IN THE MATTER OF AN ARBITRATION UNDER THE 1965 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

AND

PURSUANT TO THE 1994 ENERGY CHARTER TREATY

BETWEEN:

WATKINS HOLDINGS S.À R.L.
WATKINS (NED) B.V.
WATKINS SPAIN, S.L.
REDPIER, S.L.
NORTHSEA SPAIN, S.L.
PARQUE EÓLICO MARMELLAR, S.L.
AND
PARQUE EÓLICO LA BOGA, S.L.

Claimants

AND

THE KINGDOM OF SPAIN

Respondent

CLAIMANTS' REJOINDER ON JURISDICTION

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7 March 2018

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1. INTRODUCTION

1. This Rejoinder on Jurisdiction (the **Rejoinder on Jurisdiction**) is submitted by the Claimants pursuant to Rule 31 of the ICSID Arbitration Rules and Annex A of Procedural Order No. 1, as amended by the Parties on 19 September 2017, 17 November 2017 and 22 February 2018, in response to Spain's Rejoinder on the Merits and Reply on Jurisdiction, dated 9 January 2017 (the **Reply on Jurisdiction**).

2. Capitalised terms used in this submission and not otherwise defined herein have the same meaning as set out in the Claimants' Memorial, dated 14 November 2016 (the **Claimants' Memorial**), and the Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction (in particular, Part IV on Jurisdiction), dated 28 September 2017 (the **Counter-Memorial on Jurisdiction**). References in this document to any of the Parties' submissions are to the English versions.

1.1 Structure of the Rejoinder on Jurisdiction

3. This Rejoinder on Jurisdiction is divided into three sections, including this introduction, and is accompanied by a number of legal authorities and exhibits. Authorities are numbered consecutively from **Authority CL-160 to CL-174** and exhibits are numbered consecutively from **Exhibit C-266 to C-270**. For the Tribunal's convenience, attached to this Rejoinder on Jurisdiction are a consolidated list of exhibits (Appendix 1) and a consolidated list of authorities (Appendix 2).

4. The structure of this submission is as follows:

   (a) **Section 1** comprises this introduction, together with an executive summary of the Rejoinder on Jurisdiction;

   (b) **Section 2** addresses Spain's Intra-EU Objection; and

   (c) **Section 3** deals with Spain's Tax Objection (together with the Intra-EU Objection, the **Objections**).

1.2 Summary

5. Spain's Reply on Jurisdiction repeats many of the arguments that were raised previously in its Memorial on Jurisdiction and which the Claimants have already responded to in full in Part IV of their Counter-Memorial on Jurisdiction. For the sake of procedural economy, the

Claimants will not repeat arguments made in earlier submissions unless necessary to respond to any new matters raised in the Reply on Jurisdiction.

6. The Claimants' position remains that both of Spain's jurisdictional objections are without merit and seek to distort the regime of investment protection established by the ECT. The Claimants briefly summarise their response to each of the Objections below.

7. **Intra-EU Objection**. While numerous tribunals have unanimously and consistently held that this objection is baseless, Spain continues to maintain that because the Parties to this dispute are an EU Member State and nationals of other EU Member States, the Tribunal does not have jurisdiction under the ECT to determine the Claimants' claims. There is nothing in the ECT to support such an interpretation. Pursuant to Article 26 of the ECT, Spain has provided its "unconditional consent" to settle disputes arising under the ECT through international arbitration; that includes arbitration with nationals of other Contracting Parties which are EU Member States. There can be no doubt that the Tribunal has jurisdiction to decide claims that are intra-EU in nature.

8. **Tax Objection**. Spain argues that the 7% Levy is a *bona fide* measure and not a disguised tariff cut, so that it falls outside the jurisdiction of this Tribunal.[1] As already shown in the Counter-Memorial on Jurisdiction,[2] however, and for the reasons further developed in this submission, the 7% Levy clearly is a backdoor tariff cut targeting RE installations. It has been intentionally framed as a tax under Spanish law in order for Spain to breach its commitments to the Claimants without incurring liability under the ECT. Spain should not be allowed to rely on the tax carve-out to evade liability.

9. For the reasons set out below, the Claimants respectfully request the Tribunal to dismiss Spain's Objections, declaring that it has jurisdiction to decide this dispute in its entirety and that all of the Claimants' claims are admissible.

2. THE INTRA-EU OBJECTION

2.1 Introduction and Preliminary Observations

10. The Intra-EU Objection is based on a legal fiction that has no basis in the text of the ECT or in any reasonable interpretation of the same.

11. Spain contends that the Tribunal does not have jurisdiction *ratione personae* to hear the Claimants' claims. On Spain's case, this is because the Claimants, on the one hand, are

[1] Reply on Jurisdiction, Section II(B).
[2] Counter-Memorial on Jurisdiction, Part IV, Section 19.

nationals of EU Member States (Luxembourg, The Netherlands and The Kingdom of Spain) and the Respondent, on the other hand, is an EU Member State. Spain concludes that the requirement of Article 26(1) of the ECT that investors be of "another Contracting Party" is not met.[3] Spain advances the Intra-EU Objection even though no fewer than fifteen arbitral tribunals have rejected it.[4] As will be explained in section 2.6, the recent CJEU judgment does not deter from that conclusion.

12. In the sections that follow, the Claimants provide specific rebuttals concerning Spain's misplaced reliance on the principle of primacy of EU Law (section 2.2); Spain's flawed interpretation of Article 26 of the ECT (section 2.3); the lack of an implicit disconnection clause in the ECT (section 2.4); and the unavailing role of the European Commission (**EC**) (section 2.5). Before doing so, the Claimants would like to make the following preliminary observations.

13. First, all arbitral tribunals that have considered whether the Intra-EU Objection deprives an arbitral tribunal of jurisdiction under Article 26 of the ECT have rejected it.[5] These cases notably now include six cases against Spain itself: (a) the *PV Investors v Spain* decision on jurisdiction;[6] (b) *Charanne v Spain*;[7] (c) *Isolux v Spain*;[8] (d) *RREEF v Spain*;[9] (e) *EISER v*

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3 **Exhibit C-1**, Energy Charter Treaty, 17 December 1994, p. 72.

4 **Exhibit C-176**, L E Peterson, "*Intra-EU Treaty Claims Controversy: New Decisions and Developments in Claims Brought by EU Investors v Spain and Hungary*", available at https://www.iareporter.com/articles/intra-eu-treaty-claims-controversy-new-decisions-and-developments-in-claims-brought-by-eu-investors-vs-spain-and-hungary/ (last accessed on 10 September 2017); **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016; **Authority CL-151**, *Charanne B.V. and Construction Investments S.Á R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016; **Authority RL-77**, *Isolux Infrastructure Netherlands, B.V. v The Kingdom of Spain*, SCC Arbitration V2013/153, Award, 16 July 2016; **Authority CL-154**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017; **Authority CL-160**, *Novenergía II – Energy & Environment (SCA) Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. V 2015-063, final award dated 25 February 2018; **Authority CL-86**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012; **Authority CL-52**, *Eastern Sugar B.V. v The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007; **Authority CL-128**, *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, paras. 106-109; **Authority CL-134**, *Eureko B.V. v Slovak Republic*, PCA Case No. 2008-13, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010; **Authority CL-139**, *European American Investment Bank AG v The Slovak Republic,* UNCITRAL, Award on Jurisdiction, 22 October 2012; **Exhibit C-266**, L E Peterson, "*Details Surface on Jurisdiction Holding in Binder v Czech Republic; Ad-Hoc Tribunal Saw No Conflict between BITs and EU law*", available at http://www.iareporter.com/articles/details-surface-of-jurisdiction-holdings-in-binder-v-czech-republic-ad-hoc-tribunal-saw-no-conflict-between-bits-and-eu-law/ (last accessed on 2 February 2017); **Authority CL-161**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v The Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016; **Exhibit C-267**, L E Peterson, "*Czech solar award comes to light, offering clarity as to tribunal's handling of jurisdictional questions – including whether "Investor" must be defined in light of domestic law*", available at https://www.iareporter.com/articles/czech-solar-award-comes-to-light-offering-clarity-as-to-tribunals-handling-of-jurisdictional-questions-including-whether-investor-must-be-defined-in-light-of-domestic-law/ (last accessed on 19 February 2018). This report refers to an award dated 11 October 2017, issued by an *ad hoc* tribunal constituted under the auspices of the UNCITRAL Rules, pursuant to the Czechoslovakia-Germany BIT.

5 Counter-Memorial on Jurisdiction, para. 494. See also **Authority CL-154**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 207; **Authority RL-77**, *Isolux Infrastructure Netherlands, B.V. v The Kingdom of Spain*, SCC Arbitration V2013/153, Award, 16 July 2016, para. 636; **Authority CL-151**, *Charanne B.V. and Construction Investments S.Á R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 437.

6 **Exhibit C-176**, L E Peterson, "*Intra-EU Treaty Claims Controversy: New Decisions and Developments in Claims Brought by EU Investors v Spain and Hungary*", available at https://www.iareporter.com/articles/intra-eu-treaty-claims-controversy-new-decisions-and-developments-in-claims-brought-by-eu-investors-vs-spain-and-hungary/ (last accessed on 10 September 2017).

7 **Authority CL-151**, *Charanne B.V. and Construction Investments S.Á R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016.

Spain;[10] and (f) *Novenergía v Spain*.[11] All of these tribunals upheld jurisdiction in these disputes, which were "intra-EU" in nature.

14. In addition, it was also reported that three other tribunals recently rejected the Intra-EU Objection. In such cases, the objection was raised by the Czech Republic and Italy in the context of claims brought against them by companies incorporated in EU Member States.[12] This is in addition to nine earlier decisions that have decided that the ECT does apply as between a Member State and investors from another Member State.[13] As of today, that means that no fewer than fifteen tribunals have considered and rejected the intra-EU argument.

15. In light of the above, the fact that Spain is persisting with a jurisdictional objection that has never succeeded before any arbitral tribunal (including in cases where Spain was the respondent) is, at best, surprising, and should have costs consequences.

16. Secondly, Spain's contention that the various awards cited by the Claimants "*do not resolve matters that are fully coincident with the present case*"[14] because many of the cases relied on by the Claimants refer to BITs "*that have nothing to do with a multilateral and mixed treaty promoted and signed by the EU*"[15] is unavailing. Nine of the authorities relied on by the Claimants involve claims brought pursuant to the ECT (and six of these were brought against

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8 **Authority RL-77**, *Isolux Infrastructure Netherlands, B.V. v The Kingdom of Spain*, SCC Arbitration V2013/153, Award, 16 July 2016.

9 **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016.

10 **Authority CL-154**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017.

11 **Authority CL-160**, *Novenergía II – Energy & Environment (SCA) Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. V 2015-063, final award dated 25 February 2018.

12 **Exhibit C-268**, L E Peterson, "*Narrow Investor-State clause bars Investor from pursuing FET claim v Czech Republic, but Intra-EU BIT objection is rejected and expro claim will go forward*", available at https://www.iareporter.com/articles/narrow-investor-state-clause-bars-investor-from-pursuing-fet-claim-vs-czech-republic-but-intra-eu-bit-objection-is-rejected-and-expro-claim-will-go-forward/ (last accessed on 20 June 2017). This report refers to a jurisdictional decision dated 9 February 2017, issued by an *ad hoc* tribunal constituted under the auspices of the UNCITRAL Rules, pursuant to the UK-Czech Republic BIT; **Exhibit C-267**, L E Peterson, "*Czech solar award comes to light, offering clarity as to tribunal's handling of jurisdictional questions – including whether "Investor" must be defined in light of domestic law*", available at https://www.iareporter.com/articles/czech-solar-award-comes-to-light-offering-clarity-as-to-tribunals-handling-of-jurisdictional-questions-including-whether-investor-must-be-defined-in-light-of-domestic-law/ (last accessed on 19 February 2018). This report refers to an award dated 11 October 2017, issued by an *ad hoc* tribunal constituted under the auspices of the UNCITRAL Rules, pursuant to the Czechoslovakia-Germany BIT; **Authority CL-161**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v The Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016.

13 **Exhibit C-176**, L E Peterson, "*Intra-EU Treaty Claims Controversy: New Decisions and Developments in Claims Brought by EU Investors v Spain and Hungary*", available at https://www.iareporter.com/articles/intra-eu-treaty-claims-controversy-new-decisions-and-developments-in-claims-brought-by-eu-investors-vs-spain-and-hungary/ (last accessed on 10 September 2017); **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016; **Authority CL-151**, *Charanne B.V. and Construction Investments S.Á R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016; **Authority RL-77**, *Isolux Infrastructure Netherlands, B.V. v The Kingdom of Spain*, SCC Arbitration V2013/153, Award, 16 July 2016; **Authority CL-154**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017; **Authority CL-160**, *Novenergía II – Energy & Environment (SCA) Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. V 2015-063, final award dated 25 February 2018; **Authority CL-86**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012; **Authority CL-161**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v The Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016.

14 Reply on Jurisdiction, para. 113.

15 Reply on Jurisdiction, para. 113.

Spain).[16] Spain notes that authorities such as *Electrabel* involve Member States which "*were not yet members of the EU when they signed the ECT*".[17] As noted in the Counter-Memorial on Jurisdiction,[18] drawing a distinction between "*old*" and "*new*" Member States is an absurd proposition. Taken to its logical conclusion, Spain's argument means that Article 26 of the ECT applies to an intra-EU dispute only so long as either the home State of the claimant-investor or the respondent-host State was not an EU Member State at the time the ECT was signed. There is no support for such an interpretation in the text, object or purpose of the ECT.

17. Thirdly, Spain refers to two cases pending before the CJEU "*on compatibility between BITs and EU Law*":[19]

(a) The first one is a preliminary referral of a question from the Federal Supreme Court of Germany (the **BGH**) to the CJEU in May 2016 in the *Achmea* case.[20] The CJEU has ruled on the matter in its recent judgment of 6 March 2018.[21] In sum, the CJEU found that the submission to arbitration set forth in Article 8 of the BIT between the Netherlands and Slovakia is not compatible with EU law.[22] This case is not, however, directly relevant to this dispute as: (i) the CJEU only addresses a BIT and not the ECT, a circumstance which the CJEU itself goes out of its way to highlight;[23] and (ii) the CJEU's decision is not binding on this Tribunal which, as confirmed by numerous arbitral precedents, is not called upon to apply EU law. The CJEU's findings (and the court's curious reasoning) are further addressed in section 2.6 below.

(b) The second one is an application to the CJEU to annul the EC's decision of 30 March 2015 on the non-enforceability of the arbitral award in *Micula v Romania*, payment of which has been deemed by the EC to constitute illegal State aid.[24] Again, Spain does

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16 **Authority CL-86**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012; **Exhibit C-176**, L E Peterson, "*Intra-EU Treaty Claims Controversy: New Decisions and Developments in Claims Brought by EU Investors v Spain and Hungary*", available at https://www.iareporter.com/articles/intra-eu-treaty-claims-controversy-new-decisions-and-developments-in-claims-brought-by-eu-investors-vs-spain-and-hungary/ (last accessed on 20 June 2017); **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016; and **Authority CL-151**, *Charanne B.V. and Construction Investments S.À R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016.

17 Reply on Jurisdiction, para. 113.

18 Counter-Memorial on Jurisdiction, paras. 495-496.

19 Reply on Jurisdiction, para. 97.

20 Reply on Jurisdiction, para. 97 and fn 17.

21 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018.

22 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, p 12.

23 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 58 ("[i]*n the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States*." (emphasis added)).

24 Reply on Jurisdiction, para. 97. See **Authority CL-163**, Action brought on 30 November 2015 – Micula/Commission (Case T-684/15), Official Journal of the European Union, 1 February 2016.

not explain why this application is relevant to the present proceedings. This application relates to whether the *enforcement* (within the EU only) of an arbitral award pursuant to Article 54 of the ICSID Convention could be considered incompatible with EU law. It does not concern matters of jurisdiction.

(c) Further, Spain fails to mention that no Intra-EU Objection was raised by Romania in the *Micula v Romania* jurisdictional proceedings.[25] Subsequently, following the tribunal's issuance of its final award, Romania commenced annulment proceedings, during which the EC made submissions as a non-disputing party along the same lines as the arguments advanced by Spain in its Intra-EU Objection in this arbitration. The *ad hoc* annulment committee dismissed the EC's submissions, finding that the tribunal had not lacked jurisdiction to hear the *Micula* claimants' claims.[26]

18. Fourthly, Spain, for the first time in these proceedings, refers to claims by "*renewable energy companies* [that] *invoked EU law in Spain and not the ECT to protect their interests against regulatory measures approved by the Government of Spain*".[27] These claims were brought by the Spanish Wind Association (AEE) in respect of certain provisions of RD 1614/2010 and are irrelevant to matters of jurisdiction in the present dispute, for at least the following reasons:

(a) these claims have no bearing on the Claimants' independent right to bring a claim as investors under the ECT;

(b) the Claimants' claims are submitted solely on the basis of the provisions contained in the ECT;

(c) the protection afforded by the ECT to the Claimants' investment is wider in scope than the "*protection of EU law*",[28] *inter alia*, because there is no investor-State dispute-resolution mechanism under EU law – by contrast, there is such a mechanism under the ECT (to which Spain as a Contracting Party has given its consent), and that is what the Claimants have chosen.

19. Finally, Spain refers to the EC's considerations regarding investor-State arbitration between Member States of the EU in its Decision on State Aid SA.40348, on the current Spanish RE support schemes (the **EC Decision**).[29] In the EC Decision, the EC states that "*any provision*

25 **Authority CL-164**, *Ioan Micula, Viorel Micula and others v The Republic of Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008.

26 **Authority CL-165**, *Ioan Micula, Viorel Micula and others v The Republic of Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016.

27 Reply on Jurisdiction, para. 108.

28 Reply on Jurisdiction, para. 110.

29 Reply on Jurisdiction, para. 107.

that provides for investor-State arbitration between two Member States is contrary to Union law" because: (a) intra-EU investor-State arbitration is contrary to Article 344 TFEU; and (b) intra-EU investment treaties may affect common EU rules or alter their scope.[30] These arguments have already been addressed extensively in the Claimants' submissions.[31] The EC's arguments have also been considered by other arbitral tribunals that assumed jurisdiction.[32] They are nothing new. The argument that EU nationals do not have standing to bring ECT claims against an EU Member State finds no support on the plain meaning of the ECT and goes against the rules enshrined in the Vienna Convention on the Law of Treaties.[33] Furthermore, as addressed in section 2.5 below, the EC's position on this matter is not authoritative.[34]

20. Moreover, Spain's reference to the CJEU's ruling in *ELCOGAS*[35] and the EC decision in respect of the Czech Republic's renewable energy support scheme are irrelevant.[36] As held by the *Charanne* tribunal, the question of whether a certain support scheme could constitute incompatible State aid under EU law could only possibly affect the merits of the relevant dispute, not jurisdiction, and then only at the enforcement stage of the proceedings.[37] This was also the position of the tribunal in *Novenergía*, which held that the EC Decision, "*adopted in order to regulate certain State aid issues under EU law*", was "*irrelevant to the determinations pertaining to* [that case, including the Intra-EU Objection]" because it was "*not applying Union law*".[38]

2.2 Spain's reliance on the principle of the primacy of EU law is misplaced

21. In Spain's view, the principle of primacy of EU law means that EU law "*applies to intra-Community relations on a preferential or prevailing basis to any other right, displacing any other national or international provision*".[39] This is wrong for at least two reasons. First, Spain's view is based on the premise that the ECT and EU law cover the same subject-matter,

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30 **Exhibit RL-81**, Decision of the European Commission, rendered in November 2017, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (S.A. 40348 (2015/NN)), paras. 160-161.

31 Counter-Memorial on Jurisdiction, Section 18.

32 **Authority CL-151**, *Charanne B.V. and Construction Investments S.À R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016; **Authority RL-77**, *Isolux Infrastructure Netherlands, B.V. v The Kingdom of Spain*, SCC Arbitration V2013/153, Award, 16 July 2016; and **Authority CL-160**, *Novenergía II – Energy & Environment (SCA) Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. V 2015-063, final award dated 25 February 2018.

33 Counter-Memorial on Jurisdiction, Section 18.3.

34 See section 2.5.

35 Reply on Jurisdiction, para. 105; **Exhibit R-24**, Order of the CJEU laid down regarding the preliminary ruling C-275/13, ELCOGAS, on 22 October 2014.

36 **Authority RL-21**, Decision of the European Commission, C(2016) 7827 final, of 28 November 2016.

37 **Authority CL-151**, *Charanne B.V. and Construction Investments S.À R.L. v Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2016, para. 449.

38 **Authority CL-160**, *Novenergía II – Energy & Environment (SCA) Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. V 2015-063, final award dated 25 February 2018, para. 465.

39 Reply on Jurisdiction, para. 101.

which they do not.[40] Secondly, Spain's position is wrong based on Article 16 of the ECT, which expressly provides that the more favourable provisions of the ECT would in fact take precedence. In fashioning its primacy argument, Spain simply ignores Article 16 of the ECT.

22. As already explained in the Counter-Memorial on Jurisdiction,[41] the investor protections and judicial remedies afforded by EU law are *different* to those of the ECT in several respects. EU law provides more limited protection than the broad, sector-specific protection, afforded by the ECT. Precisely because the two legal instruments do not cover the same subject-matter, some of the protections established in the ECT have no equivalent in EU Law. For instance, as held in *Novenergía*, the FET standard is "*a legal notion which does not even exist, as such, in the EU legal order*".[42]

23. Another example is Article 26 of the ECT, which allows investors to bring claims directly against the Contracting Parties to the ECT in arbitral proceedings. EU law does not confer this right on investors. By entering into the ECT, the Contracting Parties decided to grant investors this *additional* right. It is therefore irrelevant that Spain considers that "*EU law prevails to any other when it comes to regulating the internal relations of the EU*".[43] Again, as noted above, Article 16 provides that the ECT's more favourable investor provisions, including significantly the investor-state dispute settlement mechanism, take precedence over any conflicting provision of the EU treaties. Article 26 of the ECT is more favourable to the Claimants than the provisions of the EU treaties. The investor's right to bring a claim in arbitration against a Contracting Party under the ECT is an additional right not contained in the provisions of EU law, nor is it invalidated by those provisions. This was confirmed in *Eiser*:

> "To the extent that provisions of European law may in some manner provide protections more favorable to Investors or Investments than those under the ECT, Article 16(2) makes clear that they do not detract from or supersede other ECT provisions, in particular the right to dispute settlement under ECT Part V."[44]

24. The Claimants have chosen to avail themselves of this right, which has no equivalent under EU law. The divergence between the European regime and the ECT was acknowledged by the tribunal in *Electrabel*:

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40 **Authority CL-4**, Vienna Convention, Article 30 ("*Application of successive treaties relating to the same subject-matter*").

41 See-Memorial on Jurisdiction, paras. 522-523.

42 **Authority CL-160**, *Novenergía II – Energy & Environment (SCA) Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. V 2015-063, final award dated 25 February 2018, para. 465.

43 Reply on Jurisdiction, para. 101.

44 **Authority CL-154**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 202.

> "First, it is necessary to note again that the EU law is not incompatible with the provision for investor-state arbitration contained in Part V of the ECT, including international arbitration under the ICSID Convention. The two legal orders can be applied together as regards the Parties' arbitration agreement and this arbitration, because only the ECT deals with investor-state arbitration; and nothing in EU law can be interpreted as precluding investor-state arbitration under the ECT and the ICSID Convention."[45] (emphasis added)

25. The tribunal in *Blusun* took the same position and noted that:

> "[Investors] have no ability under European law to protect their investment by suing the host State directly for breaches of the ECT. Neither does anything in European law expressly preclude investor-State arbitration under the ECT and the ICSID Convention."[46] (emphasis added)

26. The EU legal framework does not provide any mechanism for investors to bring claims against EU Member States directly in arbitral proceedings. Therefore, despite the alleged supremacy of EU law (which, to be clear, the Claimants do not accept), there is no conflict with EU law: investor-State arbitration is not addressed by EU law and the EU legal order has not offered a substitute for investor-State arbitration. Ultimately, by entering into the ECT, each Contracting Party (including Spain) consented to the jurisdiction of an international arbitral tribunal by making a standing offer to submit such disputes to arbitration and intended to confer this right on investors. The Claimants, as qualifying Investors, were entitled to accept that offer, which they did by filing their Request for Arbitration, and thereby enforce that right. This Tribunal's jurisdiction is grounded upon the freely expressed will of the Parties. As explained below, the recent CJEU judgment in the *Achmea* case does not change this.

27. Spain argues that this would lead to impermissible discrimination. Spain claims that while EU law guarantees the principle of non-discrimination to all intra-EU investors, the ECT does not.[47] The Claimants' position, however, is that the ECT does not generate any discrimination between Member States as all Member States are party to it. The Advocate General of the CJEU confirmed in the *Achmea* referral proceedings that "*an ISDS mechanism such as that established by Article 8 of the BIT…does not constitute discrimination on the ground of nationality, prohibited by Article 18 TFEU*".[48] To the extent Spain's concerns about

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45 **Authority CL-86**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.175. See also **Authority CL-166**, M. Potestà, "*Bilateral Investment Treaties and the European Union: Recent Developments in Arbitration and before the ECJ*" (2009) 8 The Law & Practice of International Courts and Tribunals 225, pp. 232 to 233.

46 **Authority CL-161**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v The Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 289.

47 Reply on Jurisdiction, 123.

48 **Exhibit C-261**, Opinion of Advocate General Wathelet of 19 September 2017, *Slowakische Republik v Achmea BV*, C-284/16, provisional text, paras. 82.

discrimination carry any weight (which the Claimants dispute), the Claimants suggest that, rather than finding intra-EU investor-State arbitration impermissible *per se*, an alternative would be for discrimination to be eliminated by the CJEU's extension of the benefits of investor-State arbitration to any non-privileged party. This position was advanced by the BGH in its referral to the CJEU:

> "11. [Quoting the Higher Regional Court] The invalidity of the arbitration clause does not follow from a violation of the principle of non-discrimination of Art. 18 of TFEU. Possible discrimination of investors from other Member States does not result in the invalidity of the arbitration clause at the expense of the defendant, but at the most should result in the extension thereof, to include investors from all Member States of the Union.
>
> 78.…the panel shares the opinion of the Higher Regional Court and the views expressed in the German literature…that a discrimination of investors of other Member States could be removed by the arbitration clause in Art. 8 Sec. 2 BIT by giving access to arbitration in the same."[49]

28. The CJEU did not address the matter of discrimination or the correct application of Article 18 TFEU in its recent judgment of 6 March 2018.[50]

2.3 Spain's interpretation of Article 26 of the ECT is flawed

29. Spain makes the following three arguments as regards Article 26:

(a) Article 26 is a "*consent model for restricted arbitration*", which is limited by some of the other provisions in the ECT;[51]

(b) the fact that other dispute-resolution options are granted to investors under Article 26, other than international arbitration, limits investors' ability to international arbitration;[52] and

(c) the requirement of Article 26(6) sets the ECT, the other rules and principles of international law, and EU law, on a course of conflict.[53]

30. Spain is wrong on all counts.

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49 **Authority CL-167**, Federal Supreme Court Decision in the procedure for the annulment of a domestic arbitral award, 3 March 2016, paras. 11 and 78.

50 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 61.

51 Reply on Jurisdiction, 137.

52 Reply on Jurisdiction, 145.

53 Reply on Jurisdiction, 147.

(a) Article 26 of the ECT provides Spain's unconditional consent to arbitration

31. Spain contends that "*Article 26 introduces a consent model for restricted arbitration*",[54] which is limited by some of the other provisions in the ECT, namely Articles 1(2), 1(3), 25 and 36(7). In reliance on these provisions, Spain considers that "[a]*n effective interpretation of the articles of the ECT… shows how the ECT itself is aware of the role of EU law and its primacy…, excluding arbitration as a dispute settlement mechanism*".[55] In addition, Spain denies that, in the alternative, Article 16 allows for intra-EU disputes to be brought under Article 26. However, none of the provisions cited by Spain supports its view as to "consent to restricted arbitration". Spain also ignores the plain language of Article 16.

32. For the first time in these proceedings, Spain contends that the "*starting point*"[56] of treaty interpretation is the "*principle of effectiveness*" advanced by the tribunal in *Poštová banka, a.s. and Istrokapital SE v The Hellenic Republic*.[57] This requires that preference be given to an interpretation that provides meaning to all the terms of the treaty as opposed to one that does not.[58] The Claimants have previously set out in detail the principles of treaty interpretation, the starting point of which is the application of Article 31 of the Vienna Convention. This requires a treaty be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[59] The ordinary meaning of Article 26 is plain: it applies to disputes between *any* Contracting Party to the ECT and an Investor of *any* other Contracting Party. As the Claimants have shown from the outset, this interpretation is consistent with the context, object and purpose of the ECT in spite of Spain's assertions otherwise.[60] There simply is no need to apply the "*effet utile*" principle here.

33. Even if the Tribunal were to adopt the "*principle of effectiveness*" as the starting point of its analysis, the same conclusion would be warranted. This is because the right of an EU investor to bring an arbitral claim against an EU Member State which is a Contracting Party pursuant to Article 26 of the ECT is entirely harmonious with the remainder of the ECT's articles. Indeed, it is absurd to suggest that the Contracting Parties agreed *unconditionally to consent* to a dispute-resolution clause that is in fact conditional on the subjective interpretation of various other articles in the treaty. To restate the decision of the Appellate Body of the WTO referred

54 Reply on Jurisdiction, 137.
55 Reply on Jurisdiction, 136.
56 Reply on Jurisdiction, 135.
57 See Reply on Jurisdiction, para. 135 citing **Authority RL-76**, *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 293.
58 **Authority RL-76**, *Poštová banka, a.s. and Istrokapital SE v The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 293.
59 Claimants' Memorial, para. 329; **Authority CL-4**, Vienna Convention, Article 31.
60 Claimants' Memorial, Section 11.

to in *Poštová*, a treaty interpreter "*is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility*".[61] That, however, is precisely what Spain is attempting to do: rely on the above-mentioned ECT articles in order to relegate Article 26 to a dispute-resolution mechanism that is ineffective as between 28 (more than half) of its Contracting Parties.

34. First, Spain relies on the definition of "*Contracting Party*" in Article 1(2), which refers to a "*state or* [REIO] *which has consented to be bound by this Treaty and for which the Treaty is in force*".[62] Spain claims that this definition means that Contracting Parties "*must have consented to* [be bound by]... *Part III of the ECT*".[63] Spain also relies on Article 1(3) of the ECT, which defines an REIO as "*an organisation constituted by states to which they have transferred competence over certain matters*".[64] It contends that Article 1(3) "*expressly recognis*[es] *that there are matters that are the subject of the ECT that must be negotiated by the EU, because its Member States no longer have competence to do so*... [t]*his competence had been transferred to the then European Community, the only* [REIO] *signed by the ECT*".[65] Spain suggests that because the REIO "*Area*" (as defined by the ECT) of the EU includes all EU Member States, there can be no jurisdiction over intra-EU claims whatsoever.

35. These arguments were categorically rejected in *Charanne v Spain* and in *RREEF v Spain*:

> "430. Article 1.10 of the ECT, in defining the concept of 'territory', refers to both the territory of the contracting States (Article 1 (10)(a)) and to the territory of the EU (Article 1(10), second paragraph). It would therefore appear reasonable to deduce that, where referring to investments made 'in the territory' of a contracting party, Article 26.1 refers both to the case of an EU Member State in the territory of a national State and the territory of the EU itself. In the ECT, there is no rule that would give rise to a different interpretation."[66]

36. This same reasoning was recently followed in *Novenergía v Spain*:

> "However, in making this argument, the Respondent fails to recognise the fact that, even though the EU itself is a Contracting Party of the ECT, this does not eliminate the EU Member States' individual standing as respondents under the ECT. The Tribunal is convinced that with a correct application of Article 26(1) of the ECT, interpreted in light of the VCLT, there is no basis for any

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61 **Authority RL-76**, *Poštová banka, a.s. and Istrokapital SE v The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 293.

62 Reply on Jurisdiction, para. 139; **Exhibit C-1**, Energy Charter Treaty, 17 December 1994.

63 Reply on Jurisdiction, para. 139.

64 Reply on Jurisdiction, para. 140; **Exhibit C-1**, Energy Charter Treaty, 17 December 1994.

65 Reply on Jurisdiction, para. 141 (emphasis added).

66 **Authority CL-151**, *Charanne B.V. and Construction Investments S.À R.L. v Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2016, para. 430; **Authority CL-152**, RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 83 citing Charanne v Spain.

> requirements other than that the investor shall be a national of an ECT Contracting State other than the host State. Put differently, the Tribunal cannot deduce from Article 26(1) of the ECT a limitation to the effect that an investor is not a national of an ECT Contracting Party to the extent that such a Contracting Party is also a member of the same REIO (i.e. the EU) as the host State. The Tribunal therefore rejects the Respondent's argument that the Tribunal lacks jurisdiction on the basis of Article 26(1) of the ECT."[67]

37. The relevant Area in the instant case is the territory of Spain. It follows, therefore, that the REIO Area definition simply does not apply unless the REIO itself (and not one of its constituent members) is the party to the dispute.

38. In any case, as explained in the Counter-Memorial on Jurisdiction, an ordinary interpretation of both Articles 1(2) and 1(3) shows that all these provisions do is recognise the existence of REIOs among the ECT's Contracting Parties.[68] There is nothing in the wording of these provisions to support the idea that the ECT does not apply amongst REIO members; nor is there anything that foresees the EU's competence in ECT matters (indeed, energy policy is a shared competence between the EU and its Member States under EU law).[69]

39. Secondly, Spain claims that the "*principle of primacy of EU law in intra-EU relations is expressly recognised in the ECT*".[70] That is wrong. There is no "*explicit*" or even implicit recognition of the primacy of EU law in Article 25. Indeed, Article 25 does not even refer to a REIO. Rather, Article 25 refers to Economic Integration Agreements, which would include any other trade and investment regimes (for example, NAFTA).[71] Spain offers no explanation as to how this clause would deprive the Tribunal of jurisdiction in this arbitration, or how it could be read to reflect the so-called primacy of EU law. As set out in the Counter-Memorial on Jurisdiction, Article 25 simply provides that most-favoured-nation treatment does not oblige ECT Contracting Parties to extend the rights of other Economic Integration Agreements to ECT Contracting Parties that are not members of that other Economic Integration Agreement.[72] As far as the EU is concerned, Article 25 protects against any claim that EU law advantages should be extended to non-EU investors. It does not state – nor even imply – that EU investors cannot bring claims against EU Member States under Article 26 of the ECT.

40. Thirdly, Spain asserts that Article 36(7) of the ECT "*reaffirm*[s]"[73] its position that the ECT expressly recognises EU competence in this area, which in turn means its Intra-EU Objection

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67 **Authority CL-160**, *Novenergía II – Energy & Environment (SCA) Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. V 2015-063, final award dated 25 February 2018, para. 453.

68 Counter-Memorial on Jurisdiction, para. 511.

69 **Authority CL-122**, Treaty on the Functioning of the European Union, Article 194.

70 Reply on Jurisdiction, para. 102.

71 **Exhibit C-1**, Energy Charter Treaty, 17 December 1994.

72 Counter-Memorial on Jurisdiction, para. 512.

73 Reply on Jurisdiction, paras. 141-142.

is acknowledged by the text of the ECT. Article 36(7), of course, does no such thing. Article 36(7) concerns the voting rights of the ECT's Contracting Parties. This provision is in reference to the Energy Charter Conference and does not concern the dispute-resolution procedure in Part V of the ECT. It provides:

> "[A REIO] shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Treaty; provided that such an Organization shall not exercise its right to vote if its member states exercise theirs, and vice versa."[74] (emphasis added)

41. Clearly, this does *not* provide that investors from EU Member States are prohibited from bringing claims against other EU Member States pursuant to Article 26 of the ECT. Article 36(7) and Article 26 deal with completely different issues. Article 36(7) simply provides – as Spain accepts – that "*the EU and its Member States may not vote simultaneously*".[75] Therefore, all this provision does is confirm that the EU and its Member States were *not* intended to be viewed as a single Contracting Party for the purposes of the ECT. It confirms that there is a diversity of Contracting Parties within the EU and that each Member State is a separate Contracting Party that can vote separately. This is simply a function of the mixed nature of the ECT, i.e. a treaty to which both the EU and its Member States are Contracting Parties.

42. Finally, although Spain no longer advances Article 16 in support for its limited reading of Article 26, Spain continues to dispute the Claimants' position that Article 16 shows that, even if there were some inconsistency between the ECT and Article 26, Article 26 that does not prohibit intra-EU investor-State arbitration given that the ECT mandates a reading favourable to the investor. Spain now contends that the protection that investors receive through the EU judicial system is not less favourable than that offered by arbitration.[76]

43. That is quite clearly wrong. As explained in the Counter-Memorial on Jurisdiction and set out above at paragraph 26 *et seq*., EU law does not offer investors recourse to international arbitration, whereas the ECT does – a fact highlighted by numerous tribunals in intra-EU disputes. The tribunal in *Blusun* observed, in response to Italy's intra-EU objection, that investors "*have no ability under European law to protect their investment by suing the host State directly for breaches of the ECT*".[77]

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74 **Exhibit C-1**, Energy Charter Treaty, 17 December 1994.
75 Reply on Jurisdiction, para. 143.
76 Reply on Jurisdiction, para. 151.
77 **Authority CL-161**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v The Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 289.

44. Moreover, the right of qualifying Investors such as the Claimants to bring their claims under the ECT is "*favourable*" precisely because it de-politicises the dispute by removing it from the purview of Spain's national courts.[78]

45. To conclude, both the EU and its Member States are Contracting Parties to the ECT and may be subject to claims brought by Investors from other Contracting Parties, which of course include the different Member States of the EU.

(b) That Article 26 provides for other forms of dispute resolution is not relevant

46. Somewhat curiously, Spain claims that its position is supported by the fact that Article 26 of the ECT "*does not provide for arbitration as the sole mechanism for settling disputes, but introduces other mechanisms*".[79] It is difficult to see how this assists Spain's case (and Spain does not develop its argument any further). Article 26(2) indeed provides that an investor party to a dispute "*may*" choose to submit that dispute for resolution to the courts or administrative tribunals of the Contracting Party or in accordance with any applicable previously-agreed dispute settlement procedure. Crucially, however, it also provides that *each* Contracting Party "*unconditionally consent*[s]" to international arbitration. It is incontrovertible that Article 26 leaves the choice between different dispute resolution mechanisms to the investor; it certainly does not deprive an investor of its right to obtain redress in international arbitration.

(c) EU law as part of international law

47. Spain also relies on Article 26(6), which provides that ECT disputes should be decided in accordance with the ECT and "*other principles and rules of international law*".[80] Spain says that EU law is also part of international law and characterises as "*not debatable*" (without providing any authority for the proposition) that "*courts should apply EU and ECT law on an equal footing*".[81] The Claimants' position, and that of no fewer than fifteen arbitral tribunals, is that EU law and the ECT do not conflict with one another, so the interplay between EU law and public international law is of no importance. Importantly, Spain does not argue that any such conflict exists. On any view, even if there were an inconsistency between the two legal orders, the ECT would prevail over EU law.

48. The relationship between the ECT and EU law was addressed in the *RREEF v Spain* Decision on Jurisdiction. The tribunal observed, contrary to the position in *Electrabel v Hungary*:

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78 **Authority CL-168**, I Shcherban, "*Benefits of Ukraine's Participation in the Energy Charter Process*" (2015) Energy Charter Secretariat, December 2015, para. 6.

79 Reply on Jurisdiction, para. 145 (emphasis added).

80 Reply on Jurisdiction, para. 147; **Exhibit C-1**, Energy Charter Treaty, 17 December 1994.

81 Reply on Jurisdiction, para. 147.

> "should it ever be determined that there existed an inconsistency between the ECT and EU law – *quod non* in the present case – and absent any possibility to reconcile both rules through interpretation, the unqualified obligation in public international law of any arbitration tribunal constituted under the ECT would be to apply the former. This would be the case even were this to be the source of possible detriment to EU law. EU law does not and cannot '*trump*' public international law."[82]

49. Likewise, the *Eiser* tribunal found that:

> "198. [Spain's] argument from Article 26(6)…seeks to introduce a major, if unwritten, exception into the coverage of the ECT on the back of a somewhat intricate argument regarding choice of law. The Tribunal does not agree that the drafters of the ECT either intended or accomplished this result.
>
> 199. The Tribunal's jurisdiction is derived from the express terms of the ECT, a binding treaty under international law. The Tribunal is not an institution of the European legal order, and is not subject to the requirements of that legal order. However, the Tribunal need not address the possible consequences that might arise in case of a conflict between its role under the ECT and the European legal order, because no such conflict has been shown to exist."[83]

50. In short, Article 26 of the ECT says nothing that could be construed so as to prohibit intra-EU disputes. This plain reading is consonant with the intent of the Contracting Parties to the ECT: provide their unconditional consent to arbitration.

2.4 There is no implicit disconnection clause in the text of the ECT

51. In Spain's Memorial on Jurisdiction, Spain appeared to rely indirectly on the EC's submission in its request for leave to intervene as a non-disputing party in this case, to argue that the ECT contains an implicit disconnection clause.[84] Spain has now clarified its position: "*the Respondent does not maintain the existence of an explicit or implicit disconnection clause*".[85] That there is no disconnection clause in the ECT – express or implied – is a point on which the Parties now agree.

52. Curiously Spain continues, however, to rely on the EC's opinion that the ECT contains an implicit disconnection clause but does not explain in what context it relies on it nor what arguments or conclusions it draws from it. To the extent this argument is further developed at the evidentiary hearing, which Spain should not be allowed to do, the Claimants reserve their right to respond accordingly.

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82 **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 87.

83 **Authority CL-154**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, paras. 198-199.

84 Memorial on Jurisdiction, para. 90 and fn. 16.

85 Reply on Jurisdiction, para. 157.

2.5 The view of EC is not authoritative

53. That the EC does not consider an explicit disconnection clause necessary is irrelevant. The same can be said for its position on intra-EU disputes in the EC Decision. The EC's view is not authoritative.

54. Spain, however, suggests that the EC's views carry authoritative weight for the purposes of interpreting investment treaties. This includes its view that arbitration is not applicable as an intra-EU dispute resolution mechanism and that a disconnection clause is unnecessary.[86] That view, however, is misplaced; while the EC did negotiate on behalf of the EU as a Contracting Party to the ECT, it has no particular authority to interpret it. Furthermore, each of the EU Member States also participated in the negotiations on their own behalf, and, in the case of some of them, very prominently.

55. In the context of the ECT, while the EC is an organ of the EU and may represent the EU's position as a Contracting Party, it is only *one* Contracting Party of the ECT. The policy positions advanced by the EC with regard to intra-EU disputes cannot be considered subsequent practice by *all* of the Contracting Parties to the ECT. As stated by the tribunal in its Partial Award in *Eastern Sugar v The Czech Republic*:

> "123. …the Arbitral Tribunal is of the view that as a matter of EU law the European Commission's opinion…cannot be binding for the Arbitral Tribunal.
>
> 124. As the European Commission correctly points out, the answer to the questions raised must be given by judicial authorities, which clearly *excludes* the European Commission, and, admittedly less clearly, includes an arbitral tribunal such as the Arbitral Tribunal in the present arbitration.
>
> 125. It follows that the views of the European Commission in its letter *are not binding* on this Arbitral Tribunal but, if clear, which they are not, would at best have persuasive force."[87]

2.6 The CJEU's ruling in the *Achmea* case does not apply to this dispute

56. In the recent judgment on the *Achmea* case, the CJEU found that the submission to arbitration set forth in Article 8 of the BIT between the Netherlands and Slovakia is not compatible with EU law.[88] As explained in this section, the case is not, however, directly relevant to this dispute mainly because: (i) the CJEU only addresses a BIT and not the ECT; and (ii) the

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86 Reply on Jurisdiction, para. 158.

87 **Authority CL-119**, *Eastern Sugar B.V. v The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, paras. 123-125.

88 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 60.

CJEU's decision is not binding on this Tribunal which is called upon to apply the ECT and not EU law. Moreover, there are a number of flaws in the CJEU's reasoning.

57. In *Achmea*, the BGH had made a request for a preliminary ruling concerning the interpretation of Articles 18, 267 and 344 TFEU. This request was made in the context of the annulment proceedings of an arbitral award, dated 7 December 2012, rendered pursuant to the Netherlands-Slovakia BIT.

58. Notably, Article 8(6) of the Netherlands-Slovakia BIT provides that:

> "6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
>
> - the law in force of the Contracting Party concerned;
>
> - the provisions of this Agreement, and other relevant agreements between the Contracting Parties..."[89]

59. The CJEU reasoned that:

> "[in order to rule on possible infringements of the BIT, an arbitral tribunal] must, in accordance with Article 8(6) of the BIT, take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties."[90] (emphasis added)

60. The CJEU then established that EU law was both: (i) the law in force in every Member State; and (ii) the law deriving from an agreement between the Member States. Framing EU law in this manner, the CJEU concluded that Article 8 of the Netherlands-Slovakia BIT determines that an arbitral tribunal "*may be called on to interpret or indeed to apply EU law*".[91] The CJEU then found that because arbitral tribunals, which may be called on to apply or interpret EU law, are not entitled to raise preliminary questions to it, thereby ensuring the full effectiveness of EU law, Article 8 of the Netherlands-Slovakia BIT is incompatible with EU law.

61. The CJEU's finding is not applicable to this case for at least five reasons.

62. First, the applicable choice of law set forth in Article 8(6) of the Netherlands-Slovakia BIT is notably different from that of Article 26(6) of the ECT. Article 8(6) of the Netherlands-Slovakia BIT provides that arbitral tribunals shall decide on the basis of, *inter alia*: (i) "*the law in force of the Contracting Party concerned*";[92] and (ii) "*the provisions of this Agreement,*

89 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 4.
90 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 40.
91 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 42.
92 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 4.

and other relevant agreements between the Contracting Parties".[93] As explained above, this led the CJEU to find that arbitral tribunals may be required to apply EU law, ultimately leading it to find Article 8 incompatible with EU law. Neither of these elements, however, is present in Article 26(6) of the ECT. This provision provides that disputes shall be solely resolved on the basis of: (i) the ECT; and (ii) applicable rules and principles of international law. This Tribunal is not being called upon to apply EU law in any shape or form. The Claimants' claims are based on the ECT and customary international law, not EU law. This was also confirmed in *RREEF*,[94] *Eiser*[95] and *Novenergía*.[96] EU law is simply irrelevant to the resolution of this dispute.

63. Secondly, this dispute is brought under the ECT and not the Netherlands-Slovakia BIT. This distinction is key since the CJEU expressly clarifies in its decision that investor-State dispute settlement mechanisms are not in principle contrary to EU law. In particular, the CJEU reasons that:

> "according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected."[97]

64. As observed by the tribunal in *Electrabel*, "*it would have made no sense for the European Union to promote and subscribe to the ECT if that had meant entering into obligations inconsistent with EU law*."[98]

65. The CJEU itself draws attention in its judgment to these two distinctions between the Netherlands-Slovakia BIT and the ECT:

> "In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the

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93 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 4.

94 **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 87.

95 **Authority CL-154**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, paras. 198-199.

96 **Authority CL-160**, *Novenergía II – Energy & Environment (SCA) Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. V 2015-063, final award dated 25 February 2018, para. 465.

97 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 57.

98 **Authority CL-86**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.133.

> judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above."[99]

66. In sum, this case can be distinguished from *Achmea* in that: (i) Article 26(6) of the ECT, in contrast to Article 8(6) of the Netherlands-Slovakia BIT, does not lead to the application of EU law; and (ii) the ECT is an international treaty concluded, *inter alia*, by the EU itself, thereby ratifying the conformity of the investor-State dispute settlement mechanism with EU law, according to the CJEU's own reasoning.

67. Thirdly, this case has been brought before ICSID, while the arbitral proceedings pursuant to the Netherlands-Slovakia BIT were seated in Germany. The latter were subject to German law provisions on annulment of arbitral awards. Notably, contrary to German law provisions on annulment of arbitral awards, ICSID awards cannot be annulled on the grounds that the recognition or enforcement of the arbitral award is contrary to public policy, nor therefore on the grounds that the arbitral award is in fundamental breach of EU law.[100]

68. Fourthly, the question that the BGH referred to the CJEU was whether the arbitration provisions in the Netherlands-Slovakia BIT were compatible with the TFEU specifically considering the fact that Slovakia had concluded the BIT with The Netherlands "*before the Contracting States acceded to the European Union*".[101] This question has no relevance in this ECT arbitration, as Spain, The Netherlands and Luxembourg (the EU Member States of which the Claimants are nationals) had already acceded to the EU when they ratified the ECT.

69. Fifthly, this Tribunal derives its jurisdiction from the ECT and is not bound by the decisions of European Institutions.[102]

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99 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 58.

100 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 5.

101 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 23(1).

102 See **Authority CL-134**, *Achmea BV v Slovak Republic* (formerly *Eureko BV v Slovak Republic*), UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paras 228, 229 and 292 ("*In the view of the Tribunal, the proper framework for its analysis of these arguments is, in the first place, the framework applicable to the legal instrument from which the Tribunal derives its prima facie jurisdiction. Just as the Court of Justice of the European Communities has held that its own perspective is dictated by the treaties that established it, so the perspective of this Tribunal must begin with the instrument by which and the legal order within which consent originated, i.e., the first stage described above. That framework is the BIT and international law, including applicable EU law … Whatever legal consequences may result from the application of EU law, those consequences must be applied by this Tribunal within the framework of the rules of international law and not in disregard of those rules … The Tribunal has considered whether it would be appropriate to suspend these arbitration proceedings until the EU Commission and/or the ECJ have come to a decision on the EU law aspects of the infringement case. While the Tribunal wishes to organise its proceedings with full regard for considerations of mutual respect and comity as regards other courts and institutions, it does not consider that the questions in issue in the infringement case are so far coextensive with the claims in the present case that it is appropriate to suspend its proceedings now. Should it become evident at a later stage that the relationship between the two sets of proceedings is so close as to be a cause of procedural unfairness or serious inefficiency, the Tribunal will reconsider the question of suspension.*") See also **Authority CL-169**, *WNC Factoring Limited v Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017, para 311.

70. Finally and in any event, the CJEU's decision in *Achmea* contains numerous flaws. In particular:

(a) The CJEU draws an erroneous distinction between commercial and investment-treaty arbitration.[103] It does so to justify moving away from the position it held in previous judgments: that EU law only requires a limited review of arbitral awards (where a reference to the court could be made).[104] In particular, the CJEU attempts to distinguish commercial arbitration from investment-treaty arbitration in that the former "*originate in the freely expressed wishes of the parties*" while the latter "*derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts disputes which may concern the application or interpretation of EU law*".[105] This is clearly wrong. It reveals a serious lack of understanding of the very principle on which arbitration is grounded: the parties' consent to submit their disputes to individuals whose judgment they are prepared to trust. Arbitration clauses in investment treaties are as freely entered into as they are in commercial arbitration. The source of the Tribunal's jurisdiction in investment-treaty arbitration is, as in commercial arbitration, based on the consent of all parties to the disputes, claimant-investor and respondent-State. As set out by, among many others, the tribunal in *Metal-Tech*:

> "In treaty arbitration, consent is achieved by the respondent State making an offer to arbitrate when ratifying the investment treaty and the investor accepting that offer in principle when filing the request for arbitration. The scope of the State's offer is defined in the investment treaty, in particular in the dispute resolution clause of that treaty. When he initiates an arbitration under the treaty, the investor accepts the offer within the scope defined in the treaty. If he chooses to resort to ICSID arbitration as one of the dispute settlement options in the treaty, the investor also accepts the conditions set in the ICSID Convention and Arbitration Rules."[106]

(b) That the CJEU's distinction makes no sense is also clear from the fact that commercial arbitration can (and routinely does) involve State or State-owned entities. If a limited

103 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 55.

104 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 54.

105 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 55.

106 **Authority CL-170**, *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 409. See also **Authority CL-171**, *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, para. 6.1.3 ("*Article 25 confirms the basic principle, that recourse to ICSID arbitration rests on written consent. In this case, to the extent that such written agreement to arbitrate exists, it is made up of: (a) Respondent's written offer to arbitrate (which is found in the provisions of Article VII.2 of the BIT); and (b) Claimant's written acceptance of that offer (which is found in its Request dated 15 December 2009).*"); and **Authority CL-172**, *SGS Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 70 "([t]*he State's consent in a BIT is often described as an "open invitation" or a "standing offer" to covered investors to submit such disputes to international arbitration, which the investor "accepts" by giving its own written consent to resort to such arbitration (whether prior to or in its Request for Arbitration)*").

review of EU law is possible in those circumstances, there is no reason why it should not be in investment-treaty arbitration. The CJEU's reasoning is clearly inconsistent.

(c) The CJEU does not draw any consequences from its findings. The CJEU establishes that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an intra-EU BIT such as Article 8 of the Netherlands-Slovakia BIT. The CJEU does not, however, offer any guidance as to the consequences of its decision. It does not indicate, for instance: (i) whether the incompatibility with EU law of Article 8 of the Netherlands-Slovakia BIT should be considered to amount to a breach of public policy for the purposes of deciding on the annulment of the arbitral award being challenged in *Achmea*; (ii) its temporal scope of application, i.e. whether its decision has any consequences for arbitral proceedings initiated before it was rendered or whether it should apply prospectively for arbitrations initiated after the date; and (iii) whether its decision has any effect on other intra-EU BITs different from the Netherlands-Slovakia BIT. At present, all that can be concluded from the CJEU's ruling is that the Member States may be required to terminate their BITs or amend them to remove the arbitration clause. The decision cannot, in any case, render these clauses automatically invalid or entail that arbitral tribunals hearing pending cases lack jurisdiction.[107] That is a question that is governed by public international law and, more particularly, the Vienna Convention. The CJEU has not explained, let alone established, that any of the conditions of either Article 30 or Article 59 of the Vienna Convention were met.

(d) The CJEU ultimately takes issue with Article 8(6) of the Netherlands-Slovakia BIT on the basis that it created a mechanism for settling disputes whereby an arbitral tribunal, not entitled to raise preliminary questions to the court, could be called upon to decide a dispute which "*may concern the application or interpretation of EU law*".[108] This is not a situation that is unique, however, to intra-EU disputes arising out of BITs. It would suffice for an arbitral tribunal to be called upon to decide a dispute which "*may concern the application or interpretation of EU law*" for the host State (and respondent to the proceedings) to be an EU Member State, at least on the CJEU's interpretation. The CJEU does not, however, find that these cases would be problematic. That a dispute "*may concern the application or interpretation of EU*

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107 **Authority CL-173**, L. R. Helfer, "*Terminating Treaties*", Oxford University Press, 2012, p 640 ("[t]*ermination does not, however, 'affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to' the date that the termination takes effect. Nor does it 'impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty'—an implicit reference to customary international law. These limitations are equally applicable to a State that unilaterally withdraws from or denounces a multilateral treaty*").

108 **Authority CL-162**, Judgment of the European Court of Justice in Case C-284/16 dated 6 March 2018, para. 55.

law" is also possible where the EU is the respondent. Yet the CJEU acknowledges, in principle, that treaties entered into by the EU are not incompatible with EU law. If application of EU law in cases where the EU has ratified the Treaty is not problematic, it is illogical for it to be problematic in others. (Of course, the application of EU law also arises in commercial arbitration – as explained above, there is no reason to make a principles distinction between the two.)

2.7 Conclusion

71. The Claimants maintain their position set out in the Counter-Memorial on Jurisdiction that Article 26 of the ECT is clear and unambiguous in its meaning and cannot be interpreted in the way that Spain suggests.[109] The Claimants' plain reading is supported by the object, purpose and context of the ECT. By contrast, Spain has advanced its own "*consent model for restricted arbitration*"[110] by looking to the primacy of EU law and to other (misinterpreted) provisions of the ECT unilaterally to amend the plain meaning of Article 26. When Spain signed and ratified the ECT, it unconditionally consented to international arbitration. It cannot now adopt an *ex-post* interpretation of Article 26 of the ECT as though it contained a separate condition barring intra-EU disputes. Such an interpretation would be inconsistent with the interpretive requirements of the Vienna Convention.

72. For the reasons set out above and in their prior Counter-Memorial on Jurisdiction of 28 September 2017, the Claimants submit that the Intra-EU Objection should be dismissed.

3. THE TAX OBJECTION

3.1 Introduction

73. The Claimants have maintained from the outset that of the 7% Levy imposed on production of electrical energy was the first in a series of measures aimed, principally, at reducing the Tariff Deficit and masquerading as a tax when it, in fact, and according to Spain's own declarations, constituted a back-door tariff cut on RE producers.[111] Spain argues that the Tribunal lacks jurisdiction to hear the Claimants' claims in respect of the 7% Levy introduced by Law 15/2012 because "*section (1) of Article 10 of the ECT does not apply to taxation measures of the Contracting Parties, in accordance with Article 21 of the ECT*".[112]

74. Spain advances two arguments in support of its Tax Objection. First, Spain contends that the Tribunal need only determine if the 7% Levy falls within the legal definition of a tax. Should

109 Counter-Memorial on Jurisdiction, Section 18.4.
110 Reply on Jurisdiction, para. 137.
111 Request for Arbitration, para. 71. See also Claimants' Memorial, para. 227 and Counter-Memorial on Jurisdiction, paras. 538-539.
112 Reply on Jurisdiction, para. 161.

the 7% Levy fall within that definition, it is beyond the Tribunal's jurisdiction irrespective of whether it is a *bona fide* tax.[113] Spain's alternative argument is that the 7% Levy is in any event a *bona fide* measure.[114] Spain is wrong on both points. These two submissions are addressed in turn.

3.2 The taxation carve-out only applies to *bona fide* taxes

75. Spain's contention that the taxation carve-out applies to anything a State has defined as a tax – even measures framed non-genuinely as taxes – is wrong. The Claimants have already shown that: (a) the taxation carve-out only applies to *bona fide* taxes (see Counter-Memorial on Jurisdiction, Section 7.2); and (b) a State's characterisation of a measure as a tax under its domestic law is in no way determinative as to whether the Article 21 taxation carve-out is applicable (see Counter-Memorial on Jurisdiction, Section 7.4). Spain makes three new points in its Reply on Jurisdiction.

76. First, Spain seeks to distinguish *Yukos* on the basis that it concerned "*extraordinary circumstances*".[115] This is irrelevant. *Yukos* made clear as a matter of principle that the mere labelling of a measure as a tax by the State does not result in the application of the taxation carve-out.[116] This ought to be beyond dispute.[117] Spain also notes that the *Yukos* award has been "*quashed*".[118] This has no bearing on the issue. The decision to set aside the *Yukos* decision solely concerned the issue of the provisional application of the ECT.[119] The tribunal's finding on the inapplicability of the taxation carve-out was in no way criticised by the set-aside decision.

77. Secondly, Spain relies on *EnCana v Ecuador* for the proposition that it is only permissible for the Tribunal to consider the "*legal operation*" of a taxation measure and not its "*economic effect*" when determining whether the measure falls within the taxation carve-out.[120] In effect, Spain seeks to rely on *EnCana* to support its claim that a measure falls within the taxation carve-out if Spain has labelled the measure a tax under its internal law. *EnCana* does not stand for this proposition. Indeed, the *EnCana* tribunal noted that arbitrary measures would

113 Reply on Jurisdiction, para. 177.
114 Reply on Jurisdiction, Section II.B.(3).
115 Reply on Jurisdiction, para. 178.
116 See Counter-Memorial on Jurisdiction, para. 600.
117 See also *Quasar v Russia*, referred to at para. 594 of the Counter-Memorial on Jurisdiction and all of the authorities referred to in Section 19.3 of the Reply Memorial.
118 Reply on Jurisdiction, para. 178.
119 See **Authority CL-174**, Hague District Court decision in the cases C/09/477160 / HA ZA 15-1, C/09/47716 / HA ZA 15-2, and C/09/481619 / HA ZA 15-112, 20 April 2016, paras. 5.95-5.98.
120 Reply on Jurisdiction, paras. 179.

not qualify for exemption under the taxation carve-out contained in the Canada-Ecuador BIT.[121]

78. Thirdly, Spain argues that the Tribunal must defer to the Spanish authorities' assessment of the 7% Levy by relying on the annulment decision in *Hussein Nuaman Soufraki v The United Arab Emirates*.[122] This is inapposite. The annulment proceedings in *Soufraki* related, at least in part, to whether the tribunal had manifestly exceeded its powers by failing to interpret and apply the proper law in making its decision – but that was in an entirely different context from the present arbitration. In *Soufraki*, the application of domestic law was to the issue of whether the claimant was a national of Italy, a question that obviously had to be decided on the basis of national law, and not international law. In contrast, the issue here is whether, under international law, the 7% Levy may be considered a *bona fide* tax measure.

3.3 The 7% Levy is not a *bona fide* tax

(a) Points that Spain has conspicuously failed to address

79. First, it is common ground that the money raised by the 7% Levy goes from the electricity producers within the electricity system to the State budget and then back to the electricity system in order to cover the costs of the electricity system.[123] The Claimants noted that "[t]*his is completely unnecessary, the only purpose for this intermediate step via the State budget is so that the measure can be labelled as a tax*".[124] Spain has not responded to this nor has it provided *any* explanation as to why the funds collected by the Spanish electricity system, allegedly self-contained,[125] must travel via the State budget. This alone demonstrates that the 7% Levy is artificially framed as a tax.

80. Secondly, the Claimants showed that the Ministry of Industry, Energy and Tourism which implemented the 7% Levy, admitted having done so as a form of reduction of the premium for RE installations.[126] Spain has essentially ignored this.[127]

81. Thirdly, the Claimants noted that the Minister's comments and the implementation of the 7% Levy occurred at a time when Spain: (a) was already defending ECT claims; (b) had retained legal advice to defend those claims; and (c) was aware of the Article 21 ECT

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121 **Authority RL-27**, *EnCana Corporation v Republic of Ecuador,* LCIA Case No. UN 3481, Award, 3 February 2006, para. 142.

122 Reply on Jurisdiction, para. 171, citing **Authority RL-85**, *Hussein Numan Soufraki v The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on Annulment, 5 June 2007, para. 97. See also, paras. 214 and 215.

123 Reply on Jurisdiction, paras. 218.

124 Counter-Memorial on Jurisdiction, para. 564.

125 Memorial on Jurisdiction, paras. 240-243 and Reply on Jurisdiction, paras. 407.

126 Counter-Memorial on Jurisdiction, paras. 571 and 572.

127 Spain addresses this merely by making the bare assertion that the minister did not refer to an indirect tariff cut via taxation (see Spain's Reply on Jurisdiction, para. 219). No doubt the minister was fully aware that Spain had committed not to revise the tariff for registered installations (see e.g. **Exhibit C-269**, Spanish Wind Energy Association (AEE by its Spanish Acronym), Work Group meeting on prices, 13 December 2010, p. 67).

provision containing the taxation carve-out.[128] Spain has not addressed any of these points. The Claimants concluded that "[t]*he inference must be that the 7% Levy was framed as a tax with the purpose of avoiding liability for breaching investors' rights under the ECT*".[129] This inference is unchallenged.

82. Fourthly, although Spain seeks to argue that the 7% Levy applies equally to conventional and RE installations, the Claimants have shown that the 7% Levy was designed to target RE installations disproportionately. Brattle states this in its first report:

> "The decision to impose the 7% Generation Levy on gross revenues, as opposed to profits, was bound to have a disproportionate impact on wind farms compared to conventional generation. When passing the levy it was clear that the wind farms had much higher revenues than conventional generation, and would therefore pay more taxes per MWh of electricity generated. Compared to their gross revenues per MWh, the actual profits per MWh of wind farms were closer to the levels associated with conventional generation. Therefore, the 7% Generation Levy increased the income of the electricity system by taking money paid to renewable installations, including wind farms."[130]

83. Spain's expert has not made any attempt to rebut this. It must therefore be accepted that the 7% Levy had a disparate impact on RE plants.

84. Fifthly, the Claimants noted that the EC has observed that the 7% Levy "*does not pursue any* '*particular purpose*'".[131] Spain has again ignored this.

(b) New submissions made by Spain

85. Spain makes three new points in defence of the 7% Levy. First, Spain argues that it has a valid purpose. Secondly, Spain argues that the cost of the 7% Levy is covered by the remuneration provided by the New Regime. Finally, Spain refers to the *Isolux*[132] and *Eiser*[133] decisions to contend that its position regarding the 7% Levy is shared by the tribunals in those cases.[134]

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128 Counter-Memorial on Jurisdiction, para. 573.
129 Counter-Memorial on Jurisdiction, para. 574.
130 Brattle Regulatory Report, para. 149.
131 Counter-Memorial on Jurisdiction, para. 584. See also **Exhibit C-185**, Request for information of the European Commission to Spain regarding Law 15/2012 "EU pilot 5526/13/TAXU" [Undated].
132 **Authority RL-77**, *Isolux Infrastructure Netherlands, B.V. v The Kingdom of Spain*, SCC Arbitration V2013/153, Award, 16 July 2016.
133 **Authority CL-154**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017.
134 Reply on Jurisdiction, paras. 222.

(i) The stated purpose of the measures reveals them to be arbitrary

86. The Claimants noted in their Counter-Memorial on Jurisdiction that the 7% Levy bore no relation to its purported rationale.[135] The preamble to Law 15/2012 states that its purpose was to benefit the environment; yet, as noted above, it asymmetrically targets RE installations, the only electrical energy producers which provide clean energy. The measure is therefore not only discriminatory but also arbitrary.

87. Spain seeks to present the 7% Levy as rational on the following basis:

> "All facilities for electric power generation, whatever the technology used in the power production, entail two kinds of environmental effects: on the one hand, the very existence of the facilities involves environmental effects and, on the other hand, the electrical energy transport and distribution networks which allow to evacuate and distribute the electric energy produced in the facilities also entail environmental effects. It is, therefore, consistent that the TVPEE is applied with respect to all production facilities."[136]

88. Spain thus seems to suggest that the "*existence*" of RE installations is bad for the environment. This assertion makes no sense and Spain makes no effort to explain it. Spain also indicates that the 7% Levy is to cover the cost of "*electrical energy transport and distribution networks which ... also entail environmental effects*".[137] Spain does not explain why the environmental effects caused by transport and distribution networks, in place long before RE came about, should be attributed to RE installations and borne in greater proportion by them. It certainly makes little sense for RE installations to be taxed to pay for the use of transmission and distribution networks given that, as Spain notes elsewhere, the Claimants must pay an access fee precisely for that purpose.[138] In fact, the Spanish Supreme Court has recently called into question the conformity of the 7% Levy with the Spanish Constitution on this basis.[139] In particular, the Spanish Supreme Court stated in its recent referral to the Constitutional Court that "[t]*his Court has serious doubts about the environmental purpose of the IVPEE*".[140]

(ii) The New Regime does not compensate for the losses caused by the 7% Levy

89. Spain's assertion that the remuneration provided by the New Regime covers the cost of the 7% Levy is clearly incorrect. It is common ground that the Disputed Measures have resulted in a

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135 Counter-Memorial on Jurisdiction, Section 19.3(b).

136 Reply on Jurisdiction, para. 193.

137 Reply on Jurisdiction, para. 193.

138 Memorial on Jurisdiction, para. 559.

139 **Exhibit C-270**, Spanish Supreme Court Procedural Decision (Contentious-administrative Chamber), Appeal No. 2554/2014, 10 January 2018.

140 **Exhibit C-270**, Spanish Supreme Court Procedural Decision (Contentious-administrative Chamber), Appeal No. 2554/2014, 10 January 2018. In the referral, the Spanish Constitutional Court questioned the conformity with the Spanish Constitution of Articles of Law 15/2012. Its main concerns were that: (i) despite its Preamble, the law's purported environmental purpose did not hold water; and (ii) the 7% Levy taxes the same economic capacity as the tax on economic activities, in apparent breach of Article 31 of the Spanish Constitution.

drop in revenues for the Claimants' Wind Farms.[141] Spain's argument appears to be that, since the Claimants' installations have received or will have received 7.398% pre-tax over their useful life under the New Regime, the Claimants have not suffered any loss as a result of the 7% Levy. This takes Spain nowhere. As the Claimants have shown, the Disputed Measures have caused the Claimants to suffer a massive drop in the value of their investment.[142] What the 7% Levy does is take Spain part of the way towards reducing the revenues of existing RE plants:

> "The only logical implication is that the Disputed Measures took Spain *part of the way* towards its final goal of reducing financial support so that investors in existing plants will stand to earn no more than 7.398% before taxes. The other Disputed Measures then took Spain the remainder of the way."[143]

(iii) Spain's references to the Isolux and Eiser decisions are inapposite

90. Finally, Spain cites the decisions in *Isolux*[144] and *Eiser*,[145] to support its contention that the Tribunal does not have jurisdiction to decide on the 7% Levy.[146] In *Isolux* and *Eiser*, the tribunals found that the Claimants did not meet the burden of proving that the 7% Levy was not promulgated for the purpose of raising revenue for the State but for a different purpose. In other words, they were unable to evidence that the 7% Levy was not a *bona fide* taxation measure. The tribunal in this case, however, is not bound by those decisions and must reach its own conclusions on the basis of the specific evidence and arguments presented before it.

91. The Claimants in this case, have repeatedly proved, throughout their Counter-Memorial on Jurisdiction,[147] that the purpose of the 7% Levy was not raising revenues for the Spanish state, but to reduce the Tariff Deficit and introduce a further reduction of the economic rights associated with and granted by the investment-inducing norms applicable to the Claimants' installations.[148] The Claimants have already stated, the money from the 7% Levy is being used to pay down the Tariff Deficit and consequently to finance the Spanish electricity system regardless of its "travels" through the Spanish State Budget.[149] Spain accepts this[150] and therefore its reliance on other decisions takes it nowhere.

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141 Brattle Regulatory Report, para. 27 and Section V(II)(A); Second Accuracy Report, para. 88 ("*we do not deny that the current regulation may, under certain assumptions, decrease revenues*").

142 Brattle Quantum Report, para. 22.

143 Brattle Rebuttal Regulatory Report, para. 168.

144 **Authority RL-77**, *Isolux Infrastructure Netherlands, B.V. v The Kingdom of Spain*, SCC Arbitration V2013/153, Award, 16 July 2016.

145 **Authority CL-154**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017.

146 Reply on Jurisdiction, paras. 221-225.

147 Counter-Memorial on Jurisdiction, para. 609.

148 Counter-Memorial on Jurisdiction, paras. 587 and 609.

149 Counter-Memorial on Jurisdiction, para. 609.

150 Memorial on Jurisdiction, para. 190.

92. For the reasons set out above, the Claimants submit that the Tax Objection is without merit and should be dismissed. The 7% Levy imposed by Law 15/2012 was a back-door tariff cut and accordingly not a *bona fide* taxation measure. As such, it forms part of the Disputed Measures that give rise to liability for Spain under the ECT.

4. REQUEST FOR RELIEF

93. Insofar as Spain's jurisdictional Objections are concerned (and in addition to the relief set out at paragraph 540 of the Claimants' Memorial and paragraph 792 of the Counter-Memorial on Jurisdiction), the Claimants hereby request that the Tribunal:

(a) dismiss both of Spain's jurisdictional Objections; and

(b) order that Spain bears the Claimants' costs associated with these jurisdictional Objections.

Respectfully submitted, 7 March 2018

Signed 

Counsel for the Claimants

Allen & Overy LL

IN THE MATTER OF AN ARBITRATION UNDER THE 1965 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

AND

PURSUANT TO THE 1994 ENERGY CHARTER TREATY

BETWEEN:

WATKINS HOLDINGS S.À R.L.
WATKINS (NED) B.V.
WATKINS SPAIN, S.L.
REDPIER, S.L.
NORTHSEA SPAIN, S.L.
PARQUE EÓLICO MARMELLAR, S.L.
AND
PARQUE EÓLICO LA BOGA, S.L.

Claimants

v

THE KINGDOM OF SPAIN

Respondent

APPENDIX 1
CONSOLIDATED LIST OF FACTUAL EXHIBITS

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7 March 2018

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Spain
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EXHIBIT NO.	DOCUMENT	DATE
C-1	Energy Charter Treaty.	17 December 1994
C-2	Instrument of Spain's ratification of the ECT, published in the Spanish Official Gazette.	17 March 1998
C-3	Letter from Allen & Overy to President Mariano Rajoy Brey on behalf of the Claimants.	5 May 2015
C-4	Extract from the Commercial Register in respect of Watkins Holdings S.à r.l.	29 June 2015
C-5	Extract from the Commercial Register in respect of Watkins (Ned) B.V.	18 February 2015
C-6	Extract from the Commercial Register in respect of Watkins Spain, S.L.	27 April 2015
C-7	Extract from the Commercial Register in respect of Redpier, S.L.	27 April 2015
C-8	Extract from the Commercial Register in respect of Northsea Spain, S.L.	27 April 2015
C-9	Extract from the Commercial Register in respect of Parque Eólico Marmellar, S.L.	27 April 2015
C-10	Extract from the Commercial Register in respect of Parque Eólico La Boga, S.L.	27 April 2015
C-11	Cinco Días, Press Article, "*Soria dice que el sistema no podía soportar el coste de las renovables*."	9 April 2014
C-12	Government of Spain, Ministry of Foreign Affairs, Marca España, "*Spain's Positioning: Leadership Key Factors*."	July 2013

C-13	Letter from Watkins Holdings S.à r.l. confirming it has taken all necessary internal actions to authorise the Request for Arbitration.	8 October 2015
C-14	Letter from Watkins (Ned) B.V. confirming it has taken all necessary internal actions to authorise the Request for Arbitration.	15 October 2015
C-15	Letter from Watkins Spain, S.L. confirming it has taken all necessary internal actions to authorise the Request for Arbitration.	14 October 2015
C-16	Letter from Redpier, S.L. confirming it has taken all necessary internal actions to authorise the Request for Arbitration.	14 October 2015
C-17	Letter from Northsea Spain, S.L. confirming it has taken all necessary internal actions to authorise the Request for Arbitration.	14 October 2015
C-18	Letter from Parque Eólico Marmellar, S.L. confirming it has taken all necessary internal actions to authorise the Request for Arbitration.	14 October 2015
C-19	Letter from Parque Eólico La Boga, S.L confirming it has taken all necessary internal actions to authorise the Request for Arbitration.	14 October 2015
C-20	Resolutions of the Board of Directors of Watkins Holdings S.à r.l. authorising the arbitration proceedings and granting a power of attorney.	8 October 2015
C-21	Resolutions of the Board of Directors of Watkins (Ned) B.V. authorising the arbitration proceedings and granting a power of attorney.	8 October 2015
C-22	Resolutions of the Board of Directors of Watkins Spain, S.L. authorising the arbitration proceedings and granting a power of attorney.	30 September 2015
C-23	Resolutions of the Board of Directors of Redpier, S.L. authorising the arbitration proceedings and granting a power of attorney.	30 September 2015

C-24	Resolutions of the Board of Directors of Northsea Spain, S.L. authorising the arbitration proceedings and granting a power of attorney.	30 September 2015
C-25	Resolutions of the Board of Directors of Parque Eólico Marmellar, S.L. authorising the arbitration proceedings and granting a power of attorney.	29 September 2015
C-26	Resolutions of the Board of Directors of Parque Eólico La Boga, S.L. authorising the arbitration proceedings and granting a power of attorney.	29 September 2015
C-27	Power of Attorney from Watkins Holdings S.à r.l.	8 October 2015
C-28	Power of Attorney from Watkins (Ned) B.V.	8 October 2015
C-29	Power of Attorney from Watkins Spain, S.L.	14 October 2015
C-30	Power of Attorney from Redpier, S.L.	14 October 2015
C-31	Power of Attorney from Northsea Spain, S.L.	14 October 2015
C-32	Power of Attorney from Parque Eólico Marmellar, S.L.	29 September 2015
C-33	Power of Attorney from Parque Eólico La Boga, S.L.	29 September 2015
Exhibits submitted with the Claimants' Memorial		
C-34	CNE Report 18/2013 on the Proposal of Royal Decree to Regulate the Generation of Electricity by Renewable Projects, Cogeneration and Waste Plants (**CNE Report 18/2013**).	4 September 2013
C-35	Share purchase agreement between Bridgepoint Europe IV Bidco 3 Limited, Bridgepoint Europe IV Bidco 6 Limited and Bridgepoint Europe IV Bidco 8 Limited and EYRA, Urbaenergía and Iverduero.	12 August 2011

C-36	United Nations Framework Convention on Climate Change, 1771 United Nations Treaty Series 107; Senate Treaty Document No. 102-38; United Nations Document A/AC.237/18 (Part II)/Add.1; 31 International Legal Materials 849 (1992), 9 May 1992 (entered into force on 9 May 1992).	9 May 1992
C-37	Kyoto Protocol to the United Nations Framework Convention on Climate Change, United Nations Document FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 International Legal Materials 22 (1998), 11 December 1997 (entered into force on 16 February 2005).	16 February 2005
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IN THE MATTER OF AN ARBITRATION UNDER THE 1965 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWAESEEN STATES AND NATIONALS OF OTHER STATES

AND

PURSUANT TO THE 1994 ENERGY CHARTER TREATY

BETWEEN:

WATKINS HOLDINGS S.À R.L.
WATKINS (NED) B.V.
WATKINS SPAIN, S.L.
REDPIER, S.L.
NORTHSEA SPAIN, S.L.
PARQUE EÓLICO MARMELLAR, S.L.
AND
PARQUE EÓLICO LA BOGA, S.L.

Claimants

v

THE KINGDOM OF SPAIN

Respondent

APPENDIX 2
CONSOLIDATED LIST OF LEGAL AUTHORITIES

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7 March 2018

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AUTHORITY NO	DOCUMENT	DATE
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