

413. The Claimants argue, in particular, that the Respondent has failed to comply with its obligation to provide stable conditions for their investment. According to the Claimants, the Respondent's decision, on 28 December 2010, to "retroactively" impose a 25% levy on the FiT and thus reduce the incentives set out in Article 6(1)(b)(2) of the Act on RES Promotion, amounted to a breach of its obligation to provide FET.[897] According to the Claimants, the measure was "retroactive" because it affected investments that had already been made, contrary to Article 6(1)(b)(2) of the Act on RES Promotion.

414. The Respondent argues, in response, that the Solar Levy did not breach in any way its obligations under Article 10 of the ECT, including its obligation to create stable conditions for the Claimants to make investments in the Czech Republic. The Respondent also denies that the Solar Levy had any retroactive effect as it only applied as of the date of its adoption; the fact that it applied to investments already made in 2009 and 2010 does not make it retroactive as it did not affect the RES support provided during those two years. The Respondent also argues that the Claimants made the bulk of their investments during the period June 2009 to July 2010, when they were aware that legislative changes to the RES scheme were imminent, and when the Czech Government was hampered in its ability to take legislative action because it had a caretaker government.

415. The Tribunal notes, and the Parties agree, that the issue before it is not whether the Respondent has breached a so-called "stabilization clause." Stabilization clauses are typically included in investment contracts, but in the present case the Claimants' investments were not made on the basis of an investment contract concluded directly with the Respondent; they were made in reliance on commitments of regulatory stability contained in a statute – the Act on RES Promotion. The Parties agree that there is no express commitment to regulatory stability in the Act on RES Promotion. The issue therefore arises – and was also raised by the Tribunal during the hearing – whether it is possible for a legislative provision to guarantee stabilization intrinsically, and what the indicia of such an intrinsic stabilization guarantee would be. The Parties were specifically requested to address this issue in their closing statements and to provide examples of such legislative stabilization guarantees, in addition to those already on record.

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[897] The measure was implemented on 14 December 2010 by Act No. 402/2010, which introduced the Solar Levy by adding new sections 6(a) and (b) and 7(a)-(i) to the Act on RES Promotion.

416. Having considered the Parties' arguments and the record before it, the Tribunal finds that Section 6(1)(a)(2) of the Act on RES Promotion indeed contains an intrinsic stabilization guarantee. The language of Section 6(1)(a)(2) is specific and establishes the benefits that an investor is entitled to in precise quantitative terms ("the *amount of revenues per unit of electricity* from Renewable Sources, assuming support in the form of Purchasing Prices, *is maintained as the minimum* [amount of revenue], for *a period of [twenty] years* from the commissioning of the facility") and this entitlement is not qualified in any way in Section 6 or elsewhere in the Act on RES Promotion. The language of Section 6(1)(a)(2) leaves no doubt that the commitment undertaken in it was not meant to be amended during the relevant period, except for increase to reflect inflation ("taking into account the industrial producer price index") and thus was meant to serve as a guarantee of regulatory stability. That the commitment was in the nature of a guarantee of regulatory stability is also reflected in the fact that the 5% breakout rule in Section 6(4) of the Act operated so as to ensure that any reduction in the level of FiT could only apply to prospective investors; it did not apply to investors that had already invested in a given year. In the circumstances, the provision leaves no doubt as to the level of support to which the State was committed. It would have been another matter and the Tribunal might have reached a different conclusion, if the Act on RES Promotion employed merely qualitative terms to characterize the benefits that the investors were entitled to thereunder (*e.g.*, "reasonable level of revenue" or "purchase prices may not be unreasonably lowered from the previous year's level," etc.). In such circumstances, it could not have been said that there was an intrinsic guarantee as to the level of revenue and the maximum allowed change in the prospective level of revenue.[898]

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[898] Contrary to the Respondent's submission, this reasoning cannot be called into question by the May 2012 Constitutional Court judgment (**Ex. R-29**). That domestic decision is not dispoisitive in determining whether Section 6(1)(b)(2) of the Act on RES Promotion provided a guarantee of a minimum FiT for purposes of the FET standard under the ECT. Rather, the Tribunal has an independent mandate, and obligation, under international law to apply the ECT in light of the provisions of the Act. The Czech Constitutional Court held, as a matter of Czech constitutional law, that the expectations of renewable energy suppliers for fixed minimum FiTs for a 15-year period did "not attain the intensity of a constitutional-law issue." Thus, the Court's judgment states that the issue presented to, and decided by, the Court "involve[d] a challenge of constitutionality of a law, a law that does not interfere with constitutionally protected rights and freedoms but which has the effect of reducing the state support stipulated in an earlier law." In response to this question, the Court concluded that "although the enactment of the challenged provisions reduced the support provided to operators of PVPP, . . . this did not constitute interference that would cause a breach of the constitutionally-guaranteed rights of the affected entities." In the Court's view, "a simple payback period on investment of 15 years" does not violate the Czech Constitution. In any event, the judgment provides no support for the Respondent's interpretation of Section 6 of the Act on RES Promotion since it expressly recognizes – contrary to the Respondent's analysis – that the Solar Levy "has the effect of reducing the state support stipulated in an earlier law," namely the support guaranteed by Section 6 of the Act on RES Promotion. Likewise, the Court declared that "the enactment of the challenged provisions reduced the support provided to operators of [photovoltaic power plants]."

417. This reasoning is supported by the context of the legislation. According to the Explanatory Statement accompanying the draft Act on RES Promotion, which was developed pursuant to an EU directive, the support system was, *inter alia,* based on:

> providing a guarantee to investors and owners of facilities producing electricity from renewable sources that qualify for support under the Bill ensuring that the amount of revenue per unit of electricity produced from renewable sources acquired by producers from the support will be maintained for 15 years from placing the facility in service (or for 15 years for facilities placed in service before the Bill takes effect).[899]

418. The Tribunal does not disagree with the Respondent's argument that the State has the sovereign right to change its laws, and that a mere change of a law cannot give rise to international responsibility. However, the issue here is not whether the State is entitled to change its laws, or whether the Czech Republic has merely changed its laws; the issue is whether the State can give, whether expressly or implicitly, an undertaking in its laws not to amend such laws over a certain period of time. It is indeed an attribute of State sovereignty that a State is entitled to give such an undertaking, just as it has the sovereign right to change its laws.[900] The concrete issue before the Tribunal is therefore whether Section 6 of the Act on RES Promotion amounts to such an undertaking. In view of the specific terms of Section 6(1)(a)(2), which not only establish but indeed quantify the level and term of RES support in precise quantitative terms, the Tribunal considers that this is what has been done in the present case.

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

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[899] Explanatory Report to the draft Act on Promotion of 12 November 2003 (extended version) (with English translation) (**Ex. C-72**). The Respondent states that "the 2003 Explanatory Report [accompanied] . . . an early draft of the Act on Promotion," implying that this early draft differed from the final Act on RES Promotion. Respondent's Rejoinder, para. 589. This ignores the fact that the Explanatory Note on the draft legislation in question contained guaranteed FiTs substantially similar to those in Section 6(1)(b)(2) of the Act on RES Promotion as later enacted. The decisive point is that, like all other government statements on the subject, the Explanatory Note referred to the fixed FiTs which were later included in the final Act on RES Promotion as "guarantees." The fact that the Explanatory Report accompanied an early draft of the Act on RES Promotion or that there were other differences in the two legislative instruments is irrelevant to the analysis.

[900] *The SS "Wimbledon,"* United Kingdom and ors v. Germany, Judgment, (1923) PCIJ Series A no 1, ICGJ 235 (PCIJ 1923), 17th August 1923, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ], p. 25 ("The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.")

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 this Treaty, **encourage and create stable**, equitable, favourable and transparent **conditions for Investors** of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment." 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.

420. In the circumstances, in view of the express undertaking given by the Respondent in Section 6(1)(a)(2) of the Act on RES Promotion, it follows that Act No. 402/2010 of 28 December 2010, which amended the Act on RES Promotion by adding a new Chapter III which introduced the Solar Levy, is necessarily incompatible with the Respondent's undertaking in Section 6(1)(a)(2).[901] The new Chapter III ("Levy on Electricity from Solar Radiation") provides, in relevant part:

> Section 7a
>
> Subject Matter of Levy on Electricity from Solar Radiation
>
> The subject of the levy on electricity from solar radiation (the "Levy") is electricity produced from solar radiation during the period from 1 January 2011 to 31 December 2013 in facilities commissioned during the period from 1 January 2009 to 31 December 2010.
>
> Section 7b
>
> Entities Subject to Levy
>
> (1) The party that is liable for the Levy is the Producer that produces electricity from solar radiation.
>
> (2) The party responsible for making the payment of the Levy is the transmission grid operator or regional distribution system operator.
>
> Section 7c
>
> Basis of Levy
>
> The basis of the Levy is the amount, without value added tax, that was paid by the party responsible for making the payment of the Levy in the form of a Purchasing Price or green bonus to the party liable for the Levy in respect of electricity produced from solar radiation in the Levy period.
>
> . . .

901 Act No. 180/2005 on Promotion of Electricity Production from Renewable Energy Sources and on Amendments to Certain Laws (Act on Promotion of Exploitation of Renewable Energy Sources), 31 March 2005, Chapter III (**Ex. R-5**).

Section 7e

Levy Rate

The rate of the Levy shall be

a) 26% of the Purchasing Price if the basis of the Levy was a Purchasing Price.

b) 28% of the green bonus if the basis of the Levy was a green bonus.

421. Although the Solar Levy applied prospectively from 1 January 2011 to 31 December 2013, it not only applied to revenues generated by photovoltaic power plants that would be put in operation after the effective date of the Act, *i.e.*, 1 January 2011; it also applied to plants that had been commissioned between 1 January 2009 and 31 December 2010 and thus reduced the level of revenues which Section 6(1)(a)(2) of the Act on RES Promotion had guaranteed for a period of twenty years "from the commissioning year of the facility." The Solar Levy is thus incompatible with the guarantee of stability in Section 6(1)(a)(2) of the Act on RES Promotion and therefore constitutes *prima facie* a breach of the FET standard in Article 10 of the ECT.

422. The question remains whether the fact that it was a matter of public knowledge, at least as of the summer of 2009, that the "solar boom" was creating a policy issue for the Czech Government, and that the Government would likely reduce the RES support, affected in any way the stability guarantee in Section 6(1)(a)(2) of the Act on RES Promotion, or the legitimacy of the Claimants' expectation of stability, as to investments made after summer 2009. Indeed, it is apparent from the record that from the beginning of July 2009 onwards, the ERO kept warning the Government of a significant rise in the number of connection requests by photovoltaic energy developers. In his letter of 8 September 2009 to the Chairman of the Chamber of Deputies, the Chairman of ERO explained that, largely as a result of the substantial fall in the price of photovoltaic panels, the installed capacity for photovoltaic resources had increased from 3.4 MW to 54 MW between 2007 and 2008, and had reached 103 MW by the beginning of September 2009. By the same date, approvals had been granted for the connection of more than 2,000 MW.[902] The ERO noted that this was leading to a "speculative blocking" of further connections by other potential producers, as well as to a substantial increase in the financing required to support the RES scheme. To address the situation, the ERO proposed amending the 5% breakout rule in Section 6(4) of the Act on

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[902] Letter from J. Fiřt to O. Vojír (Czech original and English translation), 8 September 2009 (**Ex. R-161**). *See also* Držovice - Power Purchase Agreement of 20 December 2010 (**Ex. C-332)**.

RES Promotion as of 1 January 2011, to allow a reduction of the FiT by more than 5% in certain circumstances.[903]

423. In the context of these developments, on 24 August 2009, the Ministry of Trade and Industry announced that it was preparing an amendment to the Act on RES Promotion, which would abolish the 5% breakout rule, with effect from 1 January 2010.[904] However, apparently in response to criticism by solar power investors and banks that this would affect ongoing projects, only four days later, on 28 August 2009, the Ministry abandoned its proposals and wrote to the ERO, explaining that any amendments to the Act on RES Promotion would have to be part of a broader package implementing the Second EU RES Directive, which would take time and therefore could not take effect from 1 January 2010.[905]

424. On 8 September 2009, the Chairman of the ERO, Mr Fiřt, wrote an open letter to the Economic Committee of the Czech Chamber of Deputies, suggesting that the introduction of any legislative changes to the 5% breakout rule in Section 6(4) should only affect the FiTs of energy sources after "1st January 2011."[906] The ERO noted that this delay would enable investors "to prepare sufficiently in advance for the change in the conditions for investing which should eliminate entirely the risk of possible lawsuits in the Czech Republic regarding protection of investments."[907]

425. On 16 November 2009, the Explanatory Report accompanying the Government's proposal for a bill to amend the Act on RES Promotion (Act 137/2010) explained that Section 6(4) would be amended to allow the reduction of the FiT by more than 5% for RES producers that had reached "less than an 11-year term investment recovery;" however, the provision would only apply to plants connected as of 1 January 2011.[908] This policy position was subsequently confirmed by

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903 Letter from J. Fiřt to O. Vojír (Czech original and English translation), 8 September 2009 (**Ex. R-161**. *See also* Letter from B. Němeček to (Czech original and English translation), 10 August 2009 (**Ex. R-136**).

904 "Ministry of Industry and Trade will equalize the support of renewable energy sources", Ministry of Industry and Trade press release (mpo.cz) (Czech and English original), 24 August 2009 (**Ex. R-138**).

905 Letter from to B. Němeček (Czech original and English translation), 28 August 2009 (**Ex. R-145**).

906 Letter from J. Fiřt to O. Vojíř, 8 September 2009, p. 2 (**Ex. R-161**) ("The proposed wording will enable the Office with effect from 1st January 2011 to adjust the prices for photovoltaics in harmony with the principles used for other types of renewable resources thus removing the current discrimination against other types of renewable resources.").

907 Letter from J. Fiřt to O. Vojíř, 8 September 2009, p. 2 (**Ex. R-161**).

908 Explanatory Report to Draft Act No. 137/2010 Coll. (Czech original and English translation), 16 November 2009 (**Ex. R-147**).

statements made by the Minister of Industry and Trade, and on 23 November 2009 the ERO issued a price decision fixing Purchasing Prices for electricity produced by large photovoltaic plants commissioned from 1 January to 31 December 2010 at CZK 12,150/MWh, consistent with Section 6(4) of the Act on RES Promotion then in force.[909] In February 2010, the Czech transmission system operator called for the distribution companies to observe a moratorium on issuing new grid connection approvals for solar and wind plants, to ensure the stability of the electricity grid.[910] On 17 March 2010, the 5% breakout rule was abolished for plants to be commissioned in 2011. In September 2010, the Government again considered legislation that would have reduced the burden of subsidies for renewable energy. In connection with proposed legislation addressing the issue, an Explanatory Report confirmed again that changes to FiTs would only take effect with respect to solar installations commissioned after "January 1, 2011."[911] The Report also made clear that the proposed legislation would not be applicable to "[p]hotovoltaic power plants already connected to the electric power system" and that their "right to claim support [would be] preserved under existing conditions."[912] Furthermore, the Government explicitly stated that "[f]acilities not yet connected to the electric power system but which started operation before January 1, 2011 will have 12 months to be connected to the electric power system" and would also have "their right to claim support . . . preserved."[913] Finally, on 28 December 2010 the Government introduced Act 402/2010, which entered into force on 1 January 2011. This Act amended the Act on RES Promotion by adding a new Chapter III and established the Solar Levy which was to apply from 1 January 2011 to 31 December 2013 to revenues generated by photovoltaic power plants that had been put into operation between 1 January 2009 and 31 December 2010.

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,

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909 ERO Price Decision No. 05/2009 (Czech original and English translation), 23 November 2009 (**Ex. R-38**).

910 **RER- Fiřt -2**, para. 21; S*ee also* EuroEnergy, "Initial Report on the Project – 'Construction of Photovoltaic Power Plants with Total Capacity of ca 8.8 MWp' – Blatná Locality" (supplemental English translation of Annex XI to Second Kunz Statement), 25 June 2010 (**Ex. R-316**).

911 Explanatory Report to Draft Act No. 333/2010 Coll., p. 6 (**Ex. R-172)**.

912 Explanatory Report to Draft Act No. 333/2010 Coll., p. 6 (**Ex. R-172)**.

913 Explanatory Report to Draft Act No. 333/2010 Coll., p. 6 (**Ex. R-172)**.

procurement and construction of 21 out of the 31 plants during a period when the drastic increase in the development of 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.

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 solar boom would have been considered "politically or ideologically polarizing proposals" and thus outside the remit of the caretaker government.[914]

428. Having found that Section 6(1)(a)(2) of the Act on RES Promotion established a stability guarantee for investors, and that the imposition of the Solar Levy constituted a breach of the Respondent's FET obligation in Article 10 of the ECT, the Tribunal must consider whether the fact that the Claimants substantially increased their investments in 2009 and 2010, when they were already aware of the impending changes in the RES support, should be taken into account when considering the quantum of the Claimants' claims. In considering this issue, the Tribunal is mindful of the fact that the Czech Government, when looking for ways to deal with the consequences of the solar boom to electricity prices and the support payable by the State, was addressing a legitimate policy issue, and the Claimants must have understood that this was the

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[914] Fischer Government Policy Statement (Czech original and partial English translation), 2009, p. 1 (**Ex. R-130**).

case. The Tribunal notes in this connection that it is undisputed that the vast majority of solar capacity in the Czech Republic was built during a three-month window at the end of 2010, when the total installed photovoltaic capacity increased from 754 MW in September 2010 to 1,959 MW by the end of 2010.[915] Nonetheless, the Claimants went on to substantially invest in solar energy production in the second half of 2009 and, in particular, 2010, such that approximately 35% of the Claimants' total installed capacity was installed in 2009, and approximately 52% in 2010, thus contributing to the solar boom.[916] The Tribunal finds that this issue is relevant to the issue of quantum and is more appropriately considered in that context.

2. Alleged breach of the Fair and Equitable Treatment standard in Article 2(2) of the Cyprus-Czech Republic BIT

429. As discussed above, Natland Group brings a claim for breach of the fair and equitable treatment standard under the Cyprus-Czech Republic BIT. The relevant provision under this treaty is Article 2(2), which provides:

> Investments of investors of either Contracting Party shall at all times be accorded **fair and equitable treatment** and shall enjoy full protection and security in the territory of the other Contracting Party. (Emphasis added.)

430. Unlike Article 10 of the ECT, Article 2(2) of the Cyprus-Czech Republic BIT is more concise and does not specifically refer to the Contracting Parties' obligation to "encourage and create stable, equitable, favourable and transparent conditions for Investors" in connection with the FET standard. However, it is well established in arbitral jurisprudence that one of the elements governed by the FET standard is regulatory stability.[917] This is not to say that the State cannot

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915 Hearing Transcript, Day 1, p. 152:13-18. *See also* Opening Statement of the Czech Republic, 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**).

916 *See* Statement of Claim, para. 165.

917 *Charanne and Construction Investments v. The Kingdom of Spain*, Case No. 062/2012, Arbitration Institute of the Stockholm Chamber of Commerce, Dissenting Opinion of Professor G. S. Tawil, 21 January 2016, para. 5 (**Ex. CLA-111**); R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford, 2008, p. 134-135 (**Ex. CLA-42)**; *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 7.73 (**Ex. CLA-112**); *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 172-173 (**Ex. CLA-60**); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, paras. 315(c); *Enron*, Award, paras. 264-268 (**Ex. CLA-56**); *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v. The Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 130-131 (**Ex. CLA-53**); *CMS Gas Transmission Company v. The Argentine Republic*, ICSID case no. ARB/01/8, Award, 12 May 2005, para. 275 (**Ex. CLA-48**); *Binder v. The Czech Republic*, ad-hoc arbitration, Award 15 July 2011, para. 443 (**Ex. RLA-31)**; M. Téllez, "Conditions and Criteria For The Protection of Legitimate Expectations Under International Investment Law", in *ICSID Review*, Vol. 27,

change its laws or enact new laws; it merely means that such changes cannot undermine the legitimate expectation of the investors as to regulatory stability when making their investments, in particular where such an expectation is based on an intrinsic stabilization guarantee, which is the case here.

431. The Tribunal notes that neither Party has suggested that the FET standard in Article 2(2) of the Cyprus-Czech Republic BIT is not coextensive with Article 10 of the ECT, or that the latter, but not the former, would apply in the circumstances of this case.

432. In the circumstances, since the FET standard in Article 2(2) of the Cyprus-Czech Republic BIT contains, similar to Article 10 of the ECT, the requirement of a measure of regulatory stability and protection of a legitimate expectation based on a stabilization guarantee, it follows that the Tribunal's findings above, relating to the Claimants' claims under Article 10 of the ECT, also apply to Natland Group's claims under Article 2(2) of the Cyprus-Czech Republic BIT. Consequently, the Tribunal finds that the imposition of the Solar Levy is in breach of the Respondent's obligation under Article 2(2) of the Cyprus-Czech Republic BIT to accord Natland Group fair and equitable treatment.

433. The Tribunal has determined above in Section VI that it has no jurisdiction under the ECT over the Claimants' claims relating to the repeal of the Income Tax Holiday and the modification of the Original Depreciation Provisions since these two measures qualify as Taxation Measures within the meaning of Article 21(7) of the ECT. However, since there is no such exclusion of taxation measures in the Cyprus-Czech Republic BIT, the Tribunal must consider whether the two measures amount to breaches of this particular treaty.

434. The Income Tax Holiday and the Original Depreciation Provisions were included in the Act on Income Tax (Act No. 586/1992). The Income Tax Holiday exempted photovoltaic power plants from income tax for the year in which the plant was put into operation and the following five years, whereas the Original Depreciation Provisions permitted the depreciation for tax purposes of certain components of photovoltaic plants over a period between five to ten years. These forms of RES support were abolished or modified by Act No. 346/2010, which entered into force on 1 January 2011.

No. 2, (2012), p. 436 (**Ex. CLA-113)**; "Fair and Equitable Treatment", UNCTAD Series on Issues in International Investment Agreements II, (201, p. 69 (**Ex. CLA-109**).

435. The Tribunal notes that the Income Tax Holiday and the Original Depreciation Provisions were not part of the Act on RES Promotion and thus were not covered by the stability guarantee included therein. Act No. 346/2010 also did not specifically target photovoltaic plants but was part of a broader package of legislation which aimed at reducing the budget deficit of the Czech Republic and which abolished income tax holidays and modified the depreciation periods for all types of renewable energy support and not only solar power.[918] While the Claimants suggest that Act No. 346/2010 was nonetheless wrongful because it abolished or modified these forms of support with retroactive effect in the sense that it impacted investments made before its entry into force, the Tribunal is unable to agree, in the absence of a regulatory stability guarantee, that these measures amount to a breach of the FET standard. Consequently, Natland Group's claim relating to the repeal of the Income Tax Holiday and the modification of the Original Depreciation Provisions is dismissed.

3. Alleged breach of the Fair and Equitable Treatment standard in Article 3(1) of the Netherlands-Czech Republic BIT

436. As summarized above, Natland Investment brings a claim under the Netherlands-Czech Republic BIT for breach of the FET standard contained in the treaty. The relevant provision of the Netherlands-Czech Republic BIT is Article 3(1), which provides:

> Each Contracting Party shall ensure **fair and equitable treatment** to the investments of investors of the other Contracting Party [. . .] (Emphasis added.)

437. Like Article 2(2) of the Cyprus-Czech Republic BIT, Article 3(1) of the Netherlands-Czech Republic BIT does not contain any further qualifications or elaborations, beyond the plain requirement of fair and equitable treatment, and neither Party has argued that the FET standards in Article 10 of the ECT and Article 3(1) of the Netherlands-Czech Republic BIT, respectively, are not coextensive, insofar as they have been argued to be applicable in the present case. The observations made in section VII.A.2 above, in relation to the content and the legal effect of Article 2(2) of the Cyprus-Czech Republic BIT, therefore also apply to the FET claim made by Natland Investment under the Netherlands-Czech Republic BIT. Consequently, the Tribunal finds that 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.

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918 Explanatory Report to Draft Act No. 346/2010 Coll. (Czech original and partial English translation), 26 October 2010 (**Ex. R-114**).

438. The Tribunal has determined above in Section VI that it has no jurisdiction under the ECT over the Claimants' claims relating to the repeal of the Income Tax Holiday and the modification of the Original Depreciation Provisions as they qualify as Taxation Measures within the meaning of Article 21(7) of the ECT. However, similar to the Cyprus-Czech Republic BIT addressed above, since there is no such exclusion of taxation measures in the Netherlands-Czech Republic BIT, the Tribunal must consider whether they amount to breaches of this particular treaty.

439. For the reasons set out in Section VIII.A.2 above, Natland Investment's claim arising out of the repeal and modification of the tax incentives in the Act on Income Tax (Act No. 586/1992) stands to be dismissed.

B. THE FULL PROTECTION AND SECURITY CLAIM

440. The Claimants claim that the Respondent has breached the full protection and security ("**FPS**") standard in Article 10 of the ECT, and Natland Group further claims that the Respondent has breached the FPS standard in Article 2(2) of the Cyprus-Czech Republic BIT.

441. The relevant provision of the ECT dealing with the requirement of protection and security is Article 10, which provides in relevant part:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy **the most constant protection and security** […] (Emphasis added.)

442. The relevant provision of the Cyprus-Czech Republic BIT is Article 2(2), which provides:

> Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy **full protection and security** in the territory of the other Contracting Party. (Emphasis added.)

443. While there are some differences in the wording of the two provisions, insofar as they deal with the protection and security standard ("the most constant protection and security"/"full protection and security"), in view of its findings below, the Tribunal does not consider that these differences are relevant in the context of this case.

444. Throughout their pleadings, including at the hearing, the Claimants have effectively fused their FET claim with their FPS claim, contending that the two standards are coextensive, and that a breach of the FET standard also amounts to a breach of the FPS standard. The Tribunal is unable to agree with this position, which would be contrary to the established rules of treaty

interpretation, including the requirement of *effet utile*. It would also be contrary to State practice, since if the scope of the two standards were exactly the same, State parties to investment treaties would not make an effort to distinguish between them and make sure that both standards are included. In the Tribunal's view, even assuming (and the Tribunal need not take any view on the issue) that the FPS standard governs not only physical but also legal security, the FPS standard operates so as to protect the investor from third-party interference, and not from interference by the host State.[919] The Claimants do not allege this, and there is no evidence before the Tribunal of any third-party interference with the legal or physical security of the Claimants' investments.

445. In the circumstances, the Claimants' claim for breach of the FPS standard in Article 10 of the ECT, and Natland Group's claim for breach of the FPS standard in Article 2(2) of the Cyprus-Czech Republic BIT are dismissed.

C. THE NON-IMPAIRMENT CLAIM

446. The Claimant contends that the Respondent's conduct, when enacting the Solar Levy, was unreasonable and thus also amounts to a breach of the non-impairment standard in Article 10 of the ECT and, through the MFN clause in Article 3 of the Cyprus-Czech Republic BIT, to a breach of the non-impairment standard in Article 3(1) of the Netherlands-Czech Republic BIT. These two claims will be addressed separately below.

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919 *See Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Arbitration Institute of the Stockholm Chamber of Commerce, Partial Award, 27 March 2007, para. 203 (**Ex. CLA-7**) ("As the Arbitral Tribunal understands it, the criterion in Art. 3(2) of the BIT concerns the obligation of the host state to protect the investor from *third* parties, in the cases cited by the Parties, mobs, insurgents, rented thugs and others engaged in physical violence against the investor in violation of the state monopoly of physical force. Thus, where a host state fails to grant full protection and security, it fails to act to *prevent* actions by third parties that it is required to prevent."). *See also* Christoph Schreuer, "Full Protection and Security", in *Journal of International Dispute Settlement*, (2010), pp. 13-14 ("The view that the two standards [*i.e.*, FET and FPS] are to be seen as different obligations appears to be the better one. As a matter of interpretation, it appears unconvincing to assume that two standards listed separately in the same document have the same meaning. An interpretation that deprives a treaty provision of meaning is implausible . . . As a matter of substance, the content of the two standards is distinguishable. The FET standard consists mainly of an obligation on the host State's part to desist from behavior that is unfair and inequitable. By contrast, by assuming the obligation of full protection and security the host State promises to provide a factual and legal framework that grants security and to take the measures necessary to protect the investment against adverse action by private persons as well as State organs.")

1. Alleged breach of the Non-Impairment standard in Article 10 of the ECT

447. The Claimants contend that the imposition of the Solar Levy constitutes a breach of the non-impairment standard in Article 10 of the ECT. Article 10 provides in relevant part:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and **no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal**. (Emphasis added.)

448. The Claimants' case is that the Solar Levy is an unreasonable measure that has impaired the "management, maintenance, use, enjoyment or disposal" of their investment. More specifically, the Claimants contend that the Czech Republic's conduct is unreasonable for two reasons: (a) the measures breached the Czech Republic's undertakings aimed at inducing investments needed to achieve the 8% target of electricity production from renewable energy sources; and (b) the measures altered the essential features of the RES incentive regime on which the Claimants relied when making their investments. Consequently, the issue before the Tribunal is whether the Respondent's conduct was "unreasonable" rather than "discriminatory," as the Claimants do not contend that the Respondent has breached the non-impairment standard by way of discriminatory conduct.

449. The Respondent argues, by relying, *inter alia,* on the *AES* award, that an analysis of the nature of the State's measures, in order to determine whether they are unreasonable, is only necessary when an "impairment" (in the sense of a significant impact or effect on an investment) has taken place. According to the Respondent, any such impairment must relate specifically to the management, maintenance, use, enjoyment or disposal of the investment. The Respondent contends that this requirement has not been met in this case as the Claimants have retained possession of their investments, have continued to exercise management rights over them, and have been able to freely maintain, use, enjoy and dispose of such investments.

450. The Tribunal considers that the most apt articulation of the content of the non-impairment standard, insofar as it relates to unreasonable conduct, is that of the *Saluka* tribunal, which noted that the standard of "reasonableness" requires "a showing that the State's conduct bears a

reasonable relationship to some rational policy."[920] The *AES* tribunal adopted a similar approach, finding that:

> There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to that policy.
>
> A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.[921]

451. Having carefully considered the Parties' argument and the relevant facts, the Tribunal is unable to find that the Respondent's conduct is incompatible with the non-impairment standard. In seeking to address the financial (*i.e.*, the budgetary implications of the substantially increased RES support), socio-economic (*i.e.*, the projected substantial increase in electricity prices) and technical (*i.e.*, the risk to the stability of the electricity grid) consequences of the solar boom, the Respondent pursued a rational and legitimate governmental objective. The measures it took, which included reduction in the level of RES support, bore also a rational relationship to the policy goal being pursued. Although the Tribunal has found that one of the measures that the Czech Government took (the Solar Levy) was ultimately incompatible with the stability guarantee given by the State in Section 6(1)(a)(2) of the Act on RES Promotion and thus in breach of the FET standards in the ECT, the Cyprus-Czech Republic BIT and the Netherlands-Czech Republic BIT, such a finding does not necessarily or automatically mean that the measures, including the Solar Levy, were also "unreasonable" within the meaning of Article 10 of the ECT. It is the specific, quantified nature of the commitments given by the State in Section 6(1)(a)(2) of the Act on RES Promotion that rendered the Solar Levy incompatible with the FET standard; but this does not make it unreasonable.

452. The Tribunal concludes that the Claimants have failed to establish that the Respondent has breached the non-impairment standard in Article 10 of the ECT.

2. Alleged breach of the MFN standard in Article 3 of the Cyprus-Czech Republic BIT

453. Natland Group similarly argues that the Respondent's conduct amounts to a breach of the non-impairment standard in Article 3(1) of the Netherlands-Czech Republic BIT, which Natland Group contends it is entitled to rely on by virtue of the MFN clause in Article 3 of the Cyprus-Czech Republic BIT. The Tribunal has found (see Section VI above) that it has jurisdiction over

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920 *Saluka*, Partial Award, para. 460 (**Ex. CLA-52**).

921 *AES*, Award, paras. 10.3.7 – 8 (**Ex. CLA-62**).

this claim. (GIHG also brings a similar claim, however, as determined in Section VI above, the Tribunal has no jurisdiction over GIHG's claims under the Cyprus-Czech Republic BIT. The Tribunal has also found that it has no jurisdiction over Radiance's claims under the Luxembourg-Czech Republic BIT, including its claim for breach of the non-impairment standard.)

454. Article 3(1) of the Netherlands-Czech Republic BIT provides, in relevant part:

> Each Contracting Party . . . shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.

455. The language of the provision is virtually identical to the relevant part of Article 10 of the ECT, and accordingly the Tribunal's findings in Section VIII.C.1 above apply *mutatis mutandis* to the Natland Group's claim under the Cyprus-Czech Republic BIT. Consequently, Natland Group's claim for breach of Article 3 of the Cyprus-Czech Republic BIT stands to be dismissed.

D. THE RELEVANCE OF THE EU STATE AID RULES AND DECISIONS

456. The Parties' positions on the relevance of the EU State aid rules and decisions are summarized above in Section VII.C. These raise issues that are relevant to both liability and quantum. In the present section, the Tribunal will only address those issues that are relevant to the determination of the Respondent's liability; the remaining issues are referred to the context of quantum.

457. The Commission in its Decision determined that, although the Czech Republic had failed to comply with its obligation to notify the Commission of the RES scheme under Article 108(3) of the TFEU, it had decided not to raise objections to the State aid "on the grounds that it is compatible with the internal market pursuant to Article 107(3) of the [TFEU]."[922] The Decision was limited to the assessment of the RES scheme, as notified by the Czech Republic to the Commission on 11 December 2014. The notification thus reflected the RES scheme as modified by the Czech Republic in 2013.

458. The Parties disagree in particular on the relevance of the Decision to the Claimants' claims in this arbitration, insofar as the decision deals with the notion of legitimate expectations in EU law. According to the Respondent, "it would be completely inappropriate to interpret the notion of legitimate expectations under the BIT and the ECT as being different from that accepted by the

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[922] Decision, Conclusions.

relevant States under EU law," whereas the Claimants challenge the Commission's views on legitimate expectations under both EU law and international law.

459. The Tribunal notes that, as found by many other investment treaty tribunals, the determination of whether there has been a breach of the fair and equitable treatment standard, as defined in the applicable investment treaty, is a particularly fact-sensitive exercise.[923] The assessment of whether the investor's legitimate expectations have been frustrated is only one possible factor to be taken into account in the determination; other factors may also be relevant, if not more relevant, and there may be a breach of the fair and equitable treatment standard in circumstances where there has been no frustration of legitimate expectations. In other words, what is permissible State conduct under the fair and equitable treatment standard is not only a matter of determining the investor's expectations, or their legitimacy, at the time the investment was made. The Tribunal therefore sees no point in attempting to determine, in the abstract, whether the content of the notion of legitimate expectation under EU law is the same as the legitimate expectations that may or may not be relevant in determining whether the fair and equitable treatment standard has been breached under the ECT or under any of the other investment treaties applicable in this case. The Tribunal has not made any such abstract determination in this case as the applicable legal standard is fair and equitable treatment, not legitimate expectations, which as noted above is only a factor, or a criterion, in determining whether the fair and equitable treatment standard has been complied with, but not a legal standard. The Tribunal recalls in this connection that its determination in Section VIII above that the Respondent has breached the standard of fair and equitable treatment under the ECT, the Cyprus-Czech Republic BIT, and the Netherlands-Czech Republic BIT is not based exclusively, or even principally, on the frustration of the Claimants' legitimate expectations, but on the incompatibility of the Solar Levy with the intrinsic stability guarantee in Section 6(1)(a)(2) of the Act on RES Promotion. Also, as noted in Section VIII above, the Tribunal has reserved the determination of whether the fact that the Claimants made some of their investments after the technical, financial and socio-economic consequences of the "solar boom" emerged as a policy issue in the Czech Republic has any impact on their claims, to the context of quantum.

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[923] *See, e.g.*, *Mondev International Ltd. v. The United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, Award, para. 118 ("A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.") (**Ex. CLA-12**). *See also Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 292; *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 99; *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on liability, 30 July 2010, para. 181.

IX. THE PARTIES' POSITIONS ON QUANTUM

460. In their written submissions, the Claimants sought compensation for damage allegedly suffered as a "result of the Respondent's violations of the BITs and the ECT" in the amount of CZK 2,212 million (inclusive of pre-award interest).[924] This was adjusted to CZK 1,184 million at the hearing.[925] The Claimants arrive at that figure via two methodologies: (1) the "Updated Model," which calculates damages as "the aggregate of the SPVs' Enterprise Values as reduced as a result of the Czech Republic measures;"[926] and (2) the "Deal Model," which calculates damages based on the sale of Energy 21 in January 2016.[927] The Claimants' quantum analysis is supported by three expert reports from .[928]

461. The Respondent criticizes the Claimants' damages analysis, arguing that it "suffers from numerous fundamental flaws," and is based on uncertain and speculative future events. The Respondent's quantum analysis is supported by three expert reports from [929]

A. THE CLAIMANTS' ARGUMENTS

462. In their Statement of Claim, the Claimants calculated damages by comparing the enterprise value of Energy 21's SPVs taking into account the Measures (the Actual Scenario) with the enterprise value of the SPVs without taking into account the Measures (the Counterfactual Scenario).[930] This methodology, which the Claimants update in their Reply and term the Updated Model, is discussed in Section IX.A.1 below. In their Reply, the Claimants introduced an alternative, preferred methodology, in light of the sale of Energy 21 in January 2016. This methodology involves "calculating past losses (for the period 2011-2015) on the basis of the historical audited results of the SPVs" and "adding the loss following the sale of [Energy 21] (for the period

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924 Statement of Claim, para. 515; Claimants' Reply, para. 1046.

925 Presentation by "Approach to Damages" Hearing, Day 4, slide 26.

926 Statement of Claim, para. 518.

927 Claimants' Reply, para. 1046.

928 **CER -1**; **CER- -2**; Expert Report of 6 February 2016 (hereinafter "**CER- 3**").

929 First Expert Accountant's Report on Quantum and other Financial Issues by 30 October 2015 (hereinafter "**RER- 1**"); Second Expert Accountant's Report on Quantum and other Financial Issues by 6 September 2016 (hereinafter "**RER 2**"); Third Expert Accountant's Report on Quantum and other Financial Issues by , 27 February 2017 (hereinafter "**RER- -3**").

930 Statement of Claim, paras. 515-517; **CER- 1**, para. 2.4.1.

2016-2030) based on the actual enterprise valuation derived from the sale transaction data."[931] This Deal Model is discussed in Section IX.A.2 below. The section IX.A.3 then summarizes the Claimants' arguments on future damages and the final section on quantum will address the Claimants' arguments on causation.

1. The "Updated Model"

463. The Updated Model involves comparing the enterprise value of Energy 21's SPVs with or without considering the Measures. In both scenarios, the enterprise value is calculated on the basis of the "discounted cash flow" ("**DCF**") approach.[932] [redacted] describes the DCF approach as "a commonly accepted, widely used methodology to value an asset or a business by forecasting the present value of future profits or cash flows generated from the business operations."[933] [redacted] further notes that "[t]he DCF method focuses on the income generating potential of a business or an asset."[934] The DCF approach consists of applying a "discount rate" to the "free cash flow" of a business to obtain the "net present value" of its cash flows at a certain "valuation date."[935] [redacted] considers 1 January 2011 to be the "valuation date" because this is the date on which the two scenarios being compared under this model started to diverge as a result of the Measures and the date on which the Claimants started to suffer losses.[936] The Claimants calculate the damages over a period of 20 years (from 1 January 2011 until 31 December 2030), which, they explain was the guaranteed period of payment of the FiT, based on the assumption that the SPVs would operate for the entire 20-year period.[937]

464. In the Claimants' Statement of Claim and [redacted] I, two scenarios (that is, the scenario considering the Measures and the scenario not considering the Measures) "were derived on the basis of (i) actual data for 2011-2013, based on the operating results of the SPVs and (ii) forecast data for 2014 onwards, based on revised forecasts."[938] In [redacted] II, which was submitted with the Claimants' Reply, [redacted] updated the earlier calculations based on actual audited results

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931 Claimants' Reply, para. 1024; **CER-**[redacted] **2**, paras. 5.1.6, 6.4.2.

932 Statement of Claim, para. 519.

933 Statement of Claim, para. 519; **CER-**[redacted] **1**, para. 2.3.3.

934 Statement of Claim, para. 519; **CER-**[redacted] **1**, para. 2.3.3.

935 Statement of Claim, para. 520.

936 Statement of Claim, para. 521; **CER**[redacted] **1**, para. 2.2.1.

937 Statement of Claim, para. 522. *See also* Statement of Claim, paras. 77, 79, 84, 91, 284.

938 Statement of Claim, para. 523; Claimants' Reply, para. 1021; **CER-**[redacted] **1**, paras. 3.1.1-3.1.2, Exhibit 3.2.

for 2014 and 2015 that had become available, such that the revised methodology, or Updated Model, consists of:

(i) calculating past losses (for the period 2011-2015) on the basis of the historical audited results of the SPVs; and

(ii) adding the future losses (for the period 2016-2030) calculated on future forecasted cash flows.[939]

465. The Claimants note that "[c]ash flows have been discounted applying a 'rolling discount rate,' *i.e.*, a specific discount rate for the cash flows in each year."[940] For 2011-2015,

> for which actual operating results are available, the rate used for the discount is the relevant risk-free rate of return, calculated using the Czech Republic's zero coupon sovereign bonds at January 1, 2011 (*i.e.*, the valuation date). The risk-free rate for 2011-2015 is used because actual data "can be seen as perfect forecasts for which there is no need to account for the uncertainties or risks inherent in cash flows applicable to future periods.[941]

For 2016-2030,

> cash flows are calculated relying on revised forecasts prepared on the basis of the actual parameters of the SPV's plant. These cash flows have been discounted using the SPV's WACC (*i.e.*, the weighted average of the SPV's cost of debt and its cost of equity).[942]

466. Having determined the net cash flows for the period 2011 to 2030, [redacted] discounted them by applying the discount rates to obtain the 1 January 2011 present value of the cash flows for each year.[943] Finally, the SPVs' enterprise value in both scenarios "is derived by summing the January 1, 2011 present value of the cash flows for each year of the 20-year period from 2011 until 2030."[944] [redacted] also applied pre-award interest at the rate of 3.28 % per annum.[945]

467. On the basis of this methodology, [redacted] "quantified the damages suffered by the Claimants under the Updated Model to be CZK 2,038 million (inclusive of pre-award interest)."[946] Taking into account the exchange rate as at the 1 January 2011 valuation date (EUR 1 = CZK 25.018),

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939 Claimants' Reply, para. 1025; **CER-**[redacted] **2**, Section 4, Sub-Section 6.3.

940 Claimants' Reply, para. 1036; **CER-**[redacted] **1**, para. 4.1.1.

941 Claimants' Reply, para. 1036; **CER-**[redacted] **1**, paras. 4.1.2(a), 4.4.2; **CER-**[redacted]**-2**, para. 3.3.2(a).

942 Claimants' Reply, para. 1036; **CER-**[redacted] **1**, para. 4.1.2(b).

943 Claimants' Reply, para. 1038.

944 Claimants' Reply, para. 1038.

945 Claimants' Reply, para. 1039; **CER-**[redacted] **1**, para. 6.3.3.

946 Claimants' Reply, para. 1041; **CER-**[redacted]**-2**, Table 18 at para. 6.3.5. (emphasis in original). *See also* **CER-**[redacted]**-3**, Table 6 at para. 5.1.3.

the Claimants conclude that "the loss suffered by the Claimants amounts to EUR 81,461,347."[947] Following adjustments to his calculations, [redacted] calculated losses of CZK 2,022 million in his presentation at the hearing.[948]

468. Given that, according to the Claimants, there is "only an 8% difference between the damages calculation under" this model and the Deal Model, the Claimants argue that the sale of Energy 21 "confirms: (i) the soundness and reliability of the Updated Model calculations; and (ii) the conservatism of the Updated Model."[949] The Claimants assert that this methodology—the DCF method combined with the audited actual data for 2011-2015 – "considerably reduces uncertainty and allows to estimate the Claimants' redress with 'reasonable certainty.'"[950] However, the Claimants submit that the Deal Model should be preferred over the Updated Model because "using the [Energy 21] sale as the basis of an award would mean that there would be no forecasting uncertainty in respect of the period 2016+."[951]

469. In his presentation at the hearing [redacted] acknowledged an adjustment for the "tax shield," pointed out by the Respondent's expert on damages, on the Solar Levy that reduces the claims.[952] [redacted] defends the use of two discount rates (two WACCs) "because the specific case facts and the regulatory risk in this regulated industry, a single discount rate… would be inappropriate" as there are two sets of cash flows "that require different discount rates."[953] [redacted] explains that there are two elements to WACC: the cost of debt and equity. First, regarding debt, in the counterfactual scenario (without the measures) there was no change in the risk and the prevailing rates apply.[954] In the actual scenario (with the measures) the regulatory risk increased.[955] The cost of debt at the valuation date of January 2011 is not the rate at which the firm borrowed historically, but the rate at which it may borrow in the future, and it is therefore appropriate to re-rate the debt.[956] Second, with regard to equity, in the actual scenario the increase in risk increased the cost

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947 Claimants' Reply, para. 1041.

948 Presentation by [redacted] "Approach to Damages" Hearing, Day 4, slide 25.

949 Claimants' Reply, para. 1044; **CER-[redacted] 2**, paras. 5.1.5, 5.5.1-5.5.4.

950 Claimants' Reply, para. 1019.

951 Claimants' Reply, para. 1045; **CER-[redacted] 2**, paras. 5.5.5-5.5.6.

952 Hearing Transcript, Day 4, p.166-167.

953 Hearing Transcript, Day 4, p.168:1-6

954 Hearing Transcript, Day 4, p.171:7-10.

955 Hearing Transcript, Day 4, p.171:10-12.

956 Hearing Transcript, Day 4, p.171.

of equity, which needs to be reflected in the beta.[957] The SPVs cash flows have also declined, making them more financially vulnerable, increasing the risk and therefore the beta.[958]

2. The "Deal Model"

470. In the second expert report submitted with the Claimants' Reply, [redacted] modified the methodology adopted to calculate the Claimants' damages in light of the January 2016 sale of Energy 21.[959] The Claimants assert that "the sale of [Energy 21] provides the necessary information to obtain the net present value of [Energy 21] as at January 1, 2016 (*i.e.*, the date of the sale)."[960] The Claimants explain that:

> during the negotiations that led to the sale of [Energy 21] the implied Enterprise Value of [Energy 21] and, as a consequence, the price for the sale of shares were calculated based on cash flow forecasts. In other words, both the buyer (CEE Equity) and the seller (E21 Holding) prepared their own estimates of the future cash flows of [Energy 21] from 2016 until 2030 and based thereon reached an agreement on the sale transaction price.[961]

471. The Deal Model consists of:

> (i) calculating past losses (for the period 2011-2015) on the basis of the historical audited results of the SPVs; and
>
> (ii) adding the loss following the sale of [Energy 21] (for the period 2016-2030) based on the actual enterprise valuation derived from the sale transaction data.[962]

472. [redacted] started from the actual market valuation resulting from the sale of Energy 21 as the value of the SPVs' cash flows from 2016 until 2030 for the scenario that takes the Measures into account.[963] He then derived the higher value of the cash flows for the same period (*i.e.*, 2016-2030) in the scenario that does not take the Measures into account, "essentially adjusting the cash flows to account for the Measures," because he estimated that, without the Measures, the price of the sale of Energy 21 "would have been much higher."[964] The Claimants' damages are then calculated as the difference between the two scenarios for the period 2016-2030, to which the past

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[957] Hearing Transcript, Day 4, p. 171:1-9.

[958] Hearing Transcript, Day 4, p. 173:7-15.

[959] Claimants' Reply, para. 1022; **CER-[redacted] 2**, Section 5, Sub-Section 6.4.

[960] Claimants' Reply, para. 1026; **CER-[redacted] 2**, para. 5.1.2.

[961] Claimants' Reply, para. 1026.

[962] Claimants' Reply, para. 1024; **CER-[redacted] 2**, Section 5, Sub-Section 6.4, paras. 5.1.6, 6.4.2.

[963] Claimants' Reply, para. 1027; **CER-[redacted] 2**, para. 5.1.4, Sub-Section 5.2.

[964] Claimants' Reply, para. 1027; **CER-[redacted] 2**, paras. 5.1.3, 5.1.4, Sub-Section 5.3.

losses for 2011-2015 must then be added.[965] Finally, the amount must "be increased to account for pre-award interest on the past loss for the period 2011-2015."[966] The Claimants argue that, "at the date of the final award in this arbitration [they] will already have suffered a portion of their losses, on which pre-award interest accrues . . . since the valuation date for the past loss is January 1, 2011."[967]

473. In the first expert report by [redacted], "a risk-free interest rate, compounded for six years," was adopted.[968] This was adopted "on the assumption that the final award in this arbitration will be rendered on December 31, 2016, *i.e.*, six years after the valuation date."[969] However, "since the hearing in this arbitration is scheduled for March 2017, in [[redacted] II] the date of the final award is estimated at December 31, 2017."[970] [redacted] estimates the increased pre-award interest rate to be 3.28% p.a.[971]

474. [redacted] quantified the damages suffered by the Claimants under the Deal Model to be CZK 2,212 million (inclusive of pre-award interest). By applying the exchange rate as at the 1 January 2011 valuation date (EUR 1 = CZK 25.018), according to the Claimants, the loss suffered amounts to EUR 88,416,340.[972] In his presentation at the hearing, after adjustments, [redacted] quantified damages at CZK 1,814 million.[973]

475. Responding to certain methodological criticisms in the [redacted] II report, and to reduce the number of disputed issues, [redacted] provided a third, supplemental report with a "Final Deal Model," arriving at a sum of CZK 1,904 million (inclusive of pre-award interest) for the Claimants' losses.[974] [redacted] also responded to criticisms of the "Deal Model" on overvaluation and the inclusion of certain bank loans by noting several errors in [redacted] methodology and explaining that the loans were refinanced.[975] He addressed the appropriateness of his Deal Model forecasts

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965 Claimants' Reply, para. 1028; **CER-[redacted] 2**, Sub-Section 5.4.

966 Claimants' Reply, para. 1029; **CER-[redacted] 2**, para. 5.4.3.

967 Claimants' Reply, para. 1029.

968 Statement of Claim, para. 542; **CER-[redacted] 1**, para. 6.2.1.

969 Statement of Claim, para. 544; **CER-[redacted] 1**, para. 6.2.1.3.

970 Claimants' Reply, para. 1030; **CER-[redacted] 2**, para. 6.3.3.

971 Claimants' Reply, para. 1030; **CER-[redacted] 2**, para. 5.3.2.

972 Claimants' Reply, para. 1032.

973 Presentation by [redacted] "Approach to Damages" Hearing, Day 4, slide 26.

974 **CER-[redacted]-3**, paras. 1.2.1-1.2.2; Table 8 at para. 5.2.3.

975 **CER-[redacted]-3**, paras. 3.2.1-3.2.6.

and inclusion of increased regulatory risks in the discount rate.[976] [redacted] third expert report presents evidence that there was a marked decline in new PV installations and an increase in the perceived risk of future regulatory changes requiring a Beta uplift factor.[977] He explains that the valuation target is consistent because it only excludes non-operating SPVs while refinanced bank loans were included.[978] [redacted] defends his Deal Model forecasts as appropriate because they were "used by the Buyer to arrive at the Sale Price" and that [redacted] approach would understate the value of E21.[979] The central area of disagreement between the Parties' experts is whether regulatory risk has increased because of the measures.[980] [redacted] states:

> The regulatory risk portion that I am talking about is: if that promise cannot be relied upon, not for future installations but for the installations that my business has already created and opened and plugged in, then I think it's perfectly reasonable for a businessman or businessperson to have in their mind, 'well this may happen again. What's to stop this happening again?' That's the regulatory risk. [981]

476. In his presentation at the hearing, [redacted] explained how he quantifies the decrease in valuation attributable to the increased regulatory risk.[982] [redacted] submitted that "the asset sold, was impaired" (*i.e.*, in the absence of the Measures, the sale price would have been higher).[983] He added that the fact that the enterprise value in the actual scenario was lower than the sale price "shows that the 2011 Updated Model was conservative."[984] He also stated that "there is no uncertainty in the [D]eal [M]odel forecasts" as "[t]he [P]arties have extinguished any uncertainty by valuing at a certain point those forecasts."[985] Furthermore, in this model "it is important to understand that the damages are driven by the difference in the enterprise values, consistent with the [U]pdated [M]odel; they are not driven by the enterprise value of any single scenario."[986] Under his Deal Model, [redacted] explained, he uses the buyer's forecasts (of cash flow) but uses a lower discount rate than used by the buyer (to reflect the regulatory risk), which

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976 **CER-[redacted]-3**, paras. 3.3-3.4.4

977 **CER-[redacted]-3**, paras. 2.1.4-2.1.6.

978 **CER-[redacted] 3**, paras. 3.2.2, 3.2.6

979 **CER-[redacted] 3**, paras. 3.3.4-3.3.5.

980 Hearing Transcript, Day 5, p. 166:2-7

981 Hearing Transcript, Day 5, p. 194:17-24.

982 Hearing Transcript, Day 5, p. 177:13-16.

983 Hearing Transcript, Day 5, 177:10-12.

984 Hearing Transcript, Day 5, p. 177:17-23.

985 Hearing Transcript, Day 5, p. 178:24-15, p. 179:1-2.

986 Hearing Transcript, Day 5, p. 179:11-15.

means a higher valuation.[987] The only variable in the CAPM that can be used to reflect the risk is the beta, through the beta uplift formulation.[988] "The counterfactual discount rate was applied to forecast, excluding the levy . . . and this gave the enterprise value. From that is deducted the actual scenario, and the difference between the two is damages."[989] According to [redacted] only 13% of the difference between the updated model counterfactual scenario beta and the actual sale price beta is attributable to regulatory risk.[990]

3. Response to the Respondent's characterization of the Claimed Damages as Speculative Future Damages

477. The Claimants argue that it is "undisputed that, should the Claimants prevail on the merits, they are entitled to recover at least the damages suffered until the date of the award."[991] In response to the Respondent's claim that "a large part of Claimants' damages is based on uncertain future events" and is thus speculative, the Claimants argue that "there is absolutely no risk of the damages calculation being speculative" because: (a) the sale of Energy 21 that occurred in January 2016 "dispenses with the need to resort to future forecasts in the damages calculation" because [redacted]' "damages calculation is now based on historical audited data for the period 2011-2015 and on an arm's length commercial transaction for 2016 onwards"; and (b) even without taking into account the sale of Energy 21 and relying on the calculations prepared in the first expert report by [redacted] and updated in the second, "which are based on estimate future cash flows, the Claimants would still be entitled to recover future damages because they are calculated with 'reasonable certainty.'"[992]

478. The Claimants' first argument is that data relating to the impact of the sale of Energy 21 can be used: (a) as "an invaluable benchmark to demonstrate the soundness and conservativeness of [the Claimants'] calculations prepared on the basis of future estimate cash flows;" or (b) "directly to calculate the damages from 2016 onwards because the sale 'crystalize[s] the [net present value]

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987 Hearing Transcript, Day 5, p. 180:6-14.

988 Hearing Transcript, Day 5, p. 180:18-20.

989 Hearing Transcript, Day 5, p. 181:7-9.

990 Hearing Transcript, Day 5, pp. 181-182.

991 Claimants' Reply, para. 934, *referring to* Statement of Defense, para. 709.

992 Claimants' Reply, paras. 906, 915, *referring to* Statement of Defense, para. 707.

of the 2016+ cash flows as at the date of the sale.'"[993] According to the second expert report of [REDACTED]:

> As a consequence of the sale of E21, the calculation of the damages can be split in two parts: (i) past loss for the period 2011-2015, which is calculated by CRA on the basis of historical audited data; and (ii) future loss for the period 2016-2030, *i.e.* for the period following the sale of E21, which is calculated based on the data deriving from the sale of E21.[994]

479. The Claimants conclude that the new calculations do not rely on "any sort of future estimate that is inherent in a DCF approach" and that, therefore, "the Respondent's contention that the damages claimed in this arbitration are speculative because they are based on future events has now become moot."[995]

480. The Claimants' second argument, to counter the Respondent's characterization of their damages as speculative, is that, even if the Tribunal prefers to quantify damages based on future estimated cash flows and not on the sale of Energy 21, these calculations are proved with "reasonable certainty" and are therefore recoverable. According to the Claimants, "[i]n the absence of a specific standard for redress for the violations at issue in this arbitration in the applicable Treaties, the criteria to determine the types of damages awardable and the quantum recoverable are to be determined in accordance with the 'applicable standard … existing in customary international law.'"[996] The Claimants note that the "commonly accepted standard for redress under customary international law" is the "full reparation" principle established by the Permanent Court of International Justice in the *Factory at Chorzów* case and "consistently applied" by the International Court of Justice and by investment treaty tribunals.[997] The Claimants also note that

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993 Claimants' Reply, para. 916; **CER-[REDACTED] 2**, paras. 5.1.2, 5.1.5, 5.5.1-5.5.6.

994 Claimants' Reply, para. 918; **CER-[REDACTED] 2**, paras. 5.1.6, 5.5.5(1).

995 Claimants' Reply, para. 919.

996 Claimants' Reply, para. 922, *citing British Caribbean Bank Limited v. The Government of Belize*, UNCITRAL, PCA Case No. 2010-18, Award, 19 December 2014, para. 288 (**Ex. CLA-117**). *See also National Grid P.L.C., v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 269 (**Ex. CLA-45**); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 30 (**Ex. RLA-174**); *Enron,* Award, paras. 359-360 (**Ex. CLA-56**).

997 Claimants' Reply, paras. 923-924, *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. 29 (**Ex. CLA-118**); *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Judgment of 25 September 1997, ICJ Reports 1997, p. 7 ff., paras. 149-150 (**Ex. CLA-119**); *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ, Judgment of 14 February 2002, ICJ Reports 2002, p. 3 ff., para. 76 (**Ex. CLA-120**); *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, ICJ, Judgment of 31 March 2004, ICJ Reports 2004, p. 12 ff., paras. 119-121 (**Ex. CLA-121**); *Enron,* Award, para. 359 (**Ex. CLA-56**); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 149 (**Ex. CLA-116**); *LG&E*, Award, para. 31 (**Ex. RLA-174**); *Quiborax S.A. and Non Metallic*

the standard was "upheld in the *CME Czech Republic case*, where the tribunal concluded that the Czech Republic violated – *inter alia* – the FET, FPS and the Non-Impairment standards under the Netherlands-Czech Republic BIT" and is codified in Article 31 of the ILC Draft Articles.[998]

481. Noting that Article 34 of the ILC Draft Articles provides that reparation can take the form of restitution or compensation, the Claimants state that "restitution would not suffice" as "the Respondent's breach is ongoing and restitution would only permit the Claimants to obtain reparation for the damages already suffered at the date of the award, but not for those that will accrue." [999] The Claimants further note that, "[w]hen restitution is not a viable option, Article 36(1) of the ILC Draft Articles compels the breaching state to provide (full) compensation."[1000] Applying these principles to the present case, the Claimants submit that: (a) "damages must be calculated according to a 'but-for' approach;" (b) "the consequences of the Czech Republic's violation of its international obligations cannot be properly eliminated if the Claimants are denied recovery of future damages;" (c) "the correct standard of proof for an award of future damages is 'reasonable certainty;'" and (d) "the DCF analysis adopted by [the Claimants' expert], which is coupled with an ex-post approach, is the most suitable method to calculate future damages with reasonable certainty under the given circumstances."[1001]

482. First, citing the *Micula* tribunal, the Claimants explain that the "but-for" approach requires that the investor be "placed back in the position it would have been 'in all probability' but for the international wrong."[1002] The Claimants note that the "three-step process" for the "but-for" approach used by the tribunal in *Suez and Vivendi v. Argentina* was followed in the second expert report by [redacted] which the Respondent's quantum expert "does not criticize."[1003] The three-step approach was as follows:

Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 327 (**Ex. CLA-115**).

998 Claimants' Reply, para. 924, *citing CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, paras. 616-618, 624(1) (**Ex. CLA-43**); ILC Draft Articles, Article 31 (**Ex. RLA-32**).

999 Claimants' Reply, para. 926.

1000 Claimants' Reply, para. 927.

1001 Claimants' Reply, para. 928.

1002 Claimants' Reply, para. 930, *Micula*, Award, para. 917 (**Ex. CLA-3**).

1003 Claimants' Reply, paras. 931-933, *citing Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 April 2015, para. 28 (**Ex. CLA-123**).

> [Charles River Associates] calculated the value of the Claimants' SPV, first, as if the Measures had never been enacted (*i.e.* the Counterfactual Scenario) and then taking into account the Measures (*i.e.* the Actual Scenario). The difference between the SPVs' value in the two scenarios constitutes the damage suffered by the Claimants and claimed in this arbitration.[1004]

483. Second, the Claimants argue that "a full compensation of the Claimants' damages . . . requires that the Arbitral Tribunal awards *future* damages" because historical damages "would not eliminate all the negative consequences of the Czech Republic's wrongful conduct" and an award of "forward-looking damages is perfectly in line with the ILC Draft Articles . . . and with investment arbitration jurisprudence."[1005] The Claimants note that investment tribunals have particularly awarded forward-looking damages when the relevant investment has, "in the words of the World Bank Guidelines on the Treatment of Foreign Direct Investment – an investment 'with a proven record of profitability.'"[1006] According to the Claimants, the "SPVs have been operating their photovoltaic plants for more than five years and have a significant record of profitability" and, even if this was not the case, "forward-looking compensation has recently been upheld also when the investment lacked a sufficient record of profitability."[1007]

484. Third, the Claimants "vigorously contest" the Respondent's position that there is a "legal requirement for certainty" for future damages and that such damages are uncertain or inherently speculative, arguing instead that they "need only be proven with reasonable certainty."[1008] The Respondent argues that the "predominant investment case law . . . favors the standard of reasonable certainty" and that "the legal authorities invoked by the Respondent are irrelevant to its case" and that *Mobil and Murphy v. Canada* "is easily distinguishable from the present

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1004 Statement of Claim, paras. 517-518; Claimants' Reply, para. 932; **CER-[redacted] 1**, paras. 2.3.4, 2.4.1, Table 2 at para. 6.3.1.

1005 Claimants' Reply, paras. 938-943, *citing* ILC Draft Articles, Article 36(2) (**Ex. RLA-32**); ILC Draft Articles, Commentary 28 to Article 36 (**Ex. RLA-32**); *Enron*, Award, para. 384 (**Ex. CLA-56**); *Metalclad* award (**Ex. CLA-19**), para. 119.

1006 Claimants' Reply, paras. 941, 944, *citing* World Bank Guidelines on the Treatment of Foreign Direct Investment, Section IV, para. (6)(i) (**Ex. CLA-124**); *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 344 (**Ex. CLA-115**); *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. 064/2008, Arbitration Institute of the Stockholm Chamber of Commerce, Final Award, 8 June 2010, para. 71 (**Ex. CLA-127**).

1007 Claimants' Reply, para. 944-948, *citing Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, 16 June 2010, paras. 13-75 (**Ex. CLA-129**); *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, paras. 542, 572-576 (**Ex. CLA-130**); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September,2014, para. 830 (**Ex. CLA-131**).

1008 Claimants' Reply, paras. 950-954, *referring to* Statement of Defense, paras. 709-710.

case."[1009] Referring to *Mobil and Murphy v. Canada*, the Claimants argue that "[r]equiring the victim to bring new proceedings at a time when the amount of the damages can be calculated with reasonable certainty is tantamount to denying compensation" and argues against the Tribunal refusing to award damages in this case until they are "ripe for consideration."[1010]

485. Fourth, the Claimants assert that "[t]he DCF method coupled with an ex-post approach provides reasonable certainty of the estimates of the Claimants' damages."[1011] The Claimants note that the DCF method has been used to calculate damages based on the sale of Energy 21 and in the calculation based on future estimated cash flows.[1012] According to the Claimants, "[t]he importance and reliability of DCF valuations are widely recognized," by commentators and investment tribunals alike.[1013] The Claimants note that tribunals have determined that the DCF method is suitable for "businesses with a historical record of profitability" (which the Claimants argue applies to the SPVs) as well as "in the absence of a proven record of profitability."[1014] The

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[1009] *See* Claimants' Reply, paras. 955-1002, *citing Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, 16 June 2010, paras. 13-91 (**Ex. CLA-129**); *Quasar de Valors SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. The Russian Federation*, SCC Case No. 24/2007, Arbitration Institute of the Stockholm Chamber of Commerce, Award, 20 July 2012, para. 215 (**Ex. CLA-20**); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 8.3.16 (**Ex. CLA-44**); *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, para. 345 (**Ex. CLA-133**); *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, para. 215 (**Ex. CLA-134**); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 246 (**Ex. CLA-116**); *Micula*, Award, para. 1008 (**Ex. CLA-3**); *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012 paras. 437-439 (**Ex. RLA-17)**; *Khan Resources Inc., Khan Resources B.V, CAUC Holding Company Ltd. v. The Government of Mongolia* (*MonAtom LLC)*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015, para. 375 (**Ex. CLA-132**); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 89 (**Ex. RLA-174**); *Occidental*, Final Award, para. 210 (**Ex. CLA-28**).

[1010] Claimants' Reply, paras. 995-999.

[1011] Claimants' Reply, p. 336.

[1012] Claimants' Reply, para. 1003; **CER-[redacted] 2**, Section 4, Appendices 4.1, 4.2; Section 5, Appendices 5.1, 5.2.

[1013] *See* Claimants' Reply, paras. 1005-1007, *citing* M. Kantor, Valuation for Arbitration, p. 131 (**Ex. CLA-126**); C. McLachlan, L. Shore and M. Weiniger, International Investment Arbitration – Substantive Principles, 2007, New York, para. 9.73 (**Ex. CLA-138**,); H. van Houtte and B. McAsey, Future Damages in Investment Arbitration – a Tribunal with a Crystal Ball?, p. 644 (**Ex. CLA-137**); See also *National Grid P.L.C., v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 275 (**Ex. CLA-45**); *Walter Bau AG (In Liquidation) v. The Kingdom of Thailand,* UNCITRAL, Award, 1 July 2009, para. 14.12 (**Ex. CLA-122**); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, para. 658 (**Ex. CLA-139**); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 793 (**Ex. CLA-46**).

[1014] Claimants' Reply, paras. 1008-1010, citing World Bank Guidelines on the Treatment of Foreign Direct Investment, Section IV, para. (6)(i) (**Ex. CLA-124**); *Metalclad*, Award, para. 119 (**Ex. CLA-19**); *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3,

Claimants highlight that [redacted] undertook the "DCF calculation with *ex-post* data, *i.e.*, with actual data for 2011-2015, which eliminates, or at least very significantly reduces, the risk of uncertainty."[1015] The Claimants argue that this methodology combining a DCF calculation with *ex-post* data renders "baseless" the Respondent's critique of the DCF approach as one that cannot overcome the fact that "speculative or uncertain losses are not compensable."[1016] In the Claimants' view, even '[redacted] clearly accepts [the Claimants'] DCF approach in the alternative."

4. Causation

486. In response to the Respondent's objection to the lack of analysis of causation or other legal standards, the Claimants assert that "the damages suffered by the Claimants are a proximate and foreseeable consequence of the Respondent's blatant violations of its international obligations."[1017] The Claimants first note that, "[s]ince the ECT and the Cyprus, Luxembourg and Netherlands BITs do not specifically address causation, recourse must be had to the general principles of international customary law."[1018] According to the Claimants, these principles are enshrined in Article 31 of the ILC Draft Articles, which provides that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[1019] The Claimants argue that, in the present case, "there is both a factual and legal causal link between the Claimants' losses and the Czech Republic's Measures."[1020]

487. As regards factual causation, which the Claimants explain as "the existence of a cause-effect relationship between the wrongful conduct and the loss," the Claimants assert that "it is difficult to dispute that the Measures . . . impaired the Claimants' investment and are the sole cause of the

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16 June 2010, paras. 13-75 (**Ex. CLA-129**); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 830 (**Ex. CLA-131**); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 8.3.4 (**Ex. CLA-44**); *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. 064/2008, Arbitration Institute of the Stockholm Chamber of Commerce, Final Award, 8 June 2010, para. 74 (**Ex. CLA-127**).

[1015] Claimants' Reply, para. 1010. *See also* Claimants' Reply, paras. 1016-1017, *citing Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 384 (**Ex. CLA-115**); **CER-[redacted]-2**, para. 3.3.2.

[1016] Claimants' Reply, para. 1011, *referring to* Statement of Defense, para. 711.

[1017] Claimants' Reply, para. 906, *referring to* Statement of Defense, paras. 703-706.

[1018] Claimants' Reply, para. 908, *citing Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, para. 167 (**Ex. RLA-7**).

[1019] Claimants' Reply, para. 908, *citing* ILC Draft Articles, Article 31 (**Ex. RLA-32**).

[1020] Claimants' Reply, para. 909.

loss of value of the SPVs and of the reduced price that Radiance had to agree to in January 2016 when it sold its shares in E21 to CEE Equity."[1021] The Claimants further argue that the Respondent "willfully and knowingly dismantled the Incentive Regime that it had set up to attract foreign investors by means of the retroactive Measures," measures which the Claimants argue "are attributable solely to the Respondent."[1022]

488. As regards legal causation, the Claimants explain that this "determines which wrongful conduct that satisfies the standard of factual causation entitles the harmed investor to compensation."[1023] According to the Claimants, "[t]he only instances in which compensation is not triggered are those where the link between the wrongful conduct and the damage is considered too remote or . . . not foreseeable or proximate."[1024] In the Claimants' view, "there is no denying that the Czech Republic could have foreseen that, by dismantling the Incentive Regime, it would have considerably reduced the SPVs' enterprise value."[1025] As to the relationship between foreseeability and proximity, the Claimants cite the award in *Joseph Charles Lemire v. Ukraine* which states that "a chain of causality must be deemed *proximate*, if the wrongdoer could have *foreseen* that through successive links the irregular acts finally would lead to the damage."[1026]

489. Based on these requirements for causation, the Claimants conclude that:

> The loss of enterprise value of the SPVs and, consequently, the reduced price that Radiance had to agree to in January 2016 when it sold its shares in E21 to CEE Equity are thus inescapably proximate and foreseeable consequences of the Respondent's Measures which are therefore both factually and legally the cause of the damages claimed by the Claimants in these proceedings.[1027]

B. THE RESPONDENT'S ARGUMENTS

490. According to the Respondent, "[e]ven if the Tribunal were to find that the Taxation Measures . . . were in violation of the ECT and/or the BIT, Claimants have failed to meet their burden to

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1021 Claimants' Reply, para. 910. *See also* Claimants' Reply, paras. 369-371; **CWS-[redacted] 2**, paras. 13-16.

1022 Claimants' Reply, para. 911.

1023 Claimants' Reply, para. 912.

1024 Claimants' Reply, para. 912, *citing BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, para. 428 (**Ex. CLA-110)**; ILC Draft Articles, Commentary 10 to Article 31 (**Ex. RLA-32**); *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 382 (**Ex. CLA-115**).

1025 Claimants' Reply, para. 913, *citing* Transcript of the Senate session of 8 December 2010, p. 4 (**Ex. C-371**).

1026 Claimants' Reply, para. 912, *citing Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 170 (**Ex. CLA-116**) (emphasis added by the Claimants).

1027 Claimants' Reply, para. 914.

establish damages in the amount claimed." In its Statement of Defense, the Respondent critiques the Claimants' damages analysis on the basis that it does not address causation, it is based on uncertain and speculative future events, and "it contains numerous flaws with respect to both prospective and historical damages."[1028] In its Rejoinder, the Respondent criticizes the "main flaws" in both damages methodologies submitted by the Claimants, as explained by the expert reports of [redacted].[1029]

1. Principles of Quantum and Future Damages

491. The Respondent argues that the Claimants "skip[] over crucial steps needed to bridge the gap between its merits and quantum analysis," such as causation, or "any legal standard that should be applied in assessing damages."[1030] The Respondent argues that "[i]t is wholly inappropriate for Claimants to ask this Tribunal to award them damages now on the basis of a hypothetical future breach, when events may yet unfold in a way that would prove such an award unjustified."[1031] The Respondent's expert, [redacted] postulates that it is in fact likely that events would unfold in such a way that would prove such an award unjustified." According to the Respondent, [redacted] expert report "explains that Claimants' investments in place before the valuation date of 1 January 2011 are likely to achieve simple payback (*i.e.*, a return of its capital costs) within far less than 15 years (*i.e.,* the period contemplated in the relevant legislation), and meet the 7% annual return target, even with the Solar Levy and Income Tax Act amendments."[1032] Accordingly, [redacted] argues that the premise of the Claimants' damages analysis is inaccurate. He asserts instead that "the Tribunal could only begin to consider damages if the payback guarantee and annual rate of return guarantee were violated" and, as such, the "Claimants' claim for lost enterprise value resulting from reduced profits is unreasonable."[1033]

492. In the Respondent's view, the Claimants' reliance on the DCF approach to remedy the "uncertain nature of their alleged loss" is "inadequate, as it neither overcomes the legal requirement for certainty . . . nor explains why this Tribunal . . . should rely on speculative and uncertain

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1028 Statement of Defense, para. 706.

1029 Respondent's Rejoinder, para. 659.

1030 Statement of Defense, para. 703.

1031 Statement of Defense, para. 704; **RER-[redacted]-1**, para. 2.2.4.

1032 Statement of Defense, para. 705; **RER-[redacted]-1**, para. 2.2.2.

1033 Statement of Defense, para. 705; **RER-[redacted]-1**, para. 2.2.4.

predictions as to future events to quantify loss."[1034] The Respondent submits that it is "a well-established principle in investment treaty jurisprudence and under international law that there can be no compensation for speculative or uncertain damage."[1035] The Respondent asserts that the Claimants have failed to point to any jurisprudence that overcomes this "weight of authority."[1036]

2. Flaws in the Claimants' Damages Analysis

493. The Respondent submits that the first report of "suffers from a number of conceptual flaws, relies on inappropriate assumptions and is poorly substantiated."[1037] The Respondent highlights the following "flaws": (a) "[n]early 40% of the damages calculated by result from inappropriate adjustments to the discount rate based on an unproven hypothesis that the Taxation Measures increased the risk of *future* regulatory interference with Claimants' investment;"[1038] (b) the "Claimants' approach constitutes 'double counting of the damages;'"[1039] (c) has inappropriately "increase[d] the damages by inflating the WACC" in the scenario that takes the Measures into account;[1040] and (d) "fails to distinguish between costs that form part of the regulated solar business *per se* and those that are attributable to management decisions *outside* the framework of that business."[1041]

494. In its Rejoinder, the Respondent submits that the "Claimants' Reply and the accompanying Second Report fail to justify any of the key deficiencies identified by the Czech Republic" and that the "Reply introduces various new errors."[1042] The Respondent highlights the following "flaws" in the Claimants' revised damages analysis: (a) "use of the wrong benchmark

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1034 Statement of Defense, para. 709.

1035 Statement of Defense, para. 710 *referring to Amoco International Finance Corporation v. Government of Islamic Republic of Iran* (Partial Award No. 310-56-3, 14 July 1987) 15 Iran-U.S. C.T.R. 189, para. 238 (**Ex. RLA-173**); J. Crawford*, The International law Commission's Articles on State Responsibility: Introduction, text and commentaries*, Cambridge University Press (2002), Art. 36, para. 27 (**Ex. RLA-107**); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 88 (**Ex. RLA-174**); *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/1, paras. 473, 476 (**Ex. RLA-17**).

1036 Statement of Defense, para. 711.

1037 Statement of Defense, para. 714; **RER- -1**, para. 2.2.5.

1038 Statement of Defense, para. 714; **RER- -1**, para. 5.1.3 (emphasis in original).

1039 Statement of Defense, para. 714; **RER- -1**, para. 5.5.8.

1040 Statement of Defense, para. 715; **RER- -1**, para. 5.5.1.

1041 Statement of Defense, para. 716; **RER- -1**, para. 5.2.7.

1042 Respondent's Rejoinder, para. 660.

to assess losses;" (b) "selective and inappropriate reliance on new information after the chosen valuation date;" (c) "improper discounting of all cash flows in the [scenario taking the Measures into account] by a higher amount than in the [scenario not taking into account the Measures];" (d) "significant flaws in the methodology and calculation of the Deal Model;" and (e) "an improper compensation claim in relation to future tax liabilities in the Updated Model."[1043]

495. First, as regards the benchmark to assess losses, the Respondent "does not accept that the correct measure of damages in this case is necessarily the difference in enterprise value of Claimants' business with and without the Taxation Measures (either as reflected in the Updated Model or the Deal Model)" because "damages should depend on the specifics of the breach found by the Tribunal," the valuation approach should not incorporate management decisions "solely within Claimants' control," and a model looking at specific loss should be favored over an "asset-based model."[1044]

496. Second, the Respondent takes issue with the Claimants' use of an *ex post* valuation methodology and their use of selected information after the valuation. The Respondent submits that tribunals take an *ex post* approach exceptionally and "on narrow and limited grounds that are not apposite in this case."[1045] According to the Respondent, given that the Czech Republic "is not benefitting at all from any increases in value in Claimants' alleged investments," it would "be highly unfair for Claimants to take advantage of higher-than-expected revenues to demand even higher compensation in this arbitration."[1046] In lieu of an *ex post* approach, the Respondent proposes an *ex ante* approach which, it argues, would avoid such "unfairness" and would be more appropriate in light of the Claimants' claims concerning legitimate expectations.[1047] In the Respondent's view, "[i]f the Tribunal were to accept Claimants' contention that the Czech Republic must compensate them for thwarting such expectations, then it would be illogical to award Claimants damages

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1043 Respondent's Rejoinder, para. 662.

1044 Respondent's Rejoinder, paras. 664-669; **RER-[redacted] 1**, para. 4.3.4; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, paras. 36, 41, 47-48 (**Ex. RLA-174**).

1045 Respondent's Rejoinder, para. 673, *citing ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 496 (**Ex. CLA-54**); S. Ripinsky and K. Williams, Damages in International Investment Law (1st ed. 2008), pp. 252, 258 (**Ex. RLA-247**); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Award, 18 July 2014, para. 1766 (**Ex. CLA-16**); *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Partially Dissenting Opinion, 7 September 2015, para. 43 (**Ex. RLA-248**).

1046 Respondent's Rejoinder, para. 674.

1047 Respondent's Rejoinder, paras. 674-675.

based on developments that they did not, in fact, expect at the time, and which moreover turned out to their advantage rather than their detriment."[1048]

497. The Respondent further argues that [REDACTED] "alternate[s] tendentiously between *ex ante* and *ex post* assessments" and that the choices he makes "tend to increase his damages valuation."[1049] [REDACTED] highlights the following two inconsistencies in [REDACTED]' approach: (a) failure "to use actual *ex post* interest charges (which are substantially lower than the hypothetical interest charges he has calculated on an *ex ante* basis); and (b) assumption that the "Claimants continue to use 90% of their available cash flow to pay off loans," contrary to recent financial statements.[1050] As applied to the Deal Model specifically, [REDACTED] explains that the valuation date of 1 January 2011 is maintained, but the data pertaining to a sale in 2015 "is of questionable accuracy and moreover, from the perspective of valuation date, is in the future and therefore uncertain."[1051] The Respondent's expert, [REDACTED] also states that "[e]ven in applying his ex-post approach, [REDACTED] appears to be inconsistent" as "he does not always use historical information" and "makes certain assumptions" which are "inappropriate in the circumstances."[1052] Finally, [REDACTED] considers the fact that "the cash flows . . . in Counterfactual for the Deal Model and Updated Model are different is illogical."

498. Third, according to the Respondent, '[REDACTED] constructs not one, but *two* parallel valuations, each with its own separate WACC," an analysis the Respondent describes as "not typical."[1053] One valuation considers the impact of the Measures and the other does not. By calculating damages as the difference between the two valuations, the Respondent argues that "the WACC is being used not simply to ensure that losses are awarded at their present value, as would be customary (using a single WACC), but to inflate the difference between the [two scenarios] and therefore Claimants' alleged losses."[1054] The Respondent notes that "[t]his issue pervades both the Deal Model and Updated Model."[1055] [REDACTED] notes that the inclusion of factors "unaffected by the Taxation Measures (such as financing and management decisions) "renders the valuation

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1048 Respondent's Rejoinder, para. 675.

1049 Respondent's Rejoinder, paras. 676-677.

1050 Respondent's Rejoinder, para. 678.

1051 Respondent's Rejoinder, para. 679.

1052 Hearing Transcript, Day 5, p. 234:20-25.

1053 Respondent's Rejoinder, paras. 680-681; Hearing Transcript, Day 1, p. 268:1-3. The Respondent states "we have come up with not a single example in any investor-state case where this was ever done."

1054 Respondent's Rejoinder, para. 681.

1055 Respondent's Rejoinder, para. 681.

unnecessarily complex, methodologically unsound, and unverifiable."[1056] The Respondent also notes that "[REDACTED] applies different WACCs to discounting the cash flows in the two scenarios" (a higher WACC to returns in the scenario considering the impact of the Measures) resulting in damages being claimed for identical cash flows.[1057] The Respondent also objects to [REDACTED]' inflation of the WACC in the scenario taking the Measures into account "by improperly increasing the beta factor, which is part of the WACC calculation" and the fact that he "compounds the impact by re-rating the cost of debt, which is another component of the WACC."[1058]

499. [REDACTED] presents several objections to [REDACTED] use of a beta uplift factor. In his third expert report [REDACTED] objects to the beta factor applied in [REDACTED]' third report as contradictory to the first two [REDACTED] reports. [REDACTED] criticizes the use of selective data showing a collapse in PV investment as evidence of increased regulatory risk and finds that the decline can be attributed to the decreasing FiT, not increased regulatory risk.[1059] [REDACTED] maintains that the Measures would not increase volatility and that [REDACTED]' beta uplift formula "does not represent the commonly accepted definition" and relies upon "inconsistent factors."[1060] [REDACTED] also argued that the paper introduced by [REDACTED] as justification for his beta uplift does not apply to the current situation.[1061] [REDACTED] critiqued [REDACTED]' approaches to the beta uplift, stating that "none of them have any linkage to the market itself," "they are all creations of [REDACTED]" and [REDACTED] finds no academic basis for [REDACTED] calculation.[1062] He posited that "[REDACTED] treats each SPV separately and calculates the WACC on a year-by-year basis for each [SPV]," but for the beta uplift "he lumps them together and calculates a single beta uplift."[1063] Another issue is that [REDACTED] is "initiating the calculation with a beta that was calculated for the industry, and then he is adjusting it using company specific information."[1064]

1056 Respondent's Rejoinder, para. 682.

1057 Respondent's Rejoinder, paras. 683-684.

1058 Respondent's Rejoinder, para. 688.

1059 **RER-[REDACTED]-3**, paras. 3.4.1-3.4.4.

1060 **RER-[REDACTED]-3**, paras. 2.2.1, 3.2.1-3.3.3.

1061 Hearing Transcript, Day 4, p. 236-237 *referring to* a paper written by Wright, Mason and Miles which analyzes the difference between a monopolist that is subject to regulation and a monopolist that is not subject to regulation, and a price cap regulation. [REDACTED] believes this paper does not apply in the present case because PVPPs are not monopolists, were always subject to regulation and the FiT acts as a price floor not a price cap.

1062 Hearing Transcript, Day 5, p. 238:4-9.

1063 Hearing Transcript, Day 5, p. 238:10-18.

1064 Hearing Transcript, Day 5, p.238:21-25.

500. [REDACTED] contends that [REDACTED] ignores the consolidation of bank debts into Solar 10 in 2015, which then passed through that debt to each of the SPVs as shareholder loans, whereas previously those SPVs had gone directly to the banks.[1065] [REDACTED] believes that by re-rating the debt and including that re-rating into the calculation of damages [REDACTED] is actually including the banks' uncompensated risk, as a claim.[1066] [REDACTED] also believes that [REDACTED] is including the shareholder loans in that re-rating, although it should not matter whether the Claimants funded the SPVs through shareholder loans or equity.[1067] Furthermore, even if the re-rating was necessary, the effect would not extend to the lifetime of the PVPP, but would be passed-through and fleeting.[1068] [REDACTED] also objects to [REDACTED] treatment of an operating lease.[1069]

501. Fourth, with regard to the Deal Model, the Respondent highlights that the "December 2015 Sale Agreement reveals that Claimants have sold their business for substantially *more than* what [REDACTED] himself projected it was worth, and demonstrate that Claimant Radiance – which is alleged to have been the Claimant which suffered the most damages from the Measures – earned a 15.1% return on their investment, which is more than *double* the 'adequate return' rate established by ERO for RES investment in the Czech Republic during the relevant period."[1070] The Respondent argues that this "undermines the inflated discount rate [REDACTED] has applied to reduce the value of the future cash flows of the solar plants."[1071] The Respondent also objects to [REDACTED] (a) reliance "on optimistic cash flow projections prepared by the seller (*i.e.*, Radiance) that are considerably higher than those assumed by [REDACTED] himself in his first or second report;" and (b) assumption "that the only reason why the buyer paid a lower price than such cash flows might otherwise imply is that the extent of future 'regulatory risk' resulting from the Taxation Measures must be even higher than [REDACTED] calculated under the Updated Model."[1072] The Respondent submits that the risk of future change to the regulatory regime is lower than before the Measures as the Solar Levy reduced returns, making it more stable and sustainable, and the Commission has approved the incentive regime.[1073] The Respondent notes

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1065 Hearing Transcript, Day 5, p. 239:2-9.

1066 Hearing Transcript, Day 5, p. 239:16-25.

1067 Hearing Transcript, Day 5, p. 240:1-7.

1068 Hearing Transcript, Day 5, p. 240:12-15.

1069 Hearing Transcript, Day 5, p. 240:20-24.

1070 Respondent's Rejoinder, para. 661; **RER-[REDACTED]-2**, para. 2.3.13 (emphasis in original).

1071 Respondent's Rejoinder, para. 698.

1072 Respondent's Rejoinder, para. 698.

1073 Hearing Transcript, Day 1, p .270-271.

that, "*even if* regulatory risk . . . was part of the purchaser's motivation for a higher discount rate, it was more likely due to factors other than the Taxation Measures" which would not be subject to compensation.[1074] ████ noted that the solar industry is not subject to extensive risks and the beta should be between zero and one.[1075] In his third expert report ████ considers that the Deal Model remains unreliable: it uses an inappropriate valuation target (by excluding two SPVs from the valuation and the associated benefit of their reduced interest costs) and unsupported forecasts.[1076]

502. Fifth, with regard to the Updated Model, the Respondent submits that "this alternative calculation continues to suffer from the fact that Energy 21's projected *future* losses have not crystallized and may never crystallize."[1077] The Respondent emphasizes that there is no guarantee that Energy 21's plants will continue to produce electricity and be assessed for the Solar Levy over the next fourteen years."[1078] Accordingly, the Respondent argues that, if the Tribunal awarded Claimants damages under the Updated Model, this would "run[] the risk of providing them with excessive compensation in the event the Solar Levy is not actually assessed for any reason."[1079] The Respondent concludes that "the loss has not been 'suffered' because the taxes at issue have not been assessed."[1080]

C. THE TRIBUNAL'S ANALYSIS ON QUANTUM

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

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1074 Respondent's Rejoinder, para. 701.

1075 Hearing Transcript, Day 5, p. 244:1-6.

1076 **RER-████-3**, paras. 4.3.2-4.3.3.

1077 Respondent's Rejoinder, para. 703 (emphasis in original).

1078 Respondent's Rejoinder, para. 707.

1079 Respondent's Rejoinder, para. 707.

1080 Respondent's Rejoinder, para. 711.

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.

X. COSTS

507. As the Tribunal has decided to issue a Partial Award, it does not consider it necessary or indeed appropriate to take any decisions on costs at this stage of the proceedings.

XI. PARTIAL AWARD

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

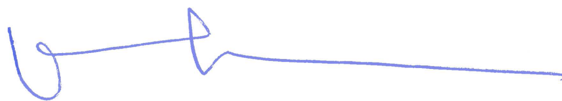
(k) All other claims, defenses and requests for relief, including claims for compensation and costs, are deferred to a subsequent phase of the arbitration.

Place of Arbitration: Geneva

Signed, this 20th day of December 2017,

Mr Gary Born

Mr J. Christopher Thomas, QC



Dr Veijo Heiskanen
Presiding Arbitrator