PCA Case No. 2014-03 **11 October 2017**

Ad hoc Arbitration

between

Mr. Jürgen Wirtgen
Mr. Stefan Wirtgen
Mrs. Gisela Wirtgen
JSW Solar (zwei) GmbH & Co. KG

and

The Czech Republic

FINAL AWARD

ARBITRAL TRIBUNAL

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

Mr. Gary Born

Judge Peter Tomka

Secretary of the Tribunal

Rahul Donde

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TABLE OF ABBREVIATIONS

Act 180 / Act on Promotion	Act No. 180/2005 Coll., on Promotion of Electricity Production from Renewable Energy Sources and on Amendments to Certain Laws
Act 165/2012	Act No. 165/2012 Coll., on Promotion of Sources of Energy and Amending Certain Acts
Act 310/2013	Act No. 310/2013 Coll.
Act 346/2010	Act No. 346/2010 Coll., Amending the Income Tax Act, as amended, and Other Related Acts
Act 586/1992 / Income Tax Act	Act 586/1992 Coll. on Income Tax
Amicus Curiae Submission	EC's Amicus Curiae Submission of 11 December 2015
BIT / Treaty	Treaty between the Federal Republic of Germany and the Czech and Slovak Federal Republic on Encouragement and Reciprocal Protection of Investments of 2 October 1990
Commission's Application	EC's Application to Intervene as a Non-Disputing Party of 11 July 2014
Commission Decision	European Commission's decision of 2 December 2016
Commission's Submission	European Commission's submission of 17 February 2017
EC / Commission	European Commission
ECJ	European Court of Justice
ER	Expert report
ERO	Energy Regulatory Office
EU	European Union
Exh. C-	Claimants' Exhibit (Documentary exhibits)
Exh. CLA-	Claimants' Legal Authority
Exh. R-	Respondent's Exhibit (Documentary exhibits)
Exh. RLA-	Respondent's Legal Authority
FET	Fair and Equitable Treatment
FIT	Feed in Tariff
[redacted]	[redacted]
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes

ILC	International Law Commission
ILC Articles	ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001
Income Tax Act	Act No. 586/1992 Coll. on Income Taxes
kWp	Kilowatt peak
MW	Megawatts
NT	National Treatment
Objections to Jurisdiction	Respondent's Objections to Jurisdiction dated 27 October 2014
PCA	Permanent Court of Arbitration
PILA	Swiss Federal Act on Private International Law
PO	Procedural Order
Rej.	Respondent's Rejoinder dated 17 December 2015
Reply	Claimants' Reply Memorial dated 16 September 2015
RES	Renewable Sources of Energy
RfA	Claimants' Request for Arbitration dated 24 June 2013
SoC	Claimants' Statement of Claim dated 18 July 2014
SoD	Respondent's Statement of Defense dated 20 March 2015
Solar Levy	Levy introduced through Act No. 402/2010 Coll.
Technical Regulation	Decree No. 475/2005 Coll. on Implementation of Certain Provisions of the Act on Promotion of Exploitation of Renewable Energy Sources
Terms of Appointment	Terms of Appointment of 3 March 2014
TFEU	Treaty on the Functioning of the European Union
Tr.	Transcript hearing on jurisdiction and merits
VCLT or Vienna Convention	Vienna Convention on the Law of Treaties
WACC	Weighted average cost of capital
WS	Witness statement

I. THE PARTIES

A. THE CLAIMANTS

1. The first Claimant is Mr. Jürgen Wirtgen, [redacted], with domicile at [redacted] Germany (“Claimant 1”).

2. The second Claimant is Mr. Stefan Wirtgen, [redacted], with domicile at [redacted], Germany (“Claimant 2”).

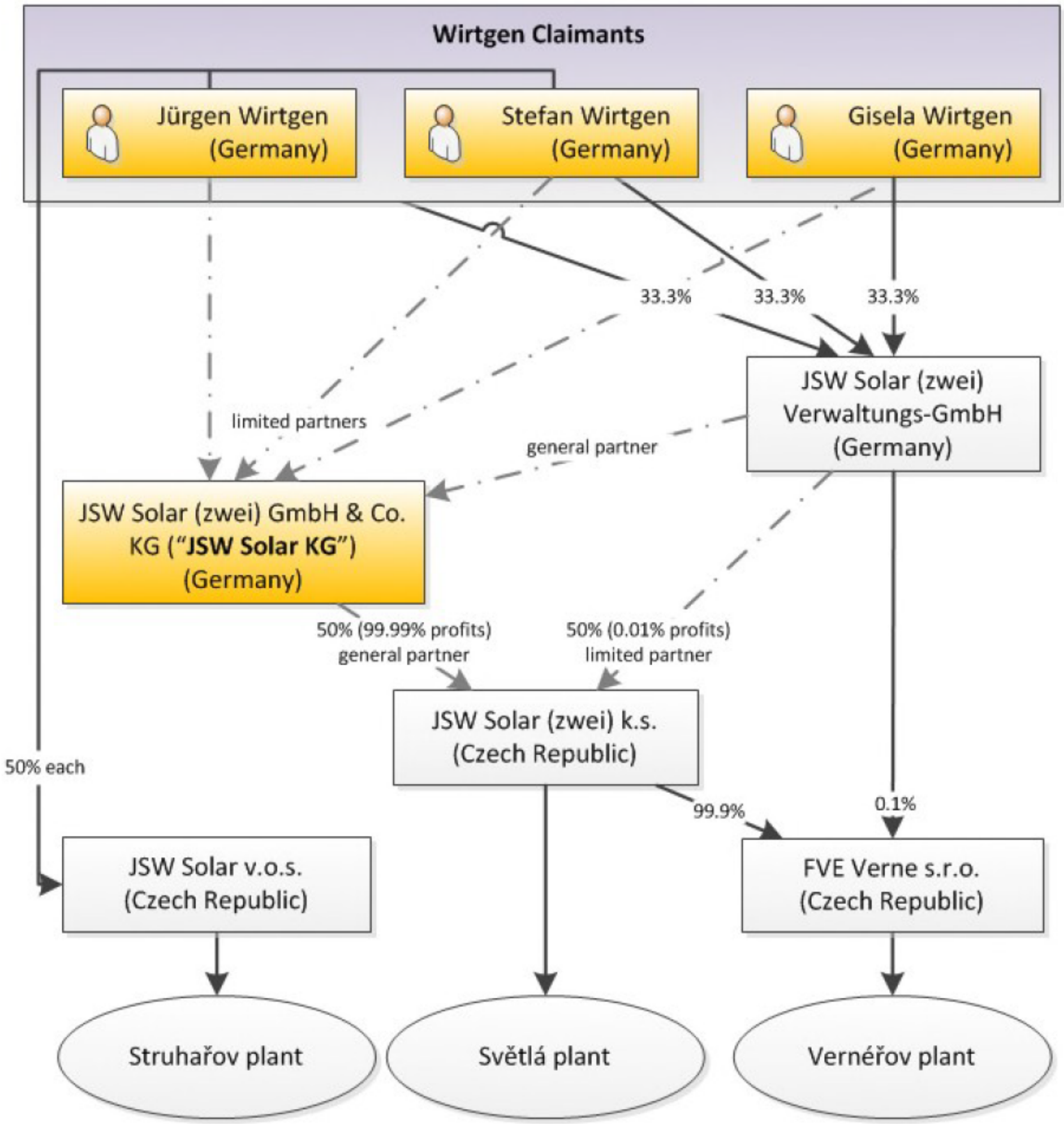
3. The third Claimant is Mrs. Gisela Wirtgen, [redacted], with domicile at [redacted], Germany (“Claimant 3).

4. The fourth Claimant is JSW Solar (zwei) GmbH & Co. KG, a limited partnership organized and existing under the laws of Germany, with domicile at Reinhard-Wirtgen-Straβe 2, 53578 Windhagen, Germany, registered with the commercial register in Montabaur, Germany (“JSW” or “Claimant 4”).

5. Claimants 1-3 are shareholders of Claimant 4.

6. The Claimants and their investments have been illustrated as follows: being specified that the three Czech power plants at issue in this arbitration — Struhařov, Světlá and Verneřov — are directly owned by three Czech special purpose vehicles set up for that purpose.[1]

[1] Rej., §168.



7. The Claimants are represented in this arbitration by:

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B. THE RESPONDENT

8. The Respondent is the Czech Republic (the "Republic").

9. The Respondent is represented in this arbitration by:

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II. MAIN FACTS

10. The following summary is meant to give a general overview of the present dispute. It does not include all the facts which may be of relevance, particularly as they emerged from the extensive evidence gathered at the hearing. To the extent relevant and useful, additional facts will be addressed in the Tribunal's analysis.

A. BACKGROUND

11. The Czech Republic came into existence on 1 January 1993 upon the dissolution of the Czechoslovak Federation. It acceded to the European Union ("EU") on 1 May 2004.

12. As a result of the accession, the Republic was required to harmonize its legal system with EU law and transpose existing EU Directives into its national legislation.

13. One area where such transposition was required was the renewable energy sector. In 2001, through Directive 2001/77/EC,[2] the EU had set non-binding indicative renewable energy production targets for its Member States. These targets envisaged that the share of renewable energy should be at or above 8% by 2010.[3] In 2009, through Directive 2009/28/EC, these targets were raised to 13% by 2020.[4]

14. The Czech Republic undertook to achieve an 8% share of production of electricity from renewable sources of energy ("RES") in its gross energy consumption by 2010.[5] Discussions for devising the appropriate framework to meet this target started in 2002, even before accession. These discussions continued in 2003 and 2004 when a draft bill was prepared.

B. SUPPORT SCHEME

15. In March 2005, a "Support Scheme" for renewable energies came into effect.[6] It broadly consisted of two parts: the continuation of existing tax incentives (1) and the enactment of Act 180 entitled "On the Support of Electricity Generation from Renewable Energy Sources"[7] ("Act 180") (2).

1. Tax Incentives

16. Act No. 586/1992 Coll. on Income Taxes (the "Income Tax Act"),[8] in force since 1993, provided specific rules for calculating the corporate income tax of producers of electricity from renewable sources of energy ("RES producers"). RES producers were exempt from income tax in the year the plant was put into operation and for the

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[2] Exh. RLA-016, Directive 2001/77/EC.

[3] Exh. C-28, Directive 2001/77/EC, Article 3.2, Annex.

[4] Exh. C-29, Directive 2009/28/EC, Annex I.

[5] Exh. RLA-016, Directive 2001/77/EC.

[6] The Claimants use the term "Support Scheme" as a collective term for Act 180, the tax exemption and the depreciation provisions of the Income Tax Act (SoC, §5).

[7] Exh. C-31, Act 180/2005 Sb on the Support of Electricity Generation from Renewable Sources of Energy and on Amendment of Some Other Acts (the Act on the Support of Use of Renewable Sources); Exh. R-4. The Respondent titles Act 180 as "Act No. 180/2005 Coll., on Promotion of Electricity Production from Renewable Energy Sources and on Amendments to Certain Laws" or "The Act on Promotion".

[8] Exh. R-5, Act 586/1992 Coll.

following five years.[9] Further, the Act provided preferential depreciation periods for certain intangible assets of RES producers (the tax exemption and the preferential depreciation period are collectively referred to as "the Tax Incentives").

17. An Explanatory Report to a draft of a legislation that eventually became Act 180 dated 12 November 2003 (the "2003 Explanatory Report") referred to these income tax exemptions for RES producers.

2. Act 180

18. Act 180 was enacted on 31 March 2005 and entered into force on 1 August 2005. Act 180 supported the production of electricity from RES through a combination of tariff and non-tariff mechanisms.

19. First, operators of the electricity grid were obliged to primarily connect facilities that generated electricity from renewable energy sources:

> "The operator of the transmission system or the operators of distribution systems are obliged to primarily connect the devices according to section 3 (hereinafter referred to as the "devices") to the transmission system or to the distribution systems on their locality […]".[10]

20. Grid operators were also under an obligation to purchase all the electricity generated by RES producers for fixed prices or so-called feed-in tariffs:

> "The operators of the local distribution systems and the operator of the transmission system are obliged to buy out every electricity from the renewable sources, to which the support applies, and to enter into the contract on supply […]".[11]

21. The Act did not contemplate compensating grid operators for the feed-in tariffs ("FITs") which they were to pay to the RES producers. These tariffs were funded through a compulsory surcharge set by the Energy Regulatory Office (the "ERO") in its yearly

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[9] Exh. C-30, The Income Tax Act, Part 1, Section 4(1)(e) ("Exempted from taxation shall be: […] e. revenues from […] solar facilities […] in the calendar year in which they were put into operation for the first time, and the five years immediately following.").

[10] Exh. C-31, Act 180/2005, Section 4(1).

[11] *Id.,* Section 4(4).

price decisions and invoiced to all electricity consumers by the grid operators as part of the electricity bill.[12]

22. RES producers were entitled to choose between FITs[13] and so-called green bonuses[14] applicable at the time when their plants were first put into operation:

> "The producer of the electricity from the renewable sources, to which the support applies, has the right to chose, whether he offers his electricity for buy-out according to the subsection 4 or whether he requires the green bonus for it".[15]

23. Each year the ERO was to determine the rate of FITs and green bonuses for plants connected to the grid in the following year. Specific considerations were to be taken into account by the ERO while setting these tariffs, as provided in Article 6 of Act 180, for which the Parties provided different translations:

Claimants' Translation of Article 6 of Act 180 (Exh.C-031)	Respondent's Translation of Article 6 of Act 180 (Exh.R-004)
Level of the prices for the electricity from the renewable sources and the green bonuses (1) The Authority defines the buy-out prices for the electricity from the renewable sources (hereinafter referred to as the "buy-out prices") separately for individual types of the renewable sources and the green bonuses always for the calendar year in advance in such way that	Amounts of Prices for Electricity from Renewable Sources and Amounts of Green Bonuses (1) The Office sets, one calendar year in advance, the purchasing prices for electricity from Renewable Sources (the "Purchasing Prices"), separately for individual kinds of Renewable Sources, and sets green bonuses, so that
a) the conditions are created for the fulfilment of the indicative target of the share of the generation of the electricity from the renewable sources in the gross consumption of	a) the conditions are created for the achievement of the indicative target so that the share of electricity produced from Renewable Sources accounts for 8% of gross electricity

[12] Exh. R-031 ERO price decision No. 9/2008 of 18 November 2010; Exh. R-033 ERO price decision No. 7/2009 of 25 November 2009; Exh. R-037, ERO price decision No. 14/2005 of 30 November 2005; Exh. R-038 ERO price decision No. 9/2006 of 27 November 2006; Exh. R-039, ERO price decision No. 9/2007 of 26 November 2007.

[13] FITs are granted to operators of renewable energy plants for the electricity they deliver to the grid and take the form of a total price per unit of electricity paid.

[14] The green bonus is an additional payment on top of the market price.

[15] Exh. C-031, Act 180/2005, Section 4(3).

the electricity amounting to 8 % in the year 2010 and	consumption in 2010 and
b) for the devices put into operation 1. after the date of the effect of this Act, the fifteen-year period of time of return of investment is reached with support of the buy-out prices under the condition of the fulfilment of the technical and economic parameters, that are especially the costs for the installed unit of the output, the efficiency of the use of the primary content of the energy in the renewable source and the period of time of the use of the device and that are defined in the implementing regulation, 2. after the date of the effect of this Act, the amount of the revenues stays unchanged for the unit of the electricity from the renewable sources with the support of the buy-out prices for the period of time of 15 years since the year, when the device was put into operation as minimum amount whilst taking the price index of the industrial producers into consideration; also the completion of the reconstruction of the technological part of the existing device, the change of the fuel or the completion of the modernisation, that increases the technical and ecological level of the existing device, are also regarded as putting the device into operation, 3. prior to the date of the effect of this Act, the minimum amount of the buy-out prices defined for the year 2005 according to the existing legislation stays unchanged for the period of 15 years whilst taking the price index of the industrial producers into consideration.	b) for facilities commissioned 1. after the effective date of this Act, there is attained, with the Support consisting of the Purchasing Prices, a fifteen year payback period on capital expenditures, provided technical and economic parameters are met, such parameters consisting of, in particular, cost per unit of installed capacity, exploitation efficiency of the primary energy content in the Renewable Source, and the period of use of the facility, such parameters being stipulated in an implementing legal regulation, 2. after the effective date of this Act, the amount of revenues per unit of electricity from Renewable Sources, assuming Support in the form of Purchasing Prices, is maintained as the minimum [amount of revenues], for a period of 15 years from the commissioning year of the facility, taking into account the industrial producer price index; the commissioning of a facility is also deemed to include cases involving the completion of a rebuild of the technological part of existing equipment, a change of fuel, or the completion of modernization that raises the technical and ecological standard of an existing facility, 3. prior to the effective date of this Act, there is maintained for a period of 15 years the minimum amount of Purchasing Prices set for the year 2005 in accordance with the legal regulations to date and taking into account the industrial producer price index.
(2) When defining the amount of the green bonuses, the Authority also takes into consideration the increased risk level of selling the	(2) When setting the amounts of green bonuses, the Office also takes into account a heightened degree of risk associated with off-taking

electricity from the renewable sources on the market with the electricity.	electricity from Renewable Sources in the electricity market.
(3) When defining the buy-out prices and the green bonuses, the Authority starts out from various costs for acquisition, connection and operation of individual types of devices including the time development thereof.	(3) When setting Purchasing Prices and green bonuses, the Office proceeds on the basis of differing costs for the acquisition, connection and operation of individual types of facilities, including the development thereof over time.
(4) The buy-out prices defined by the Authority for the next calendar year may not be lower that 95 % of the value of the buy-out prices valid in the year, in which the new decision is to be taken. This provision is to be used for the first time for the prices defined for the year 2007.	(4) Purchasing Prices set by the Office for the following calendar year shall not be less than 95% of the Purchasing Prices in effect in the year for which the setting decision is made. This provision shall be used for the first time for the prices set for 2007.

24. Section 6(3) clarified that the ERO should set tariffs based on the differing installation and operating costs of different sources of RES, "including the development [of those costs] over time", recognizing that changes in costs over time would lead to an adjustment of the tariffs. Moreover, the FIT for electricity generated by a plant newly put into operation could not be lower than 95% of the tariff applicable to the electricity generated by the plants connected in the previous year (Section 6(4)) (so-called "5% brake rule"). Finally, pursuant to Public Notice No. 150/2007, the FITs would be increased annually to reflect the producers' price index, by at least 2% but no more than 4%.[16]

[16] Exh. C-036, Public Notice 150/2007 Coll. of 19 June 2007 on price regulation in the energy sectors and on price regulation methods, Section 2(11) provides: "[…] Throughout the lifetime of the facility producing electricity, which falls in the relevant category determined pursuant to the type of renewable source used and date of putting into operation, the feed-in tariffs shall be increased annually taking in consideration the price index of industry manufacturers at least by 2% and at maximum by 4%".

25. Further guidance for calculating the FIT was provided by means of Decree No. 475/2005 Coll., on Implementation of Certain Provisions of the Act on Promotion of Exploitation of Renewable Energy Sources (the "Technical Regulation"), which established the specific technical parameters to be used by the ERO:

> "In order for the 15-year pay-back period to be assured through the support by Purchasing Prices of electricity produced from renewable sources, technical and economic parameters of an installation producing electricity from renewable sources must be satisfied, where the producer of electricity from renewable sources shall achieve, with the given level of Purchasing Prices
>
> a) an adequate return on invested capital during the total life of the installation, such return to be determined by the weighted average cost of capital (WACC), and
>
> b) the net present value of the cash flows after tax over the total life of the installation, using a discount rate equal to WACC, at least equal to zero".[17]

26. The formula to calculate the net present value required by Section 4(1)(b) of the Technical Regulation and the weighted average cost of capital ("WACC") was published on the ERO's website.[18] Until the end of 2010, the WACC used by the ERO in calculating the tariffs was 7% per year.[19]

27. Annex 3 to the Technical Regulation specified the individual technical parameters that would be applied in calculating the FIT. These included (i) the assumed lifetime of the installation; (ii) the assumed level of efficiency of the solar panels used; (iii) the assumed investment costs per installed kilowatt peak ("kWp"); and (iv) the assumed annual usage in kilowatt hours of installed kWp. The levels of these parameters were set for a representative hypothetical installation and were modified as appropriate by the ERO prior to calculating tariffs for the coming year.

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[17] Exh. R-013, Decree No. 475/2005 Coll., implementing certain provisions of the law on support for the use of renewable sources ("Technical Regulation"), §4(1).

[18] Exh. R-014, ERO Methodology for Determination of Purchasing Prices and Green Bonuses.

[19] *Id.*

28. The period for which the producers would be eligible to receive the FIT calculated on the basis of Act 180 and its supporting framework was set through Public Notices:

- Under Public Notice No. 150/2007, the FIT was to apply "throughout the lifetime of the facility producing electricity";[20]

- Through Public Notice No. 475/2005, the "lifetime of the facility producing electricity" was set at 15 years;[21]

- Through Public Notice No. 364/2007, this period was increased to 20 years.[22] The reasons for the increase were described as follows:

> "[T]he lifespan of the facilities shall be modified; owing to the progress in the industry, the lifespan has increased from 15 years to 20-25 years; it is proposed to count on 20 years. However, this involves the issue of the ageing of the panels because the panel output at the end of its lifespan is not the same as its output once it is installed. This is why it is proposed to count on the year-on-year decline in the panel output by 0.8% of the nominal output per year".[23]

C. THE CLAIMANTS' INVESTMENTS

29. In 2009, Mr. [redacted]t, the managing director of [redacted], a company engaged in the search, management and operation of PV projects, approached the Claimants with investment opportunities in the Czech solar sector. With [redacted]'s co-operation, the Claimants invested in three solar PV plants in the Czech Republic, Struhařov (1), Světlá (2), and Vernéřov (3).

1. Struhařov

30. On 14 August 2009, [redacted] provided Claimants 1 and 2 with a proposal for a PV project in the municipality of Struhařov.

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[20] Exh. C-036, Public Notice 150/2007 Coll. of 19 June 2007 on price regulation in the energy sectors and on price regulation methods. While Public Notice 150 was replaced by Public notice 140 (Exhibit C-37) in 2009, the cited provision remained unchanged.

[21] Exh. C-038a, Public notice 475/2005 Coll. of 30 November 2005 implementing certain provisions of the Act on Support for Renewable Sources Utilization.

[22] Exh. C-038b, Public notice 475/2005 as amended through 364/2007.

[23] Exh. R-157, Explanatory Report to draft ERO Regulation No. 346/2007 Coll., p. 4.

31. On 25 August 2009, Claimant 4 purchased plots of land in the Struhařov municipality through [redacted], a project developer. One month later, on 25 September 2009, it entered into a turnkey contract with [redacted] for the construction of a solar PV plant. The construction permit for the plant was subsequently issued on 27 November 2009. Thereafter, on 14 December 2009, ERO issued a license for the generation of electricity at the Struhařov plant. The plant was put into service on 16 December 2009 and connected to the grid on the same day pursuant to a contract with the grid operator [redacted].

32. As mentioned above, the Claimants could choose to be paid for the electricity generated through a FIT or through a green bonus. The Claimants chose the former. At the time, the tariff was 12.79 CZK per kWh (EUR 0.492 per kWh) in accordance with ERO's Price Decision No. 8 of 18 November 2008 for plants commissioned in 2009.

2. Světlá

33. After the commissioning of the Struhařov plant, Claimants 1 and 2 considered further investments in the Czech Republic. Eventually, they invested in two other PV plants along with their [redacted], Claimant 3.

34. In February 2010, [redacted] advised the Claimants that the city of Světlá was seeking to sell property development rights by way of tender. The city intended to participate in the profits of a PV plant without committing capital. On 12 February 2010, [redacted] responded to the tender. Its bid was successful and a development contract was signed between [redacted] and the city of Světlá on 26 March 2010. The contract provided that, besides the purchase price, the city would receive a fee [redacted] of the tariffs paid by the grid operator for the electricity produced.

35. Two months later, on 7 April 2010, the Claimants set up JSW Solar (zwei) k.s., a company directly owned by Claimant 4 (99.9%) and by JSW Solar (zwei) Verwaltungs GmbH (0.01%), and indirectly owned by Claimants 1, 2 and 3 who are shareholders of both companies. The development contract entered into by [redacted] was assigned to JSW Solar (zwei) k.s. by trilateral agreement.

36. The construction permit for the Světlá plant was granted on 18 May 2010, and a turnkey contract was entered into with [redacted] on 26 May 2010. The license for the generation of electricity at the plant was issued by ERO on 22 September 2010. The

plant was put into service on 13 October 2010 and connected to the grid on the same day.

37. As in the case of the Struhařov plant, the Claimants opted for compensation in the form of FIT. At the time, the tariff was 12.15 CZK per kWh (EUR 0.48 per kWh) in accordance with ERO's Price Decision No. 5 of 23 November 2009 for plants commissioned in 2010.

3. Vernéřov

38. While the investment in Světlá was ongoing, the Claimants received information from [redacted] about a project at Vernéřov. On 28 May 2010, JSW Solar (zwei) k.s. signed a turnkey construction contract with [redacted] for a PV plant at that location.

39. Somewhat later, on 7 July 2010, to develop the PV plant at Vernéřov, JSW Solar (zwei) k.s. together with JSW Solar (zwei) Verwaltungs-GmbH acquired all shares in FVE Verne s.r.o.[24] FVE Verne s.r.o. was owned by JSW Solar (zwei) k.s. (99.9%) and by JSW Solar (zwei) Verwaltungs GmbH (0.01%), which were in turn owned by Claimants 1-3.

40. The construction permit for the Vernéřov plant was granted on 20 September 2010. The license for the generation of electricity at Vernéřov was issued by ERO on 11 October 2010. The plant was put into service on 17 December 2010 and connected to the grid on the same day.

41. Like for their other plants, the Claimants chose a FIT rather than a green bonus. At the time, the tariff was 12.15 CZK kWh (approximately EUR 0.48 per kWh) in accordance with ERO's Price Decision No. 5 of 23 November 2009 for plants commissioned in 2010.

D. CHANGES IN THE PV SECTOR

42. The Respondent contends that a "fundamental change" in the global market for solar panels occurred in 2009 and 2010. The price of solar panels – which form the bulk of a

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[24] The project rights were held by a special purpose vehicle FVE Verne s.r.o, which was owned by another company Windenergie s.r.o.

producer's investment costs – fell dramatically. As the FIT was set on the basis of a higher investment costs, a "perfect storm" was in the making: while the investment costs of RES plants decreased substantially, the Respondent could not reduce the tariffs proportionately due to the 5% brake rule. The result, so says the Respondent, was that producers stood to earn windfall profits at the expense of the Czech consumers.

43. In these circumstances, the Respondent argues that it "had no choice" but to modify the Support Scheme, which it did.

E. AMENDMENTS TO THE SUPPORT SCHEME

44. The Support Scheme was amended on several occasions in 2009 and 2010. The principal amendments are outlined below.

1. Abolishing the 5% Brake Rule

45. On 21 April 2010, the Respondent enacted a first amendment of its Support Scheme through Act 137/2010, which ended the 5% brake rule. As a result, ERO could reduce the FIT by more than 5% for plants connected in the following year, i.e. 2011. This amendment did not affect the Claimants,[25] other than it allegedly "made it extremely important that [the Claimants' projects] would be concluded within 2010 in order to be entitled to the 2010 feed-in tariff".[26]

2. Limiting the Support Scheme to Small PV Plants

46. On 3 November 2010, in Act 330/2010, the Respondent limited, as from 1 March 2011, the Support Scheme to small PV plants that had an installed capacity of up to 30 kWh. This Act, in effect from 1 January 2011, applied to all plants connected from 2011 onwards. It did not affect the Claimants' plants as these were all put into operation in 2009 (Struhařov) or 2010 (Světlá and Vernéřov).

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[25] The Claimants have submitted that the 5% limit is one of the "three independent guarantees" to which they were entitled under Act 180 (Reply, §29). However, as the 5% brake rule did not apply to tariffs for existing investments, it could not impact the Claimants' investments. See also Tr. (Day 1) 31:13-15 ("[The] 5% brake clause. Not relevant for Claimants. They managed to bring their plants online on time.").

[26] SoC, §88.

3. Abolishing the Tax Incentives

47. Still on 3 November 2010, through Act No. 346/2010 Coll., Amending the Income Tax Act, as amended, and Other Related Acts ("Act 346/2010"), the Respondent amended the Income Tax Act. More specifically, it terminated the Tax Incentives as of 1 January 2011. The reasons for the amendment were set out in the Explanatory Report accompanying Act 346/2010:

> "The proposed changes are in response to the need to eliminate all legal means for the indirect support of electric power generation from renewable resources (mainly solar power plants) that is no longer justified, and therefore they are making taxation on environmentally friendly power generation sources and facilities stricter and eliminating the tax-exempt status of income from the operation of environmentally friendly power generation facilities. In order to simplify legal regulation and enable easier administration, the elimination of this exempt status for other environmentally friendly facilities has also been proposed".[27]

4. Introducing the Solar Levy

48. On 14 December 2010, the Respondent adopted Act 402/2010 Coll., ("Act 402/2010"),[28] which limited the contribution of consumers to the RES subsidies (FIT or green bonus) to CZK 370/MWh. This created a shortfall between the funds raised from the final consumers and the amount of subsidy to be paid to RES producers. Act 402/2010 provided that this shortfall would be financed from the state budget. The state budget, consequently, needed additional revenues to fund this expenditure.

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[27] Exh. R-221, Government's proposal for adoption of a bill amending Act No. 586/1992 Coll., on income tax, as amended, and other related acts.

[28] Exh. R-123, Act 402/2010 Coll., amending Act No. 180/2005 Coll., on promotion of electricity production from renewable energy sources (the Act on Promotion of Renewable Energy Sources), as amended, and certain other acts.

49. These additional revenues were to come from multiple sources, one of which was a 26% so-called solar levy (the "Solar Levy") which was introduced through Act 402/2010.[29] The Solar Levy was to remain in force for a period of three years and applied to PV plants put into operation between 1 January 2009 and 31 December 2010:

> "Subject-Matter of Levy from Electricity from Solar Radiation
>
> The subject-matter of the levy for the electricity from the solar radiation (hereinafter referred to as the "levy") is the electricity generated from the solar radiation in the period of time from January 1, 2011 to December 31, 2013 in the device that was put into operation in the period of time from January 1, 2009 through December 31, 2010".[30]

50. The Solar Levy was imposed on PV producers, but was to be remitted by the grid operators:

> "Persons subject to the Levy
>
> (1) The payer of the levy is the producer, if he generates the electricity from the solar radiation.
>
> (2) The payer remitting the levy is the operator of the transmission system or the operator of the local distribution system".[31]

51. The Solar Levy was withheld at source. The grid operator continued to pay the FIT to the RES producers, but after deduction of the Solar Levy.

52. A formal order providing for the deduction of the Solar Levy was never issued to the Claimants. They therefore complained about it to the grid operator [redacted].[32] They also filed complaints with the relevant offices, but their complaints were dismissed.[33] They appealed these dismissals, but later withdrew their appeals on the basis of the decision of the Czech Constitutional Court which is discussed below. The Solar Levy continues to be deducted from the monthly payments by [redacted] to the Claimants' plants in Světlá and Vernéřov.

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[29] In 2013, the Levy was reduced to 10%. See Exh. C-077, Act 310/2013.

[30] Exh. C-065, Act 402/2010, Section 7(a).

[31] Exh. C-065, Act 402/2010, Section 7(b).

[32] Exh. C-018, Letter from Claimants to grid operator [redacted] of 6 April 2011.

[33] Exh. C-020, Complaint from Claimants to tax office of 29 June 2011; Exh. C-021, Decision by Děčín Tax Office of 1 July 2011.

F. CONSOLIDATION OF THE SUPPORT SCHEME AND FURTHER LEGISLATION

53. On 30 May 2012, the Respondent published Act 165/2012 Coll., on Promotion of Sources of Energy and Amending Certain Acts ("Act 165/2012"), which repealed and replaced Act 180. Act 165/2012 came into effect partly from the date of publication and partly as of 1 January 2013. It incorporated the FIT as set out in Act 180 and the Solar Levy introduced in Act 402/2010.

54. Act 165 was itself amended with effect from 2 October 2013 by Act No. 310/2013 Coll. ("Act 310/2013"). Act 310/2013 extended the Solar Levy at a rate of 10% of the FIT for the plants commissioned in 2010 for the entire period of time during which these plants would have right to electricity support.[34]

55. The provisions of Acts 346/2010 and 402/2010 applied to all of the Claimants' plants. The prolongation of the Solar Levy under Act 310/2013 applies to the Claimants' plants in Světlá and Vernéřov.

G. DECISIONS OF THE CZECH COURTS

1. Decision of the Czech Constitutional Court

56. On 10 March 2011, a group of 20 senators (members of the upper chamber of the Czech Parliament) filed a petition with the Czech Constitutional Court asking the Court to repeal, *inter alia*, the Solar Levy. The withdrawal of the tax exemption was challenged as well. The petition was subsequently modified and supplemented on several occasions.

57. The Constitutional Court defined the legal question before it as follows:

> "[W]hether there existed on the part of the affected operators of [solar plants] such a strong, constitutionally-relevant interest in the keeping of the existing stipulated-in-law price for electricity from renewable sources, and the stipulated amounts of green bonuses, without having such support curtailed by the levy, that such interest would outweigh the public interest in reducing the stipulated electricity prices".[35]

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[34] Exh. C-077, Act 310/2013, Art. I(8)−(9) of (amending §§14 and 18 of Act 165/2012).

35 Exh. R-084, Decision of the Constitutional Court, case no. Pl. ÚS 17/11, 15 May 2012, §56.

58. On the Solar Levy, the Court observed that under Act 180 RES producers were at most entitled to expect that their investment would be paid back in 15 years, which time was maintained despite the Solar Levy:

> "The Constitutional Court consequently concurred with the conclusion that the consequence of the enactment of the parts of Act No. 402/2010 Coll. that were challenged by the petitioners consists, in the case of investors that commissioned their installations during the period from 1 January 2009 to 31 December 2010, merely of the fact that the extent of their profits was temporarily affected by the amount of the newly-introduced levy and the resulting extension of the payback period on their investment. However, the system of support and the principles for setting regulated prices, as regulated in Act No. 180/2005 Coll., continue to guarantee such conditions as to enable investors to achieve a simple payback period on investment of 15 years. In relation to the payback period, the change is merely reflected in the fact that the payback will be achieved in a longer time horizon (but one that is maintained by the act) than the producers of electricity from renewable sources had expected."[36]

59. The Constitutional Court also observed that the introduction of the Solar Levy was proportionate to the "entirely legitimate" objective of "averting the social and economic impacts of a substantial rise in electricity prices for end consumers, and regulating state support in response to an extreme fall in capital expenditure costs":[37]

> "The means that were selected for attaining such objectives seem to be reasonable and appropriate, since as follows from the materials presented, the levy on electricity from solar radiation was set so as to continue to guarantee a fifteen year payback period on investment, the period guaranteed by the law. [T]his was not an extreme measure, the production of electricity from renewable sources continues to be subsidized to a significant extent".[38]

60. On the withdrawal of the tax exemption, the Court made the following observations:

> "[T]he challenged provisions responded to the need to eliminate, through the use of all legal means, the indirect support provided for the production of electricity from ecological sources, support that was no longer justified at that time, particularly as concerned solar installations, and such provisions therefore made the tax regime applicable to ecological sources and installations stricter by ending the tax exemption on income from the operation of ecological installations.
>
> The relevant legal regulation concurrently aimed to fulfill a major public interest (that of keeping energy prices stable, keeping the public debt from

[36] *Id.,* §71.
[37] *Id.,* §72.
[38] *Id.,* §72.

rising etc.), an aim which, in the spirit of the case-law of the Constitutional Court, can be used to justify even potential interference with the legitimate expectations of taxpayers.

> It is therefore evident that the reasons and objectives of the challenged legal regulation, which was used to cancel the exemption from income tax with regard to income from the operation of solar installations […] are identical to the reasons and objectives that led to the enactment of the legal regulation stipulating the levy on electricity from solar radiation, and accordingly the Constitutional Court makes reference to paragraphs [above] that fully fit this issue. For the sake of completeness, the Constitutional Court would like to add that the income tax exemption was also cancelled with regard to other ecological installations. Taxpayers could use this exemption for the last time in the tax period that commenced in 2010, which means that the change also applies to taxpayers that commissioned their ecological energy sources and installations before these amendments entered into force".[39]

61. In conclusion, the Court emphasized:

> "The principle of legal certainty cannot be viewed as being identical to a requirement of absolute unchangeability of legal regulation, since legal regulation is subject to, among other things, social and economic changes and the requirement of ensuring that the state budget remains stable.
>
> […]
>
> [T]he Constitutional Court has not ignored the fact that it had been the state that guaranteed, by means of a law, a fifteen year payback period on investment and a certain amount of revenues per unit of electricity produced from renewable sources, thereby motivating the affected entities to undertake entrepreneurial activities in the area of energy production from renewable sources.
>
> As was stated above, however, the Constitutional Court concurrently feels that it is legitimate for lawmakers, after objectively ascertaining that a change has occurred in the investments in PVPP, to take the step of regulating support for the production of electricity from RES, to regulate it in a manner so as to maintain the balance between inputs and revenues that had been established by the original version of [the Act on Promotion], a balance that was expressed by the fifteen year payback period […] and a firmly-established amount of revenues".[40]

62. These principles were subsequently upheld by a later decision of the Court.[41]

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[39] *Id.,* §§83-84.
[40] *Id.,* §§85-86.
[41] Exh. R-234, Decision of the Czech Constitutional Court, case no. 2216/14, 13 January 2015.

2. Decisions of the Supreme Administrative Court

63. Although the Constitutional Court held that the contested measures were not unconstitutional, it recognized that they could harm individual investors in a disproportionate manner. It therefore opened the way for investors who could demonstrate that the measures had a “strangling effect” on their business to seek judicial redress or apply to the relevant tax authority for tax deferrals.

64. Consequently, a large number of solar generators brought proceedings against the local tax administrations, arguing that the Solar Levy had a “strangling effect” in their particular cases.

65. Most of these cases were dismissed on the basis that solar investors had no legitimate expectations beyond the 15-year payback guarantee. In its decisions, the Supreme Administrative Court confirmed that the guarantee under the Act 180 did not include a guarantee of sufficient cash flow or of a certain level of profitability:

> “The fact that the investment made is not capable in certain years of its existence of generating a sufficient cash flow to cover the repayment of interest and the principal amount of the loan that is provided for a period shorter than the expected payback period does not mean that such investment cannot be expected to be paid back − there is only a problem with cash flow, resulting from various requirements pertaining to its amount in the course of the lifespan of the investment, not from the fact that the investment as a whole would not be paid back. Therefore, not only the issue of simple payback of the investment (in the sense of statutory guarantees), but also another issue of adequate profit from carrying out business on a regulated market must be perceived in relation to the overall period of the expected 20-year lifespan of photovoltaic panels. The Constitutional Court has addressed the issue of profitability in a comprehensive manner (i.e. also with respect to the method of determining the purchase prices) and has not found any defects in the amended version of [the Act on Promotion] that would automatically collide with any constitutionally guaranteed rights of photovoltaic plant operators”.[42]

66. The Supreme Administrative Court further clarified that a “strangling effect” was one that would cause the liquidation or affect the substance of the producer:

> “In certain specific, individually assessed cases, the application of [the Solar Levy] could indeed, in the opinion of the Constitutional Court, be contrary to the Constitution; however, these would only be cases where the

42 Exh. R-124, Decision of the Supreme Administrative Court, case no. 2 Afs 13/2013-28, 15 August 2013, p. 8.

charges would have liquidation effects and or would affect the very substance of the electricity producer in terms of its assets”.[43]

67. A Grand Chamber of the Supreme Administrative Court later held that the Ministry of Finance should grant tax relief to solar generators which demonstrated that, in their individual circumstances, the effect of the Solar Levy was “suffocating” in the sense of the 2012 Constitutional Court judgment. It also set the parameters for obtaining relief.[44]

III. PROCEDURAL HISTORY

A. WRITTEN PHASE

68. On 24 June 2013, Claimants 1 and 2 served the Czech Republic with a Request for Arbitration under Article 10 of the Treaty between the Federal Republic of Germany and the Czech and Slovak Federal Republic on encouragement and reciprocal protection of investments of 2 October 1990 (“the Treaty” or “the BIT”)[45] accompanied by exhibits.

69. On 23 August 2013 Mr. Gary Born was appointed as co-arbitrator by the Claimants. On 26 August 2013 Judge Peter Tomka was appointed as co-arbitrator by the Respondent. With the consent of the co-arbitrators and the Parties, Prof. Gabrielle Kaufmann-Kohler was appointed as President of the Tribunal.

70. On 3 March 2014, the Parties and Tribunal signed the Terms of Appointment (“Terms of Appointment”). In the Terms of Appointment, the Parties agreed to the choice of Geneva as the seat of the arbitration and to the rules that would govern the arbitration. Further, they consented to the appointment of Ms. Eva Kalnina, an attorney in the firm of the President as Secretary to the Tribunal. Mr. Rahul Donde, also an attorney in the firm of the President, later replaced Ms. Kalnina with the consent of the Parties. The Parties also approved the tasks which the Secretary would perform in the course of the arbitration as described in the Tribunal’s letter of 19 August 2014.

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[43] *Id.,* p.10.

[44] Exh. R-225, Decision of the Grand Chamber of the Czech Supreme Administrative Court, case no. 1 Afs 76/2013-57, 17 December 2013.

[45] By exchange of notes of 18 December 1992 and 1 January 1993 respectively, the Federal Republic of Germany and the Czech Republic agreed that the Treaty would remain applicable between the two States after the dissolution of Czechoslovakia.

71. On 12 March 2014, the Tribunal issued Procedural Order No. 1 ("PO 1") in which it set the procedural calendar and other procedural rules for the arbitration. The proceedings were bifurcated, it being provided that the Respondent's jurisdictional objections would be heard first. The bifurcation was later undone with the consent of the Parties as it arises from the following account.

72. On 18 July 2014, the Claimants filed their Statement of Claim ("SoC") accompanied by factual and legal exhibits, witness statements of Messrs [redacted], [redacted], and an expert report of Mr. [redacted] of Alvarez and Marsal on quantum.

73. On 21 July 2014, the Tribunal received a letter dated 11 July 2014 from the European Commission ("EC") containing an application by the Commission to intervene as a non-disputing party in the arbitration.

74. On 23 July 2014, the Tribunal forwarded the application to the Parties, inviting them to comment. It also advised the Commission that it would hear the disputing parties on the application and revert to the Commission with its decision. An amended application filed by the Commission was subsequently conveyed to the Parties (the "Commission's Application").

75. On 15 August 2014, the Parties submitted their comments on the Commission's Application.

76. On 25 August 2014, the Respondent advised the Tribunal that since it intended to raise only a single jurisdictional objection regarding the lack of standing of Claimant 4, it did not wish to proceed with the bifurcation of the present arbitration. Further, it had initiated discussions with the Claimants on a new calendar for the arbitration where jurisdiction, merits and quantum issues would be heard together.

77. On 27 August 2014, the Tribunal invited the Parties to propose a new calendar for the arbitration, and suspended the preparation of its decision on the Commission's Application. It also separately informed the Commission that, due to likely changes in the calendar of the arbitration, its decision may be delayed.

78. On 8 September 2014, the Tribunal noted that the Parties had been unable to agree on a procedural calendar, principally because the Claimants maintained that the

proceedings should remain bifurcated – a position which the Respondent opposed. On the basis of the Parties' submissions, the Tribunal decided to de-bifurcate the arbitration. The Claimants later objected to this decision.

79. On 26 September 2014, the Tribunal directed the Respondent to submit its Objections to Jurisdiction as contemplated by PO 1, and to make any additional comments on bifurcation/de-bifurcation by 27 October 2014. The Claimants were then to state whether they maintained their objections to the de-bifurcation of the arbitration and to the Commission's Application.

80. On 27 October 2014, the Respondent filed its Objections to Jurisdiction ("Objections to Jurisdiction") accompanied by legal authorities.

81. On 31 October 2014, the Claimants agreed to the de-bifurcation of the arbitration. However, they maintained their opposition to the Commission's Application.

82. Following the Claimants' approval of de-bifurcation, on 6 November 2014, the Tribunal advised the Parties that, since both Parties now consented, jurisdiction, admissibility and merits (liability and quantum) would be heard together. Accordingly, it invited the Parties to submit (preferably joint) proposals for the calendar of the arbitration, specifying that they were not to take into account the (possible) effect of the Commission's Application. If the Tribunal allowed the Commission's Application, it would insert the Commission's submission and the Parties' related comments into the calendar in parallel to other steps such that the calendar would not be affected.

83. On 13 November 2014, the Respondent contended that the Claimants had provided limited information on their purported investments "indicat[ing] licensing irregularities that may warrant an objection to the Tribunal's jurisdiction on the grounds of illegality of Claimants' investment". Accordingly, it requested that document production should precede the filing of its Statement of Defense ("SoD") because otherwise it would be precluded from raising its illegality objection. It also submitted a proposal for the procedural calendar and commented on the Claimants' objections of 31 October 2014 to the Commission's Application.

84. On the same day, the Claimants insisted that document production should occur in the usual course after the first round of submissions. They also submitted their own proposal for the procedural calendar in the arbitration.

85. To facilitate the decision on the timing of the document production, on 24 November 2014, the Tribunal invited the Respondent "to identify the documents that it seeks from the Claimants and the reasons why it does so". At the same time, the Tribunal noted that the Respondent had agreed to the Claimants' proposal that the Tribunal rule on the Commission's Application only after the first round of submissions, i.e. after the SoD. As a result, the Tribunal advised the Parties that it would address the Commission's Application, its power to accept an *amicus* intervention, and, if applicable, the merits of such intervention and practicalities, after the submission of the SoD.

86. On 4 December 2014, the Respondent produced a table listing its document requests and explaining their relevance and materiality.

87. On 11 December 2014, the Claimants responded to the Respondent's submission.

88. On 16 December 2014, the Tribunal granted the Respondent's request for a document production phase, and set a schedule for document production. This schedule was revised on 6 January 2015.

89. On 16 February 2015, the Tribunal issued Procedural Order No. 2 ("PO 2"), in which it decided the Respondent's document production requests. It appended a revised procedural calendar.

90. On 20 March 2015, the Respondent filed its SoD accompanied by factual exhibits, legal authorities, an expert report of Ms. Kelyn Bacon, QC and an expert report by Mr. Michael Peer. The Respondent advised the Tribunal that it was seeking a decision from the Commission on whether the State aid granted for installations put into operation before 1 January 2013 was compatible with the EU internal market. It requested the Tribunal to stay the present proceedings until the Commission's decision.

91. In their reply of 13 April 2015, the Claimants opposed the Respondent's request for a stay. They argued that the Commission's decision would not affect the outcome of the case and, therefore, could not justify a stay of the proceedings. According to them, the decision was a matter outside these proceedings that would "very likely arise only after

the award was rendered".[46] Further, the decision would likely be issued only in mid to late 2016, not counting time for challenges.

92. On 24 April 2015, the Tribunal rejected the Respondent's request. It noted that the request was belated and that, in any event, the Respondent had not shown how itself or the arbitration proceedings would be prejudiced if the stay was not granted. It further noted that "[i]f the Commission's decision is rendered while the arbitration is ongoing, then the Tribunal will, of course, entertain the submissions the Parties choose to make on the effect of the decision on the arbitration. If the time comes for the Tribunal to render the award and the decision has still not been issued, the Tribunal will see at that time whether that requires it to delay the award".

93. On the same day, the Tribunal advised the Parties that it was about to rule on the Commission's Application and that, before doing so, it would consider any additional comments the Parties wished to make.

94. The Claimants submitted their comments on 29 April 2015, maintaining their objections of 15 August and 31 October 2014. The Respondent submitted its comments on 4 May 2015, also reiterating its earlier position.

95. On 27 May 2015, the Tribunal issued Procedural Order No. 3 ("PO 3") in which it decided on the Parties' document production requests submitted to the Tribunal on 10 April 2015.

96. On 16 September 2015, the Claimants filed their Reply (the "Reply") accompanied by factual exhibits, legal authorities, the second witness statement of Mr. [redacted], as well as the second expert report of Mr [redacted].

97. On 22 September 2015, the Tribunal issued Procedural Order No. 4 ("PO 4"), in which by majority it granted the Commission's Application, and set out a timetable for the Commission's non-disputing party submission and the Parties' responses thereto. Mr. Born issued a dissenting opinion on 8 October 2015.

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[46] Claimants' communication of 13 April 2015.

98. On 12 November 2015, upon a request by the Commission and after consulting the Parties, the Tribunal confirmed that the Commission's understanding of the nature of the dispute as stated in the Commission's communication of 30 October 2015 was correct. It also advised the Commission that Acts No. 165/2012, No. 310/2013 and No. 346/2010 Coll. (in respect of the latter, specifically Article I(36) and Article I(75) and transitional provisions being Articles II(2), II(9), and II(10) thereof) could be relevant to the dispute.

99. On 11 December 2015, the Commission filed its non-disputing party submission (the "Amicus Curiae Submission") accompanied by annexes.

100. On 17 December 2015, the Respondent filed its Rejoinder (the "Rejoinder" or "Rej.") accompanied by factual exhibits, legal authorities, a witness statement by Mr. [redacted] and the expert reports of Mr. Wynne Jones of Frontier Economics and Ms. Kelyn Bacon, QC, and the second expert report of Michael Peer of KPMG.

101. On 14 January 2016, the Claimants requested the Tribunal to disregard the witness statement of Mr. [redacted] and the expert report of Mr. Wynne Jones (the "New Evidence") on the basis that they contained evidence that should have been submitted earlier. In its response of 20 January 2016, the Respondent opposed the exclusion of the New Evidence. In its ruling of 25 January 2016, the Tribunal (i) admitted the New Evidence into the record, (ii) gave the Claimants an opportunity to file rebuttal evidence and brief explanatory comments limited to the New Evidence, and (iii) gave the Respondent an opportunity to file sur-rebuttal evidence and brief explanatory comments limited to the Claimants' just preceding submission.

102. On 15 February 2016, the Claimants and the Respondent filed their replies to the Amicus Curiae Submission (the "Claimants'/Respondent's Comments on the Amicus Curiae Submission").

103. On 11 March 2016, the Claimants filed their "Reply to the New Evidence Submitted in Respondent's Rejoinder" (the "Claimants' Comments on the New Evidence"), accompanied by factual exhibits and an expert report of Mr. [redacted] of Onyx Energy Consulting.

104. On 29 March 2016, upon receipt of the Parties' comments, the Tribunal advised the Parties and the Commission that, as it had the benefit of the Commission's extensive submission, it did not require Commission representatives to attend the hearing.

105. On 14 April 2016, the President, acting on behalf of the Tribunal, and the Parties held a telephone conference to discuss the outstanding issues pertaining to the organization of the hearing.

106. On 18 April 2016, the Respondent filed its "Sur-Rebuttal Comments on 'New Evidence'", accompanied by factual exhibits, legal authorities and the second expert report of Mr. Wynne Jones.

107. On 19 April 2016, the Tribunal issued Procedural Order No. 5 ("PO 5") in which it set out certain organizational issues for the hearing. Further directions were issued subsequently.

B. HEARING ON JURISDICTION AND MERITS

108. From 9 to 12 May 2016, a hearing on jurisdiction and merits was held at the Peace Palace in The Hague. In addition to the Tribunal and the Secretary, the following persons attended the hearing in whole or in part:

- For the Claimants:
  - Counsel

    [redacted], Luther Rechtsanwaltsgesellschaft
    [redacted], Luther Rechtsanwaltsgesellschaft
    [redacted], Luther Rechtsanwaltsgesellschaft
    [redacted], Luther Rechtsanwaltsgesellschaft
    [redacted], Luther Rechtsanwaltsgesellschaft

  - Party Representative

    [redacted], Wirtgen

  - Experts:

    [redacted], Onyx Energy Consulting
    [redacted], Onyx Energy Consulting
    [redacted], Alvarez & Marsal
    [redacted], Alvarez & Marsal

- Witnesses:

[redacted]

- For the Respondent:

  - Counsel

Paolo Di Rosa, Arnold & Porter LLP
Dmitri Evseev, Arnold & Porter (UK) LLP
Mallory Silberman, Arnold & Porter LLP
Peter Nikitin, Arnold & Porter (UK) LLP
Bart Wasiak, Arnold & Porter (UK) LLP
Aimée Reilert, Arnold & Porter LLP
Dara Wachsman, Arnold & Porter (UK) LLP
Karolina Horáková, Weil, Gotschal & Manges s.r.o. Advokátní kancelář
Libor Morávek, Weil, Gotschal & Manges s.r.o. Advokátní kancelář
Pavel Kinnert, Weil, Gotschal & Manges s.r.o. Advokátní kancelář

  - Party representatives

Marie Talašová, Ministry of Finance of the Czech Republic
Anna Bilanová, Ministry of Finance of the Czech Republic

  - Experts

Wynne Jones, Frontier Economics Ltd.
Michael Peer, KPMG Česká republika, s.r.o.
Jiří Urban, KPMG Česká republika, s.r.o. (colleague of Mr. Peer)

  - Witness

[redacted]

109. Except for Messrs [redacted] and Urban, whose cross-examination was not requested, all the fact witnesses and experts listed above were heard.

110. On the penultimate day of the hearing, the Tribunal posed several questions to the Parties, which they answered in their closing oral statements on the last day of the hearing.

C. Post-Hearing Phase

111. On 17 May 2016, the Tribunal issued Procedural Order No. 6 (“PO 6”), reproducing the directions given by the Tribunal at the end of the hearing with regard to post-hearing matters. It noted the Parties’ agreement that there would be no post hearing briefs.

112. On 31 May 2016, the Parties submitted their joint revisions to the hearing transcripts.

113. On 15 June 2016, the Parties submitted their cost submissions.

114. On 20 June 2016, in response to an allegation made by the Claimants in their cost submission concerning double recovery, the Respondent confirmed that "the costs for which the Czech Republic seeks recovery in this case are ones that are solely allocated to this proceeding, and shall not be included in cost submissions in any other matter. In consequence, there is no risk of "double recovery".

115. On 21 October 2016, the Tribunal advised the Parties and the Commission that it had deliberated and determined that it had all necessary information to proceed to draft its award. Subject to any comments to be made by 4 November 2016, the Tribunal would thus close the proceedings.

116. On 29 October 2016, the Commission advised the Tribunal that the German *Bundesgerichtshof* had requested the European Court of Justice ("ECJ") to issue a preliminary ruling on whether a provision similar to Article 10 of the Treaty appearing in an intra-EU BIT was compatible with EU law. It suggested that the Tribunal stay the arbitration pending a decision by the ECJ. It also advised the Tribunal that the Commission had adopted the second step of the infringement procedure against five EU Member States for not having formally terminated their intra-EU BITs.

117. On 4 November 2016, the Claimants and the Respondent confirmed that they did not have any comments to make before the Tribunal closed the proceedings.

118. On 7 November 2016, the Tribunal conveyed the Commission's submission of 29 October 2016 to the Parties, giving them the opportunity to comment on the submission by 14 November 2016.

119. On 7 November 2016, the Claimants requested the Tribunal to instruct the Commission to submit an English language translation of Annex 1 of the Commission's submission.

120. On 11 November 2016, the Tribunal advised the Parties that they could submit their comments referring to their own translation of Annex 1 if at all necessary.

121. On 14 November 2016, the Claimants responded to the Commission's submission, opposing the Commission's suggestion of staying the proceeding. They pointed out that the *Bundesgerichtshof* had approached the ECJ on 3 March 2016, two months before the oral hearing in the present arbitration. The Commission had thus approached the Tribunal belatedly, in an attempt to delay the award. Further, they submitted that the Commission's submission should be rejected as it was inadmissible and had no legal basis.

122. In its response of the same day, the Respondent too opposed the Commission's suggestion of staying the proceeding. It submitted that, while the Czech Republic shared many of the Commission's concerns about the possible incompatibility of intra-EU investor-state dispute settlement with EU law, the pendency of the preliminary ruling proceeding did not justify staying the present arbitration as neither disputing Party had asked the Tribunal to declare that the Treaty was incompatible with EU law. It also pointed out that a decision by the ECJ would take a long time, and that the court could limit the effect of the ruling to the period after the ruling, in which case it would not affect the present dispute.

123. On 2 December 2016, the Claimants requested the Tribunal to reopen the proceedings. They noted that on 28 November 2016, the Commission had decided that the Support Scheme did not constitute unlawful State aid (the "Commission Decision"). The Claimants also requested leave to introduce into the record the press release of the Commission and, once available, the Commission Decision.

124. On 6 December 2016, the Tribunal invited the Respondent to comment on the Claimants' request by 13 December 2016.

125. In its response of 13 December 2016, the Respondent did not object to the Claimants' request to reopen the proceedings, or their request to file the Commission Decision and accompanying press release into the record. Instead, it offered to submit an un-redacted version of the Commission Decision into the record, on the condition that it be treated as confidential. It also submitted that the Parties should only be given a limited opportunity to comment on the Commission Decision.

126. On 15 December 2016, the Tribunal advised the Parties that it would accept submissions on the Commission Decision and that, subject to these submissions, the proceedings were closed. The Respondent was invited to introduce the un-redacted

version of the Commission Decision and accompanying press release into the record on the understanding that the un-redacted version of the Commission Decision would be treated as confidential. Moreover, the Parties were invited to make simultaneous submissions on the Commission Decision by 6 January 2017. There would be a second round of simultaneous submissions if a Party so requested or if the Tribunal so directed.

127. The next day, the Claimants agreed to the procedure proposed by the Tribunal and requested that the Respondent produce the Commission Decision by 19 December 2016, or else they would need more time to prepare their submission.

128. On 19 December 2016, the Respondent confirmed that it would submit the Commission Decision on 19th or 20th December 2016, and subsequently did so on 20 December.

129. On 21 December 2016, the Tribunal advised the Parties that as the Commission Decision was filed a day later than requested by the Claimants, and having due regard to the intervening holidays, the time limit for submission of the Parties' comments on the Commission Decision was extended to 10 January 2017 and the subsequent time limit for advising the Tribunal if either Party wished a second round was deferred to 17 January 2017.

130. On 10 January 2017, the Parties submitted their comments on the Commission Decision (the "Claimants'/Respondent's Comments on the Commission Decision").

131. On 17 January 2017, the Parties advised the Tribunal that they did not seek a second round of submissions. The next day, the Tribunal confirmed that it too did not require further submissions.

132. On 21 February 2017, the Commission wrote to the Tribunal attaching its submission on its Decision (the "Commission's Submission").

133. On 1 March 2017, the Tribunal conveyed the Commission's Submission to the Parties. It advised them that while the Tribunal did not expect any further submissions from the Parties, if either Party considered that the Commission's Submission called for further comments, it could file such comments by 10 March 2017.

134. On 10 March 2017, the Claimants commented on the Commission's Submission, stating that it did not agree with the Commission's views. On its part, the Respondent advised the Tribunal that it did not intend to provide comments.

135. On 23 March 2017, the Claimants asked the Secretary for a status update on the issuance of the award. The Secretary replied on 27 March 2017 stating that the Tribunal would advise the Parties of the status of the award shortly.

136. On 27 March 2017, the Tribunal advised the Parties that it anticipated being in a position to issue its decision in principle in late June or early July.

137. On 7 July 2017, the Tribunal advised the Parties that it was well advanced in its deliberations and that it anticipated issuing its award no later than September. It stated that the Parties would be given three days advance notice before sending out the award.

138. On 25 August 2017, the Tribunal advised the Parties that the award was ready to be issued. However, one member of the Tribunal was preparing an opinion that would not be ready before late September. The Parties could therefore choose to jointly receive the award first and the opinion later, or to receive the award and the opinion together at a later time.

139. On 28 August 2017, the Claimants advised the Tribunal that they would prefer receiving the award and opinion together. The Respondent wrote on 1 September 2017 that "the Czech Republic would prefer that the Award be issued as soon as possible, and […] any separate opinion be distributed at a later time."

140. On 11 September 2017,the Tribunal advised the Parties that it would follow the usual practice in international arbitration and issue award and opinion together.

141. On 6 October 2017, the Parties were notified that the award would be issued on 11 October 2017.

IV. POSITIONS OF THE PARTIES AND RELIEF REQUESTED

A. SUMMARY OF THE CLAIMANTS' POSITION

142. The Claimants have summarized their case as follows:

> "Claimants invested in 2009 and 2010 in three PV-plants in the Czech Republic. Their investment decision was based on explicit guarantees contained in the Support Scheme, among others, that the feed-in tariff given at the time of commissioning the plants would be guaranteed for twenty years. The Support Scheme also preserved long-term income tax exemptions and shortened depreciation periods. The Czech Republic endorsed these benefits at home and abroad in order to attract foreign investors.
>
> Based on these guarantees, Claimants, having procured due diligence reports to assess the factual and legal risks involved, proceeded with their investment. At the time of their investments, the introduction of the solar levy was in no way foreseeable. Claimants relied on the explicit guarantees that the Czech Republic itself deemed to be in full compliance with EU law.
>
> Respondent has tried to argue that the guarantee for a return on investment within fifteen years [was the] "operative basis" of the Support Scheme. Claimants have shown that this term coined by Respondent for the purpose of these proceedings finds no basis whatsoever in the wording of the Support Scheme, the legislative history, the representations of the Czech Republic or the decisions of domestic courts. Respondent also failed to show that Claimants or any other investors received "windfall profits" as a result of an alleged drop in prices for solar panels between 2009 and 2010. Furthermore, Respondent has not submitted any evidence suggesting that the solar levy was introduced to curb "windfall profits". Instead, the legislative documents show that the solar levy was simply introduced to reduce the effect of the solar subsidies on the national budget and on the consumer prices.
>
> Finally, Respondent has failed to explain what any other due diligence, besides the extensive due diligence reports obtained from three law firms by Claimants, should have brought to light and why this should have discouraged Claimants to invest in the Czech Republic. All of Claimants three PV-plants are currently operating and there are no pending disputes with Czech authorities regarding the permits or licenses of those plants.
>
> This is not a dispute about naive or negligent investors rushing-in to benefit from "windfall profits". It is a dispute about experienced businessmen investing in the Czech Republic on the basis of highly specific legislative guarantees which they were invited to rely on by the Czech Republic. In essence, the question that has to be decided is whether states should be allowed to open the honeypot to attract foreign investors and then, once those investors commit serious capital to the host country, to retract and

> circumvent long-term guarantees and simply fail to hold-up their end of the bargain".[47]

143. In so far as they are relevant to resolve the issues in dispute, the Claimants' detailed arguments will be summarized in the introduction to the Tribunal's analysis of each disputed issue. For the avoidance of doubt, the Tribunal emphasizes that, while it has only referred to the aspects of the Claimants' case which are most pertinent to its decision, it has considered all of the Claimants' submissions and evidence.

B. THE CLAIMANTS' REQUEST FOR RELIEF

144. In their SoC, the Claimants sought the following relief:

> "I. DECLARE that the Czech Republic has breached its obligations towards Claimants under the BIT;
>
> II. ORDER the Czech Republic to pay damages to the Claimants, currently calculated to [EUR 19,012,000][48] and pre- and post award interest on the damages in an amount of 2,23 % from 01.01.2014 until date of payment, compounded annually;
>
> III. ORDER the Czech Republic to compensate Claimants for their costs of arbitration in an amount to be specified later together with interest thereon and, as between the parties, alone to bear all costs for the arbitration including compensation and fees to the Arbitral Tribunal and the administrative costs of the PCA".[49]

145. This request for relief was substantially similar to the one contained in the RfA.[50]

146. At the end of the hearing, however, the Claimants revised their request for relief as follows:

> "Claimants therefore ask the Tribunal to
>
> I. Declare that the Czech Republic has breached its obligations towards Claimants under the BIT;
>
> II. Order the Czech Republic to pay, together with an appropriate pre-and post award interest rate since 1.1.2015,

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[47] Reply, §§125-129.
[48] Reply, §21.
[49] SoC, §18. See also Reply, §21 and RfA, §64.
[50] RfA, §64.

1. For damages [sic] relating to the plant Struhařov to claimants Jürgen Wirtgen and Stefan Wirtgen each TEUR 1,105.3 including tax consequences,

2. For damages to the plant Světlá

a. to Claimant JSW Solar (zwei) GmbH & Co. KG TEUR 7,171.50 including tax consequences; (OR)

b. if the Tribunal finds it has no jurisdiction over Claimant JSW Solar (zwei) GmbH & Co. KG, to Claimants Jürgen Wirtgen, Stefan Wirtgen and Gisela Wirtgen TEUR 2,390.50 each including tax consequences,

3. For damages to the plant Vernéřov

a. to Claimant JSW Solar (zwei) GmbH & Co. KG TEUR 9,629.50 including tax consequences, (OR)

b. if the Tribunal finds it has no jurisdiction over Claimant JSW Solar (zwei) GmbH & Co. KG, to claimants Jürgen Wirtgen, Stefan Wirtgen and Gisela Wirtgen TEUR 3,209.80 each including tax consequences

III. In the alternative,

1. order the Czech Republic to pay, together with an appropriate pre-and post award interest rate since 1.1.2015,

a) For damages [sic] relating to the plant Struhařov to claimants Jürgen Wirtgen and Stefan Wirtgen each TEUR 580.50,

b) For damages to the plant Světlá

(1) to Claimant JSW Solar (zwei) GmbH & Co. KG TEUR 3,766.90; (OR)

(2) if the Tribunal finds it has no jurisdiction over Claimant JSW Solar (zwei) GmbH & Co. KG, to claimants Jürgen Wirtgen, Stefan Wirtgen and Gisela Wirtgen TEUR 1,255.60 each,

c) For damages to the plant Vernéřov

(1) to Claimant JSW Solar (zwei) GmbH & Co. KG TEUR 5,057.90, (OR)

(2) if the Tribunal finds it has no jurisdiction over Claimant JSW Solar (zwei) GmbH & Co. KG, to claimants Jürgen Wirtgen, Stefan Wirtgen and Gisela Wirtgen TEUR 1,686 each.

d) Declare that the Czech Republic shall compensate the Claimants for any and all tax that may be levied by the tax authorities on them as a consequence of any damages being awarded to them in accordance with III 1. (a) - (c) above,

and

IV. Order the Czech Republic to compensate Claimants as joint creditors for their costs of arbitration in amount to be specified later together with interest thereon and, as between the parties, alone to bear all costs for the arbitration including compensation and fees to the Arbitral Tribunal and the administrative costs of the PCA".[51]

147. The Respondent opposed the revision of the Claimants' requests for relief as untimely.

C. SUMMARY OF THE RESPONDENT'S POSITION

148. The Respondent has summarized its case as follows:

"Like thousands of other investors, Claimants raced to take advantage of the massive decline in solar panel costs […], before the price drop could be reflected in the regulated subsidy price. In doing so, Claimants hoped to earn substantially more than the rate of return targeted by the regulation. However […] Claimants never received any assurances of stabilization of the regime, or assurances that the State would refrain from measures that could reduce their excess profits. Unlike a traditional business, Claimants' investments were (and remain) almost wholly shielded from market risk for a period of 20 years. This does not mean, however, that they were also shielded from the risk of legislative change. To the contrary, in a subsidy-based regulated environment and in the absence of market forces, it is the State and its energy regulator that must protect the public interest by ensuring that industry subsidies do not result in windfall profits at the expense of electricity consumers and taxpayers.

[…]

Claimants' [arguments] are largely divorced from reality. Some of these arguments rely on the denial of basic facts, including the dramatic decline in solar panel prices by mid-2009 and the resulting imbalance between the fixed subsidies and the profit levels targeted by the regulation. Other arguments attempt to shift focus away from the key benchmarks of investment return (within 15 years) and reasonable profit (over the 20-year lifetime of the solar plants), by emphasizing other provisions, such as those providing for fixed tariff rates, which in fact were not modified at all by the Tax Measures. By the same token, Claimants' repeated references to "contracts and licenses" embodying their supposed guarantees lose sight of the fact that none of these documents contained any guarantees

[51] Exh. C-115, Claimants' Closing Presentation, 12 May 2016.

whatsoever with respect to taxation, profitability, or even the RES Scheme more broadly.

> Claimants' Reply also fails to acknowledge the clear relevance of EU law to the core issues in this case. [T]he EU Treaties remain part of the applicable law in this arbitration, regardless of the fact that the seat of this arbitration is outside the EU […] EU law is important both to the merits of the dispute and to the issue of enforceability of the award
>
> […]
>
> Claimants fail to establish that the Tribunal has jurisdiction to entertain claims for alleged injury to Claimant JSW Solar KG, because that entity does not qualify as an "investor" within the meaning of the BIT. The fact that JSW Solar KG does not qualify as an investor under the BIT means that all claims for alleged injury to that entity must be excluded from this arbitration.
>
> In any event, all of the Claimants have utterly failed to substantiate their merits claims. As discussed below, Claimants assert claims under three different provisions of the BIT — the umbrella clause, the fair and equitable treatment clause, and the full protection and security clause — which ultimately boil down to two unfounded theories of liability: first, that the Government supposedly altered domestic law in circumstances when it was internationally-bound not to do so; and, second, that the measures are flawed because they allegedly were intended to deliberately harm Claimants. Each of these theories founders on both law and fact".[52]

149. In so far as they are relevant to resolve the issues in dispute, the Czech Republic's detailed arguments will be summarized below just before the Tribunal's analysis of each disputed issue. For the sake of clarity, the Tribunal emphasizes that, while it has only referred to the elements of the Respondent's case which are most important for its decision, it has considered all of the Respondent's submissions and evidence.

D. THE RESPONDENT'S REQUEST FOR RELIEF

150. In the SoD, the Respondent sought the following relief:

> "For the foregoing reasons, and reserving the right to further develop and expand its submission and request for relief, the Czech Republic respectfully requests the Tribunal to:
>
> a) order a stay of the present proceedings until the European Commission issues a decision in the proceedings regarding state aid represented by the RES Scheme as applicable to installations commissioned before 1 January 2013 (the other requested relief thus being in the alternative);

[52] Rej., §§5 et. seq.

> b) declare that the Tribunal does not have jurisdiction *ratione personae* over Claimant JSW Solar (zwei) GmbH & Co. KG;
>
> c) declare that the Czech Republic has not breached the Treaty;
>
> d) dismiss all of the Claimants' claims in their entirety;
>
> e) order the Claimants to pay the costs of these arbitral proceedings, including the cost of the Tribunal and the legal and other costs incurred by the Czech Republic, on a full indemnity basis; and
>
> f) order the Claimants to pay interest on any costs awarded to the Czech Republic, in an amount to be determined by the Tribunal".[53]

151. In its Rejoinder, the Respondent sought the following relief:

> "For the reasons set forth above, the Czech Republic respectfully reiterates its request that the Tribunal (a) reject Claimants' claims in their entirety because (with regard to JSW Solar KG) they are outside the Tribunal's jurisdiction and, in any case, are entirely lacking in merit; and (b) issue an award of costs and fees (including all legal fees and expenses), and interest thereon, in favor of the Czech Republic".[54]

152. These requests were not changed at the hearing.

V. ANALYSIS

A. PRELIMINARY MATTERS

153. Prior to entering the merits of the dispute, the Tribunal will address the applicable procedural law (1), the law governing jurisdiction (2) and the merits of the dispute (3) as well the maxim *jura novit curia* (4) and the relevance of previous decisions or awards (5).

1. Applicable Procedural Law

154. This *ad hoc* investment arbitration is governed by (i) the procedural rules contained in the BIT and, as it is seated in Geneva and involves non-Swiss parties, by (ii) Chapter 12 of the Swiss Federal Act on Private International Law Act (PILA).[55] As for the Treaty, Article 10(2) contains some basic provisions on the constitution of an arbitral

[53] SoD, §317.
[54] Rej., §487.
[55] Art. 176(1) PILA.

tribunal for settlement of an investment dispute. It further provides that "[i]nsofar as the parties do not agree otherwise, the provisions of Article 9, paragraphs 3 to 5[56] shall be appropriately applied" in an investment arbitral proceeding. In accordance with Article 9(5), the arbitral tribunal shall reach its decisions by a majority of votes and the decisions of the Tribunal shall be binding. This Article also gives some guidance on costs and provides that the arbitral tribunal shall determine its own procedure in respect of other matters.[57]

155. In implementation of Article 9(5) of the Treaty and taking account of the seat of the arbitration, Section 8 of the Terms of Appointment provides as follows:

> "APPLICABLE PROCEDURAL RULES
>
> This arbitration shall be governed by (in the following order of precedence):
>
> a) The mandatory rules of the law on international arbitration applicable at the seat of the arbitration;
>
> b) These Terms of Appointment and the procedural rules issued by the Arbitral Tribunal, as will be reflected in Procedural Order No. 1 and any amendments thereof.
>
> 44. If the provisions therein do not address a specific procedural issue, the applicable procedural issue shall be determined by agreement between the Parties or, in the absence of such agreement, by the Arbitral Tribunal".

2. Law Governing Jurisdiction

156. It is generally accepted that an investment tribunal's jurisdiction is governed by international law, first and foremost by the BIT. In addition, the Tribunal may look to other rules of international law which may apply as between the Contracting Parties. National law may be relevant to jurisdictional requirements depending on the issue in

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[56] Article 9 applies to the settlement of disputes between the Contracting States of the Treaty.

[57] Article 9(5) of the Treaty: "Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in arbitration proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitral tribunal may decide on a different allocation of costs. The arbitral tribunal shall determine its own procedure as regards other matters."

question, particularly if the Treaty contains a reference to national law[58] or uses a term that can only be understood by reference to national law.[59]

3. Law Governing the Merits

157. While they agree on the application of the BIT to the merits of the dispute, the Parties and the EC diverge on the applicability of EU law. In light of this divergence, it falls on the Tribunal to determine whether EU law may find application. It will do so (d) after having summarized the Parties' ((a) and (b)) and the Commission's positions (c).[60]

a. The Claimants' position

158. The Claimants assert that the Parties agreed that the law relevant to the present dispute is the Treaty and public international law. Had the Parties intended for any law to apply additionally, they would have said so. The Claimants further submit that although the Treaty does not define the applicable law, its existence is governed by public international law. Thus, where the Treaty provides no guidance, deficiencies in the Treaty can be remedied by turning to principles of public international law.

159. As to the application of EU law, it is the Claimants' position that EU law is irrelevant to the resolution of the dispute. The application of EU law would "exceeds the commitments as agreed by the parties to the BIT, as well as the parties to this dispute",[61] which is underscored by the agreement of the Parties to arbitrate outside of the EU.

160. The Claimants are further of the view that, while EU law may be applied as international or supranational law within the EU, this does not mean that EU law is international law within the international legal order. The Tribunal cannot place EU law at the same level as the rules set in the Treaty. In the event that the Tribunal considers

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[58] See for e.g. *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ("*Quiborax*"), §47.

[59] This determination is in line with Article 178 PILA. As to its form, there is no question that the arbitration agreement is in writing under Article 178(1). As to the law governing substantive validity, the determination accords with the first two options of Article 178(2) PILA, being specified that the Contracting States consent to jurisdiction and applicable law when concluding the treaty and the investor when starting an arbitration under it.

[60] The Commission's argument that the applicability of EU law deprives this Tribunal of jurisdiction is considered below.

[61] Claimants' Comments on the Amicus Curiae Submission, §12.

it necessary to take EU law into account, the Claimants argue that it should apply as national law. Other international tribunals have treated national law as fact and there is no reason to deviate from that approach here.

161. Moreover, the Claimants submit that the closest connection test provided in Article 187 of the PILA is irrelevant for present purposes. Domestic conflict law rules, they contend, play no role in an investor-State arbitration under a BIT. They further underline that the Treaty provides for both state-to-state arbitration in Article 9 and for investor-State arbitration in Article 10, and that the latter refers to the former in respect of procedural matters. They contend that "[i]t is evidently absurd to assume that proceedings under Article 9 should be subject to national law. It is equally absurd to assume that proceedings under Article 10, which refer to the same subject matter, should be subject to national law".[62]

162. In any event, they submit that the closest connection test is only relevant where the parties have not chosen the applicable law. Here, as the Parties have chosen the Treaty and public international law, the closest connection test does not come into play.

b. The Respondent's position

163. The Respondent submits that for issues that are not expressly regulated in the Treaty, the Tribunal must look to the Treaty's governing law. Since the Treaty offers no guidance, the Tribunal must determine "the rules of law with which the case has the closest connection" in accordance with Article 187 of the PILA.

164. In the Respondent's submission, the "rules of law" with the closest connection in this case are the rules and principles of international law. This is because the Treaty is an international instrument and because the Claimants allege that the Czech Republic has breached international law. Further, as the Claimants invested in the Czech Republic and because they are German nationals, Czech law and, to some extent, German law are also relevant. Swiss law too is relevant as it provides the procedural rules that the Tribunal must follow in the absence of an agreement between the Parties. In sum, the

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[62] Claimants' Comments on the Amicus Curiae Submission, §24.

Tribunal must first have regard to the rules and principles of international law, supplemented if necessary by the rules of Czech and German law as applicable.

165. Furthermore, the Respondent argues that because of the Czech Republic's accession to the EU, "[t]he EU Treaties, and the general principles, rules and regulations comprised therein […] constitute applicable rules and principles of international law in force between the Contracting Parties to the BIT".[63] Consequently, EU law too forms part of the "rules of law" applicable in this dispute.

166. For the Respondent, EU law itself is highly relevant in multiple ways. First, EU law forms part of the international law applicable to this dispute and is a source of international obligations. Second, to the extent the Tribunal finds that the municipal law of the Czech Republic or Germany are applicable to any issue in dispute, EU law is relevant as it forms an integral part of these legal systems. Third, EU law must also be taken into account when interpreting the obligations contained in the Treaty pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"). Fourth, as part of the legal order binding on the Czech Republic, EU law is relevant as a fact when assessing the rationality of the Czech Republic's conduct, as well as the legitimacy of the Claimants' expectations. Fifth, EU law is relevant to the enforceability of the award.

167. Finally, the Respondent submits that, as a matter of international law, the Treaty must be interpreted harmoniously with EU law to the extent possible. If harmonious interpretation is not possible, the Treaty must be "disapplied". This is so because of the fundamental principle of "primacy" of the EU legal order over all conflicting norms including treaties concluded between EU Member States. If this were not so, EU Treaties would be unable to function as its Member States could enter into new international agreements amongst themselves that would derogate from EU law. The Treaty does not allow its Contracting Parties to escape obligations imposed by EU law.

c. The Commission's position

168. The Commission observes that, like other German BITs, the Treaty contains no choice of law. Thus, the governing law must be determined in conformity with the rules under

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[63] Rej., §306.

which the arbitration is conducted. Arbitral tribunals have generally considered that BITs are governed by international law. Further, EU law is also applied as part of international law binding on Germany and the Czech Republic. The outcome would be the same under the "closest connection" test: EU law would apply because the Czech Republic transposed EU directives into the Czech legal order as part of its obligations under EU law.

169. Finally, the Commission shares the view of the Respondent that Member States cannot invoke international agreements which they have concluded between themselves to justify a failure to comply with EU law.

d. Analysis

170. Section 7 of the Terms of Appointment records that the Parties consent to the application of the BIT.[64] Indeed, this arbitration has been initiated under Article 10 of the Treaty. The Claimants' seek damages for the Czech Republic's alleged breaches of the Treaty. In the circumstances, the Treaty is the primary source of applicable law.

171. Beyond the application of the BIT, Section 7 of the Terms of Appointment notes that the Tribunal will determine the governing law:

> "APPLICABLE SUBSTANTIVE LAW
>
> The applicable law, in addition to the application of the BIT which is uncontroversial, will be subject to briefing by the Parties and determined by the Tribunal".

172. From the Parties' submissions, the Tribunal understands that there is no dispute – and rightly so – on the applicability of international law in addition to the Treaty.[65]

173. By contrast, there is no common ground on the status and applicability of EU law. The Claimants argue that EU law cannot be categorized as international law. Only if relevant or necessary, may EU law be applied as domestic law. The Respondent takes a contrary position, arguing that EU law forms part of the applicable international law.

[64] See also Claimants' Reply to Commission's Amicus Curiae Submission, §10 ("[T]he dispute should be governed by the provisions of the BIT.") and Rej., §299 ("[I]n resolving this dispute, the Tribunal must, first and foremost look to the provisions of the BIT itself.").

[65] See Claimants' Comments on the Amicus Curiae Submission, §11; SoC §168; Rej. §§299 et. seq.

174. The Tribunal will thus focus its choice of law analysis on determining the role of EU law if any. Doing so, it bears in mind Article 187 of the PILA, which provides that, failing a choice of law, the tribunal must apply the rules of law with the closest connection with the dispute in accordance with the so-called principle of proximity. Here, the BIT contains no choice of law and the disputing Parties have not agreed on the application of EU law. Hence, the Tribunal will assess the applicable law under the principle of proximity, being specified that it enjoys substantial discretion in doing so.[66]

175. The status and applicability of EU law in investment treaty arbitration were exhaustively discussed in *Electrabel v. Hungary.*[67] Essentially, *Electrabel* considered that EU law was "a *sui generis* legal order, presenting different facets depending on the perspective from where it is analysed". Accordingly, it found that EU law was on the one hand an "international legal regime" and, on the other, "once introduced in the national legal orders of EU Member States",[68] it became "part of these national legal orders".[69] This being so, EU law should not be confined to the national legal order: "[i]n the international setting in which this Tribunal is situated and from which it necessarily derives its perspective",[70] so continued the ICSID tribunal, "EU law has to be classified first as international law",[71] "because it is rooted in international treaties".[72] It added that "EU law as a whole is part of the international legal order"[73] and that "EU legal rules are part of a regional system of international law and therefore have an international legal character".[74] In other words, the fact that EU law is also applied within the national legal order of an EU Member State does not deprive it of its international legal nature, whereby it is irrelevant from the perspective of international law "whether such application within a national legal order take effect directly or indirectly".[75] As a result, the *Electrabel* tribunal concluded that there was no "fundamental difference in nature between international law and EU law that could

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[66] Gabrielle Kaufmann-Kohler/Antonio Rigozzi, International Arbitration – Law and Practice in Switzerland, OUP 2015, §7.47.

[67] *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ("*Electrabel*"), §§4.117ff.

[68] *Id.,* §4.118.

[69] *Id.*

[70] *Id.,* §4.119.

[71] *Id.*

[72] *Id.,* §4.120.

[73] *Id.,* §4.122.

[74] *Id.*

[75] *Id.,* §4.125.

justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law".[76] Finally, *Electrabel* noted that, "when it is not applied as international rules […], EU law must in any event be considered as part of the Respondent's national legal order, i.e. to be treated as a "fact" before this international tribunal".[77]

176. Tribunals in *Achmea v. Slovak Republic*[78] and *Euram v. Slovak Republic*[79] have reached similar conclusions.

177. The Tribunal finds the reasoning and conclusions of the *Electrabel* tribunal persuasive, and sees no reason to depart from them in the present proceedings. It concludes that international law, which applies in addition to the Treaty, encompasses EU law. Further, on some occasions, the Tribunal may take EU law – which otherwise forms part of a national legal system of an EU Member State – into account as a relevant fact.[80]

178. The Tribunal considers that these conclusions are sufficient for the present purposes and that it can dispense with addressing the arguments concerning the so-called "primacy" of EU law over the Treaty. Indeed, for the reasons mentioned below [§§250 et. seq.], the Tribunal has found no relevant conflict between EU law and the Treaty. Therefore, the question of primacy, if any, simply does not arise.

4. Jura Novit Curia

179. When applying the governing law as it was just identified, the Tribunal is not bound by the arguments or sources invoked by the Parties. Under the maxim *jura novit curia* – or, better, *jura novit arbiter* – the Tribunal is required to apply the law of its own motion, provided always that it seeks the Parties' views if it intends to base its decision on a

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[76] *Id.,* §4.126.

[77] *Id.,* §4.127.

[78] *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 ("*Achmea*").

[79] *European American Investment Bank v. Slovakia*, UNCITRAL, Award on Jurisdiction, 22 October 2012 ("*Euram*").

[80] The Parties' agree. See Respondent's Comments on the Amicus Curiae submission, §4 ("this Tribunal [should] take account of EU law as both a relevant fact and applicable law to the merits of the dispute."); Claimants' Comments on the Commission Decision, §1 ("Claimants maintain their position that EU law, including EU state aid law, must be treated as domestic law and thus as part of the factual matrix.").

legal theory that was not addressed and that the Parties could not reasonably anticipate. This is a principle followed by international courts and tribunals[81] and is also the rule under Swiss international arbitration law.[82]

5. Relevance of Previous Decisions

180. In support of their positions, both sides have relied on previous decisions or awards, either to conclude that the same solutions should be adopted in the present case or in an effort to explain why this Tribunal should depart from a solution reached by another tribunal.

181. The Tribunal is not bound by the decisions of other arbitral tribunals. At the same time, however, the Tribunal considers that it should pay due respect to such decisions. Unless there are reasons to the contrary, the Tribunal will adopt the approach established in a series of consistent cases, subject, of course, to the specifics of the Treaty and to the circumstances of the actual case. By doing so, the Tribunal is of the view that it will act in conformity with its duty to contribute to the harmonious development of investment law and meet the legitimate expectations of the community of States and investors towards legal certainty and the rule of law.

B. JURISDICTION

182. It is not disputed that the Treaty is in force. Through the Exchange of Notes on 18 December 1992 and 1 January 1993, the Governments of the Czech Republic and of the Federal Republic of Germany have agreed that the treaties concluded between the latter and the Czech and Slovak Federal Republic would remain in force with

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[81] E.g. among others *Quiborax*, §47.

[82] *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, §295 ("[…] an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, sua sponte, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it"). See also *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Merits, Judgment, 25 July 1974, §18 ("[i]t being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court."); *Albert Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Case ("*Oostergetel*"), Award, 23 April 2012, §141; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 ("*Metal-Tech*"), §287.

respect to the Czech Republic as long as both parties would not agree otherwise. No such contrary agreement has been concluded.

183. The Claimants initiated the present arbitration under Article 10 of the Treaty which provides in relevant part as follows:

> "(1) Disputes concerning investments between a Contracting State and an investor from the respective other Contracting State should as far as possible be settled amicably between the parties to the dispute.
>
> (2) If the dispute cannot be settled within six months of the date on which it was raised by one of the parties to the dispute, it shall, at the request of the investor from the other Contracting State, be submitted to arbitration.
>
> […]"

184. It is undisputed[83] that the following requirements set in Article 10 have been complied with:

- The Parties "numerous" attempts to settle the dispute amicably have failed.[84] Hence, the requirement of Article 10(1) of the Treaty is met.

- Each of the Claimants has accepted the Respondent's offer to arbitrate contained in Article 10(2) of the Treaty:

    - Claimants 1, 2 and 4, i.e. Jürgen Wirtgen, Stefan Wirtgen and JSW Solar (zwei) GmbH & Co. KG, have accepted the offer by filing the Request for Arbitration on 24 June 2013;

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[83] In its initial submissions, the Respondent mentioned that it would challenge the jurisdiction of the Tribunal on three separate grounds: (i) that the Claimants had violated the six-month waiting period under Article 10(2) of the Treaty with respect to the application of the 10% Solar Levy to the Claimants' solar plants commissioned in 2010 through Act 310/2013; (ii) that the Claimants had violated the six-month waiting period also with respect to the claims of Ms. Gisela Wirtgen, Claimant 3, and (iii) that JSW lacked standing in this arbitration. However, it later explained that the first two objections relating to the Claimants' violation of the six month waiting period had become moot through the passage of time (see, for instance, Respondent's letter of 25 August 2014). Hence, the Respondent decided to proceed only with the third jurisdictional objection concerning Claimant 4, which is considered below. Further, in its Objections to Jurisdiction, the Respondent noted that the "little information" provided by the Claimants in respect of their investments led the Respondent to believe that there may be "licensing irregularities". Accordingly, the Respondent reserved the right to raise a jurisdictional objection on the grounds of illegality of the Claimants' investment. However, no such objection was made.

[84] SoC, §§160-164.

- o Claimant 3, i.e. Ms. Gisela Wirtgen, has accepted the offer to arbitrate by her letter of 6 January 2014.

- The present dispute concerns “investments”. Article 1(1) of the Treaty contains a broad definition of “investment”, which includes “ownership of movable and immovable property” and “shares of companies and other kinds of interest in companies”. Moreover, there is common ground that the Claimants made an allocation of resources for a long duration at their risk when they invested through JSW Solar v.o.s., JSW Solar (zwei) k.s. and FVE Verne s.r.o. in the construction and operation of three PV plants in the Czech Republic.

- The Respondent does not dispute that Claimants 1, 2 and 3 qualify as “investors” as defined in Article 1(3) of the BIT.

185. By contrast, the Respondent contends that Claimant 4, i.e. JSW, is not an investor within the meaning of Article 1(3) of the BIT (1). Further, in its Amicus Curiae Submission, the Commission argues that EU law deprives this Tribunal of jurisdiction (2). Both these arguments are considered below.

1. Is Claimant 4 an Investor?

a. The Respondent’s position

186. The Respondent submits that the Claimants bear the burden of establishing the Tribunal’s jurisdiction under the Treaty and that they have failed to meet this burden with respect to JSW.

187. According to the Respondent, the wording of Article 1(3) of the Treaty is clear. The Claimants must meet three cumulative requirements for JSW to be considered as an “investor” within the meaning of Article 1(3): (i) JSW is a “juridical person”, (ii) JSW has its seat in “the territory covered by” the Treaty, and (iii) JSW is “authorized to act as an investor”. For the Czech Republic, JSW fails to meet the first requirement. It is not a “juridical person”, because it is a “limited partnership” (Kommanditgesellschaft or “KG”), which lacks legal personality under German law.[85]

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[85] Objections to Jurisdiction, §42.

188. The Respondent objects to the Claimants' translation of Article 1(3) of the Treaty and submits that the term "juristische person" in the German version and "právnická osoba" in the Czech version "unequivocally translate as juridical person",[86] and not as "legal entity". Thus, despite the Claimants' submissions to the contrary, the Treaty only covers investors who are "juridical persons", a requirement that JSW does not satisfy.

189. The Respondent denies the Claimants' submissions that the term "juridical person" must be interpreted autonomously. For the Respondent, the Claimants have advanced no "principled reason" why the Tribunal should ignore German law for purposes of determining whether JSW can be deemed a German "investor" under the Treaty. Indeed, a treaty is not a self-contained legal system and reference may be made to a "wider juridical context".[87] The absence of express *renvoi* to domestic law is not determinative, as tribunals have frequently relied on definitions of domestic law to give content to treaty terms, even absent an express reference.

190. The Respondent also refutes the Claimants' submission that an entity only needs legal capacity, but not legal personality to fall within the ambit of Article 1(3) of the Treaty. This view is not in line with the text of the Treaty. Neither is it supported by German treaty practice or international law. It is irrelevant in the Respondent's submission that resort to domestic law may yield different results for Czech and German entities. Indeed, a BIT is not meant to standardize nationality requirements or corporate formalities of the two Contracting Parties.

191. The Respondent opposes the Claimants' argument that this approach would not respect the object and purpose of the Treaty. According to it, "if a person or entity does not qualify as an "investor of the other Contracting Party", by definition the exclusion of that person or entity from the BIT's protection cannot contradict the object and purpose of the BIT. In fact, the precise opposite is true: it would contradict such object and purpose to include such a person within the BIT's scope of coverage".[88]

192. The Respondent also refutes the Claimants' argument that the exclusion of KGs from treaty protection would entail that a majority of German entities would be deprived of investment protection. It submits that, when entering into the Treaty, Germany may

[86] Objections to Jurisdiction, §34.
[87] Rej., §380.
[88] Rej., §383.

precisely have had such intent. Germany may have wished to discourage foreign investments via KGs and to encourage outbound investment through other types of legal entities which could be taxed both at the company and at the shareholder levels.

193. Moreover, the Respondent observes that other German BITs contain broader notions of the term "investor", expressly including entities other than juridical persons. Therefore, if the Tribunal were to accept the Claimants' arguments, "the express extension to German law partnerships in other investment treaties concluded by Germany would be rendered meaningless".[89]

194. Should the Tribunal deny jurisdiction over Claimant 4, the Respondent argues that all claims for alleged injury suffered by that entity must be discarded from the scope of this arbitration. Claimants 1-3 cannot be substituted for Claimant 4 as the Claimants suggest. According to the Respondent, this is so for several reasons, including "(1) JSW Solar KG cannot assert such claims itself, (2) the remaining Claimants have not asserted claims for injury to JSW Solar KG, and (3) the remaining Claimants could not assert claims for injury to JSW Solar KG without effectively undoing any decision to decline jurisdiction over JSW Solar KG".[90] Further, the Claimants have not asserted or established any damages for their indirectly held investments.

b. The Claimants' position

195. The Claimants challenge the Respondent's position. According to them, Article 1(3) of the Treaty "leads to the conclusion that an '[i]nvestor' only needs legal capacity, but not legal personality: it needs to be able to invest, i.e. to buy and sell, conclude contracts, sue and be sued".[91] As it is undisputed that a KG has these attributes, JSW is an "investor" within the scope of Article 1(3).

196. More specifically, the Claimants submit that the term "juridical person" has to be interpreted autonomously; a position which they say is supported by decisions of other investment tribunals. They also note that KGs acted as claimants in three ICSID proceedings in the past without their standing being questioned. In addition, two proceedings brought by KGs are currently pending. According to the Claimants, "if KGs

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[89] Objections to Jurisdiction, §53.

[90] Rej., §8.

[91] Reply, §139.

can pass the hurdle under ICSID, then […] they should also be considered juridical persons under the BIT".[92]

197. For the Claimants, the very premise of the Respondent's argument is incorrect. The Respondent assumes that the Contracting Parties intended to refer to different definitions of "juridical person" under their national laws. That is not the case. First, a review of German BITs shows that, when Germany wished to refer to national law, it did so explicitly. Second, the Respondent's interpretation would lead to "nonsensical" results. A KG would be an investor in Germany, but not in the Czech Republic, which would be contrary to the reciprocal protection expressly stated in the preamble of the BIT. Finally, the Claimants stress that "it […] is possible that a company from another EU member state which transferred its seat to Germany is an investor within the terms of the Treaty. Applying German law standards to these companies clearly is impossible".[93]

198. The Claimants insist that about one third of all German companies are KGs; they are the "heart" of the German economy. The Respondent "[hasn't] put forward a single quotation, a single document from the [Treaty] negotiations which could explain why Germany suddenly should have wanted to waive protection for one third of its companies".[94]

199. The Claimants also dispute that German treaty practice supports the Respondent's case. While some German BITs explicitly refer to "companies or associations with or without legal personality", these treaties define the term "investor" differently for each contracting state. This is not true of the German-Czech BIT, which contains one definition for both Contracting Parties. Of the seven German BITs (including the Treaty) that contain a single definition, in four treaties the definition explicitly includes legal entities without legal personality. However, all four were concluded after the German-Czech BIT. The two other BITs, concluded in 1989, do not address the question of legal personality.[95] Thus, in all but three BITs, Germany protects companies with or without legal personality. For the Claimants, there is no reason why

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[92] Tr. (Day 4) 602:12-15.
[93] Reply, §136.
[94] Tr. 45:24-46:1.
[95] Reply, §146 relying on Exh. C-094 (Definition of "investor" under German BITs).

Germany should have excluded companies without legal personality from the scope of investor protections in the German-Czech BIT.

200. Finally, the Claimants submit that, the exclusion of Claimant 4 would in any event have no “major relevance” for the resolution of their dispute. Claimants 1-3, all of whom are natural persons, invested their own money into the solar plants through Claimant 4. In the circumstances, as the Treaty does not exclude investments held indirectly, the claims of Claimant 4 could be brought by Claimants 1-3.[96]

c. Analysis

201. Article 10 of the BIT refers to disputes between a Contracting State and an “investor”. The term “investor” is defined in Article 1(3), being specified that the German and Czech texts are equally authentic.[97] In the German text, Article 1(3) of the Treaty reads as follows:

> “[Für die Zwecke dieses Vertrag] bezeichnet der Begriff “Investor” eine natürliche Person mit ständigem Wohnsitz oder eine juristische Person mit Sitz im jeweiligen Geltungsbereich dieses Vertrags, die berechtigt ist, Kapitalanlagen zu tätigen”.[98]

202. In the Czech text, Article 1(3) of the Treaty reads as follows:

> “[Pro účely této Dohody] Pojem “investor” znamená fyzické osoby se stálým bydlištěm nebo právnické osoby se sídlem v okruhu působnosti této Dohody, jež jsou oprávněny jednat jako investoři”.[99]

203. Several English translations are in the record:

- In the Request for Arbitration, the Claimants translated Article 1(3) as:

  > “[For the purposes of this Agreement] an “Investor” is either a natural person who has its permanent residence in a contracting state *or a juridical person* with its seat in one of the Contracting States”.[100]

[96] Tr. (Day 4) 604-605.

[97] RLA-001 ("Done at Prague on 2 October 1990, in duplicate in the German and Czech languages, both texts being equally authentic.").

[98] Exh. RLA-002.

[99] *Id.*

[100] RfA, §15.

- In the SoC, the Claimant then translated Article 1(3) somewhat differently:

> "investor" means a "natural person with permanent residence *or a legal entity* with registered office in the respective area of jurisdiction of this Treaty who or which is entitled to make investments.[101]

- In the SoD, the Respondent provided its translation:

> ""investor" shall mean a natural person with permanent residence *or a juridical person* with its seat in the territory covered by the application of this Treaty and authorized to act as an investor".[102]

- In the Reply, the Claimant appeared to agree[103] with the Respondent's translation just quoted:

> "the term "investor" means a natural person with permanent residence or *a legal entity [read "juridical person"]* with registered office in the respective area of jurisdiction of this Treaty who or which is entitled to make investments (emphasis supplied)".[104]

204. As a consequence, the Tribunal understands that the Parties are in principle in agreement that the term "investor" in the Treaty is defined as:

> "a natural person with permanent residence or a *juridical person* with its seat in the territory covered by the application of this Treaty and authorized/entitled to act as an investor".

205. From its own reading of the original versions of the Treaty, the Tribunal considers this translation accurate being specified that the word "berechtigt" in German or "oprávněny" in Czech is more precisely reflected by "entitled" to invest or "act as investor" than by "authorized", which may convey the idea that a specific approval or permission is required, a requirement not implied in the original version. It follows that "investors" under the Treaty are (1) "natural persons" with permanent residence or (2) "juridical persons" that have a seat in the territory of one of the Contracting Parties and are entitled to act as an investor.

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[101] SoC, §152; Exh. C-078.

[102] Exh. RLA-001, Article 1(3).

[103] Reply, §140 and fn.75 ("Claimants reject the contention that they might have tampered with the wording of the translation. They did not do the translation themselves. […] Claimants will adopt — for the sake of argument — Respondent's terminology.").

[104] Reply, §140.

206. JSW is not a “natural person”. Thus, in order for it to fall within the scope of the Treaty, it must be (i) a “juridical person” (ii) that has its seat in “the territory covered by” the Treaty. Further, it must be entitled to act as an investor (iii). The latter two requirements – that JSW has its seat in Germany and that it be entitled to act as an investor – are not contested.[105]

207. By contrast, the Parties disagree whether JSW is a “juridical person”. The Respondent submits that the term “juridical person” must be understood by reference to German law. As German law does not confer legal personality to KGs such as JSW, JSW is not a “juridical person” for purposes of Article 1(3) of the Treaty. The Claimants object, stating that the term “juridical person” must be interpreted autonomously. As JSW can invest, conclude contracts, acquire property and sue and be sued in its own name, it must be deemed a “juridical person” within the meaning of the Treaty.

208. To resolve this dispute, the Tribunal must interpret Article 1(3) of the Treaty in which the term “juridical person” appears. For doing so, the Tribunal turns to the rules of interpretation of treaties contained in Articles 31[106] and 32[107] of the VCLT, which applies because both Czechoslovakia[108] and Germany became parties to it in 1987, some three years prior to the conclusion of the Treaty in 1990. Accordingly, it will interpret Article 1(3) of the Treaty giving the term “juridical person” its ordinary meaning, in its context, and in light of the object and purpose of the Treaty.

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[105] See, for instance, SoD, §§146-71, alleging that JSW cannot be considered an “investor” because, under German law, a KG does not have legal personality and is not considered a “juridical person.” See also Rej., §167 stating that JSW is a limited partnership registered in Germany “as a vehicle for the Wirtgen Claimants’ investment in the Czech Republic”.

[106] According to Article 31 of the VCLT, a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The starting point of the interpretation is the “ordinary meaning” of the text. The latter must be ascertained in the light of the context and the treaty’s object and purpose, any subsequent agreement or practice of the Contracting Parties related to the interpretation of the treaty, and any other relevant rules of international law applicable in the relations between the Contracting Parties.

[107] Pursuant to Article 32 of the VCLT, one may resort to supplementary means of interpretation (i) to confirm the meaning resulting from the application of Article 31 or (ii) to determine the meaning when the interpretation according to Article 31 “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable”.

[108] The Czech Republic notified its succession to the VCLT on 22 February 1993 with effect as of 1 January 1993.

(i) Ordinary meaning and context

209. The threshold question here is whether the term "juridical person" is to be interpreted by reference to German law as the Respondent suggests, or interpreted autonomously, as the Claimants propose. For the following reasons, the Tribunal is of the view that the term "juridical person" is an autonomous or treaty-specific concept.

210. First, the Tribunal notes that the definition in Article 1(3) of the Treaty recognizes two kinds of investors. "Natural persons" who must have a "permanent residence" and "juridical persons" with a seat in a territory covered by the Treaty and entitled to invest. No recourse to national law is provided in respect of either type of investors.

211. By contrast, other provisions of the Treaty do refer to national law. Thus, Article 1(1) of the Treaty which defines the term "investments", expressly refers to the "internal legislation" of the Contracting States:[109]

> "the term "investments" covers assets of any kind which are invested by investors from one Contracting State in the territory of the other Contracting State *in accordance with the internal legislation of the respective other State.*"

212. Similarly, Article 2(1) of the Treaty which considers investment promotion and fair and equitable treatment, too contains an express reference to the Contracting States' domestic legislation:[110]

> "Each Contracting State shall in its territory promote as far as possible investments by investors from the other Contracting State and *admit such investments in accordance with its legislation*. Each Contracting State shall in every case accord investments fair and equitable treatment."

213. Other provisions of the Treaty also contain references to the Contracting States' domestic legislation. This is so in Article 7(1) ("*If the legislation of either Contracting State* or international obligations existing at present or established hereafter between the Contracting States in addition to this Treaty contain any provisions, whether general or specific, entitling investments by investors from the other Contracting State to a treatment more favourable than is provided for by this Treaty, such provisions shall

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[109] Exh. C-078.
[110] *Id*.

prevail over this Treaty to the extent that they are more favourable"); Article 8 ("This Treaty shall also apply to investments made since 1 January 1950 but prior to the Treaty's entry into force by investors from either Contracting State in the territory of the respective other Contracting State *consistent with the latter's legislation*"); and paragraph 3(c) of the Protocol to the Treaty ("Within the framework *of their internal legislation* […]").

214. It is evident that when the Contracting Parties wished their municipal laws to govern, they included an express reference to this effect. In the absence of such reference, it is reasonable to conclude that the Contracting Parties intended to give a term a treaty-specific meaning "for the purposes of this Agreement", as the chapeau of Article 1 expressly states. It is not unusual for contracting states to give a term used in a treaty an autonomous meaning which may differ from its significance under national law. It is a technique used to achieve the uniform applications of a treaty. So for instance, terms used in the New York Convention in principle have an autonomous meaning.[111] This conclusion is strengthened when one examines the object and purpose of the Treaty, as well as the relevant treaty practice which the Tribunal does below.

215. The Tribunal is sensitive to the Respondent's submission that tribunals should consider national law in interpreting treaty terms and that an express *renvoi* is not required. This is uncontroversial. It does not mean, however, that a tribunal should turn to national law in all cases. If it appears, taking into account the object and purpose[112] of a treaty that the parties to it did not wish to give to the term used therein a particular or specific meaning which it may have in national law, but rather a general one, a treaty term can be interpreted independently from the national law of the parties to the treaty.

216. The Tribunal is equally sensitive to the Respondent's contention that "a tribunal does not have authority to autonomously articulate rules for the creation or establishment of nationality".[113] This too is uncontroversial. The Tribunal certainly considers German law to identify the characteristics or attributes of a KG under the law of its constitution.

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[111] ICCA's Guide to the Interpretation of the 1958 New York Convention, p.13 ("In principle, the terms used in the [New York Convention] have an autonomous meaning (Article 31 Vienna Convention.)."

[112] The object and purpose of a treaty can be ascertained in particular from its preamble. Here, the parties to the Treaty in its Preamble "recogniz[e] that the encouragement and reciprocal protection of such investments are suitable means to strengthening all forms of economic activities, especially those associated with private enterprise".

[113] Rej., §382.

Being so informed about national law, it must then examine whether an entity with the characteristics given by its national law falls within the autonomous concept of a "juridical person" under the Treaty.

217. The Tribunal thus concludes that the term "juridical person" must be interpreted autonomously. The next question is for the Tribunal to determine what this term means.

218. The first thing that strikes the interpreter when reading Article 1(3) is the opposition between "national persons" on one side and "juridical persons" on the other. A "juridical person" is an "artificial person". However, such an artificial person can be an investor like a natural one. Hence, it must have similar legal attributes, such as the capacity to invest, enter into contracts, acquire property, and sue and be sued in its own name.

219. This understanding is confirmed when looking at dictionary definitions. For instance, The Legal Dictionary defines the term "juridical person" as:

> "a body recognized by the law as being entitled to rights and duties in the same way as a natural or human person, the common example being a company".[114]

220. The *Abaclat* tribunal came to the same conclusion interpreting the same term "juridical persons", which also appears in Article 25(2) of the ICSID Convention.[115] It was faced with associations formed under Italian law, which under such law lack legal personality, but enjoy the attributes specific to legal entities:

> "Based on the wording of Article 1(2)(b) BIT and the situation under Italian law, it has to be concluded that not only entities with full legal capacity qualify as "juridical persons" under Article 1(2)(b) BIT. Under Article 36 Italian Civil Code […] associations not recognized as legal entities (hereinafter "non-recognized associations") have the procedural capacity to stand in court and to be represented by their president or director. In other words, whilst non-recognized associations may not have legal personality, they possess certain attributes of legal personality and in particular the right to sue and to be sued. To the extent that the relevant Claimants had the capacity to make the relevant investment, and that they also have the statutory right to litigate in their own names, and that their constituents all have the requisite nationality, the "juridical

[114] http://legal-dictionary.thefreedictionary.com/Juridical+person.

[115] Article 25(2)(b) of the Convention reads as follows: "(2) "National of another Contracting State" means: […] (b) any juridical person which had the nationality of a Contracting State […]".

person" requirement of Article 25(2)(b) ICSID Convention must be considered satisfied".[116]

221. There is common ground between the Parties that, under German law, KGs have legal capacity to invest, conclude contracts, acquire property, and sue and be sued in their own name.[117] In the Tribunal's view and as will further be seen below, the fact that German KGs are not "juristische person" under German law does not alter this conclusion. Indeed, the reason for the lack of legal personality lies in the mode of creation of the entity. A corporation with legal personality comes into existence through registration, while a KG is constituted by agreement. Beyond this difference, the legal capacity of these entities is identical when it comes to entering into legal transactions, owning assets, or standing to sue or to be sued in court.[118]

222. It follows from the foregoing discussion that the ordinary meaning of the term "juridical person" used in Article 1(3) of the Treaty taken in its context refers to an entity which can invest, enter into contracts, acquire property, sue and be sued in its own name.

(ii) Object and purpose of the Treaty

223. After the ordinary meaning and context, the Tribunal turns to object and purpose. The overall objects and purposes of the Treaty are set out in its Preamble, which provides that Germany and the Czech Republic enter into the Treaty to "intensify economic cooperation between the two States" and to "create favourable conditions for investments by investors from either State in the territory of the other State".[119]

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[116] *Abaclat and Others v. the Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 ("*Abaclat*"), §417(i).

[117] Objections to Jurisdiction, §47, stating that Claimant 4 is a limited partnership, and referring to Weipert, L., Handelsgesetzbuch (Commercial Code), Ebenroth/Boujong/Joost/Strohn, C.H. Beck, 2014, 3rd Edition, RLA-011 which sets out the rights and duties of a limited partnership ("By becoming a limited partnership—i.e., an exoteric partnership [an entity] acquires […] the ability (i) to acquire rights; (ii) to enter into liabilities, (iii) to acquire property and other in rem rights in real property; (iv) to file complaints before courts of law; and (v) to have complaints filed against it before courts of law—all in its own name. Limited partnerships are, therefore, acknowledged by law as being a legally independent investment fund (Sondervermögen) of its collectively affiliated partners without being a legal person itself."); Reply, §139.

[118] See Exh. RLA-009, Judgment of the German Federal Court of Justice dated 29 January 2001, II ZR 331/00, ("It is therefore practically without contention that general partnerships (offene Handelsgesellschaften) and limited partnerships (Kommanditgesellschaften) are capable of being bearers of rights and duties and are, by extension, sui juris without the collective unit having the status of a legal person.").

[119] Exh. C-078.

224. The Respondent argues that Claimant 4 not being a "juridical person" is not an "investor" and thus cannot initiate an arbitration under Article 10 of the BIT. At the same time, the Czech Republic does not dispute that Claimants 1, 2 and 3 are the limited partners (Kommanditisten) of Claimant.[120] Claimants 1, 2 and 3 have the capacity to make the relevant investment and also have the right to litigate in their own names. In other words, the Respondent contends that an entity (such as a KG) whose constituents are fully entitled to make a protected investment under the Treaty and who can both sue and be sued in their own name in respect of their investment, are not allowed to initiate an arbitration under the Treaty. The Tribunal does not see why this should be the case. As above, the object and purpose of the Treaty is not only to "intensify economic cooperation", but also to "create favourable conditions for investment". It would be contrary to the object and purpose of the Treaty to deny entities that have made protected investments under the Treaty the right to invoke protection for violation of the rights concerning such investments.

225. The *Abaclat* tribunal came to the same conclusion in respect of the ICSID Convention and the Argentina-Spain BIT:

> "Where a non-natural investor falls within the definition of juridical persons provided for in the BIT, and where such investor has under the law applicable to it the legal capacity to acquire an investment protected under the BIT and to sue and to be sued, it would be contrary to the purpose of the BIT and the ICSID Convention to deny such investor the capacity to initiate ICSID arbitration. Indeed, it would make no sense to allow on one hand an investor to make an investment protected under the BIT, and deny on the other hand such investor the right to invoke protection under the BIT for violation of the rights attached to such investment".[121]

226. The Tribunal further notes that Czech law also knows the concept of a KG. However, unlike German law, Czech law does not treat KGs differently from other corporate entities. Under Czech law, a corporate entity, entered into a register, be it a KG or another form, is considered a juridical person.[122] Thus, if the Respondent's argument is followed, it would mean that a Czech KG investing in Germany would benefit from the

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[120] Exh. C-025a, Excerpt from the Commercial Register for JSW Solar (zwei) GmbH & Co. KG), 9 May 2014; Exh. 025b, Excerpt from the Commercial Register for JSW Solar (zwei) Verwaltungs-GmbH, 9 May 2014; Exh. 025c, List of Shareholders filed with the Commercial Register for JSW Solar (zwei) Verwaltungs-GmbH, 15 July 2010.

[121] *Abaclat,* §417(iii).

[122] Reply, §137, relying on Exh. C-091, Letter of Rödl & Partner, advokáti, k.s.to Mr [redacted], p.2, 2 December 2014.

protections of the Treaty, but a German KG investing in the Czech Republic would not. Such distinct treatment of German and Czech KGs would be contrary to the principle of reciprocal protection expressly stated to be the object and purpose of the Treaty as stated in the Preamble of the Treaty:

> "recognising that the encouragement and reciprocal protection of such investments are suitable means to strengthening all forms of economic initiatives, especially those associated with private enterprise".[123]

227. Moreover, unlike in other treaties the object and purpose of which are neutral towards economic initiatives, the BIT's Preamble just quoted, expressly records the Contracting States' wish to strengthen "all forms" of economic initiatives, "especially those associated by private enterprises".

228. Furthermore, the Claimants' observation that one third of all German companies are KGs[124] was not disputed. If the Respondent's arguments are followed, it would mean that one third of all private enterprises in Germany would not be covered by the Treaty. This can hardly be said to meet the object and purpose of the Treaty just stated. No cogent reason has been advanced why the Contracting Parties would have intended such a result.

229. An analysis of the ordinary meaning, context, and object and purpose of the Treaty leads the Tribunal to conclude that a "juridical person" in Article 1(3) is an entity with the legal capacity to invest, conclude contracts, acquire property and sue and be sued. It is not disputed that KGs have these attributes. Thus, KGs are "juridical persons" falling within the ambit of Article 1(3) of the Treaty. The supplementary means of interpretation provided in Article 32 of the Vienna Convention, to which the Tribunal now turns, confirm this interpretation.

(iii) Treaties with third States

230. Both Parties have relied on other treaties concluded by Germany in support of their respective submissions. The Respondent draws attention to the fact that Germany has entered into BITs that contain a broad definition of investor which includes German law

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[123] Exh. C-078.

[124] Exh. C-097, Chart on Business Register.

partnerships like KGs.[125] Hence, it argues that when "[i]n accordance with the *effet utile* principle of treaty interpretation, the Tribunal must give effect to the express words of the Treaty in Article 1(3) by giving effect to the limitation inherent in this formulation for the definition of an "investor" for otherwise the express extension to German law partnerships in other investment treaties concluded by Germany would be rendered meaningless".[126] By contrast, the Claimants point out that the treaties invoked by Respondent are those in which the term "investor" is defined specifically for each contracting state. Therefore, they cannot be compared to this Treaty which has a single definition of investor for both Contracting Parties. They further note that some German BITs require that an entity be "incorporated/organized" under the laws of Germany,[127] which purportedly shows that when German BITs are meant to refer to national law, they do so explicitly.

231. Treaties addressing the same subject matter entered into with third States may be of some assistance in the interpretation exercise. Tribunals in *Churchill Mining*,[128] *AAPL*[129], *Plama*[130]*, Metal-Tech*[131] *and ICS*[132] have for instance referred to other treaties concluded by the contracting parties with third States.

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[125] Exh. RLA-012, Treaty between the Federal Republic of Germany and the People's Republic of Bulgaria on the Mutual Promotion and Mutual Protection of Investments of 12 April 1986 ("any legal person and any partnership (Handelsgesellschaft), or other company and association with or without a legal personality having its seat in the territory to which this Treaty is applicable and lawfully existing under the laws regardless of whether the liability of the partners, shareholders, or members is limited or unlimited and whether its business is intended to be for profit or not".).

[126] SoD, §170.

[127] Exh. RLA-013, Treaty between the Federal Republic of Germany and Federal Republic of Brazil on the Promotion and Reciprocal Protection of Investments of 21 September 1995 ("legal persons, partnerships (Handelsgesellschaften), or other companies and associations with or without a legal personality, which (i) have their seat in the Sovereign Territory of one of the contracting parties and (ii) have been incorporated/organized under their legal regime regardless of whether their business is intended to be for profit or not and (iii) make any capital investment within the Sovereign Territory of the other contracting party.").

[128] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40, Decision on Jurisdiction, 24 February 2014 ("*Churchill Mining*"), §182 ("Treaties on the same subject matter concluded […] with third States can legitimately be considered as part of the supplementary means of interpretation. For instance, in *Oil Platforms*, the ICJ had recourse to treaties on the same subject-matter concluded by one disputing party with third States. This approach also found resonance in investment treaty arbitration […]".).

[129] *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 ("*AAPL*"), §40.

[130] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 ("*Plama*"), §195 ("It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into.").

[131] *Metal-Tech*, §159.

232. Having reviewed the German treaty practice invoked by the Parties with respect to the definition of the term "investor",[133] the Tribunal makes the following observations:

- While some German BITs contain a separate definition of "investor" for each Contracting State, 13 German BITs (including the German-Czech BIT) do not;

- Out of these 13, two treaties (Germany-Poland (1989) and Germany-Russia (1989)) pre-date the Treaty and have definitions of "investor" similar to the one of the Treaty;[134]

- 9 of the remaining 10 treaties that post-date the Treaty contain language "[association/organization] with or without legal personality".[135] The Germany-Mexico BIT employs an altogether different formulation speaking of "commercial companies or other companies or associations";[136]

- All of the treaties examined that contain a separate definition of "investor" for each Contracting State whether they pre-date or post-date the Treaty, use the wording "[association/organization] with or without legal personality" within that definition.

233. It follows from these indications that German treaty practice changed after 1990, the year of the Treaty, to expressly include in the definition of "investor" the mention of "associations/organizations with or without legal personality". After 1993, the treaties

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[132] *ICS v Argentina***,** Ad Hoc Arbitration, UNCITRAL Arbitral Rules, PCA Case No 2010-9, Award, 10 February 2012 ("*ICS*"), §296.

[133] Neither Party supplied information on Czech treaty practice. Further, the Claimants submitted a table reproducing the various definitions of "investor" in some German BITs (Exh. C-094). The Respondent did not contest the correctness of this table.

[134] Germany-Poland BIT ("The term "investor" shall mean a natural person with permanent domicile or a juridical person with its seat in the respective area of application of this Treaty, entitled to engage in investments."); Germany-Russia BIT ("The term "investor" means an individual having a permanent place of residence in the area covered by this Agreement, or a body corporate having its registered office therein, authorized to make investments.").

[135] Germany-Latvia (1993); Germany-Slovenia (1993); Germany-South Africa (1995); Germany-Macedonia (1996); Germany-Croatia (1997); Germany-Venezuela (1998); Germany-Thailand (2002); Germany-Ethiopia (2004); Germany-Guinea (2006).

[136] Germany-Mexico (1998): "The term "companies" refers to any juridical person, as well as any commercial companies or other companies or associations, constituted or organized under the applicable law of a Contracting State whether or not for profit, whose territorial seat is located in the territory of any of the Contracting States."

examined with common definitions consistently use "with or without personality".[137] This appears as an evolution of treaty drafting clarifying the meaning present in earlier BITs, rather than – as the Respondent suggests – a sign that Germany wished to exclude entities without legal personality from the ambit of the Treaty. No cogent reason is indeed advanced why German KGs investing in the Czech Republic would not benefit from treaty protection when German KGs investing in other countries would.

234. Thus, German treaty practice confirms the meaning arising out of the ordinary meaning of the term "juridical person" in its context and taking into account the object and purpose of the Treaty.

(iv) Decisions of other tribunals

235. In support of its submissions, the Respondent relies on the majority view of the tribunal in *Renta4*.[138] There, the claimants were three Spanish investment funds and four variable stock companies. As the Russia-Spain BIT required that an "investor" be a "corporate body", and as the investment funds could not be considered "corporate bodies" under Spanish law, the tribunal declined jurisdiction over the funds.[139] The Tribunal is unable to see the relevance of this decision to the present case.

236. First, the definition of "investor" in the Spain-Russia BIT is materially different from that of the Treaty. It includes two references to domestic legislation ("in accordance with the legislation of either Party", "under the legislation in force there").[140] As was discussed above, Article 1(3) of the Treaty does not refer to national law. Second, the Tribunal has reached its conclusion after conducting a thorough analysis. It has examined the context, object and purpose of the Treaty and considered the supplementary means of interpretation as well. In the circumstances, and in view of the materially different treaty provisions, this Tribunal cannot simply follow the views of the *Renta4* tribunal.

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137 Except for Germany-Mexico BIT, which uses "commercial companies or other companies or association", which is a broader formulation.

138 *Renta4 S.V.S.A. et al. v. Russia*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009 ("*Renta4*"), §§121–31.

139 *Renta4*, §§121–131.

140 Article 1(1) of the Russia-Spain BIT: "The term "investor" shall mean: […] (b) Any corporate body established in accordance with the legislation of either Party, domiciled in its territory, and allowed under the legislation in force there to make investments in the territory of the other Party."

237. For similar reasons, the dicta in *Impregilo*[141] and *LESI*[142] are unavailing as well.

238. The Tribunal does, however, agree with the conclusions of the tribunal in *Abaclat.* There, the tribunal was called to interpret the words "persona jurídica" (Spanish) or "persona giuridica" (Italian) found in the definition of the term "investor" in the Italy-Argentina BIT.[143] The tribunal concluded that although some of the claimants were not "persona giuridica" under Italian law, they were nevertheless protected by the Italy-Argentina BIT as they could make investments, and litigate in their own name. While the wording in the Italy-Argentina BIT was admittedly broader than the one applicable in this case,[144] the reasoning of the tribunal is enlightening to the extent it focuses on an entities' capacity to make investments and sue and be sued:

> "With regard to the nature of the capacity necessary for corporations to benefit from the protection of the BIT and be a party to the present arbitration, the Tribunal is of the opinion that neither Article 1(2)(b) BIT nor Article 25 ICSID Convention limits the scope of eligible entities to those having full legal capacity, and also encompasses entities which enjoy limited civil capacity to the extent that such entities have the capacity to make an investment under the BIT and further to sue and to be sued".[145]

(v) Conclusion

239. For the foregoing reasons, the Tribunal holds that the term "juridical person" in Article 1(3) of the Treaty includes KGs. As a result, Claimant 4 is an "investor" under the Treaty. Consequently, the Respondent's jurisdictional objection in respect of Claimant 4 must be rejected. The Tribunal does have jurisdiction over Claimant 4.

240. Having reached this conclusion, the Tribunal need not address the Respondent's submission that Claimants 1-3 cannot assert the claims of Claimant 4. Similarly, the

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[141] *Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 *("Impregilo").*

[142] *Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award of 10 January 2005 ("*LESI*"), §§37 et. seq.

[143] Spanish Original: "2. El término — "inversor" comprende toda persona física o jurídica de una Parte Contratante que haya realizado, realice o haya asumido la obligación de realizar inversiones en el territorio de la otra Parte Contratante. Por — "persona jurídica" se entiende, con relación a cada una de las Partes Contratantes, cualquier entidad constituida de conformidad con la legislación de una Parte Contratante, con sede en el territorio de esa Parte y por esta ultima reconocida, tales como entidades públicas que realizan actividades económicas, sociedades de personas o de capitales, fundaciones y asociaciones, independientemente de que su responsabilidad sea limitada o no."

[144] *Ibid*.

[145] *Abaclat*, §§416 et. seq.

Claimants revised request for relief reproduced above [§146] has become moot. Accordingly, the Tribunal can dispense with ruling on the Respondent's objections to this revised request.

2. Does EU Law Deprive this Tribunal of Jurisdiction?

a. The Commission's position

241. According to the Commission, the "decisive question" for this Tribunal's jurisdiction is whether, on the day on which the Claimants filed the Request for Arbitration, the Czech Republic's offer to arbitrate contained in Article 10 of the Treaty was valid under public international law. The EC submits that the Respondent's offer was invalid for several reasons: first, because the Treaty as a whole must be regarded as terminated, since the conclusion of the Treaty on Accession of the Czech Republic to the EU implied the termination of the BIT pursuant to Article 59 of the VCLT; second, because the relevant provisions of the Treaty cannot be applied in light of Article 351 of the Treaty on the Functioning of the European Union ("TFEU") as they are incompatible with the TFEU; and, third, because it results from the operation of the conflict rules in Article 30(3) of the VCLT.

242. While these arguments have been rejected by other arbitral tribunals, the Commission submits that this Tribunal should undertake a "fresh analysis" as "there are three new elements that those Arbitral Tribunals have either overlooked (the relevance of Article 351 TFEU), or that constitute new elements that could not have been known to them because they post-date the awards (the judgment of the ECJ in *Pringle*), or were not yet relevant for their decision (the entry into force of the Treaty of Lisbon, and in particular the new exclusive competence of the Commission in the field of investment protection)".[146]

b. The Claimants' position

243. The Claimants deny that the Treaty has been terminated due to the Czech Republic's accession to the EU or rendered inapplicable due to the Lisbon Treaty. Investment tribunals, so say the Claimants, have repeatedly concluded that BITs remain in force following a State's accession to the EU. The Treaty grants specific protections to

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[146] Commission's Amicus Curiae Submission, §75.

investors and EU law cannot interfere with either the Tribunal's jurisdiction or those protections.

244. The Claimants note that the Contracting States have not terminated the Treaty. A third party such as the Commission cannot insist that the Treaty is terminated, nor can the Tribunal consider the Treaty terminated without hearing Germany. Moreover, the EU's acknowledgement that it has proceeded to the second step of the infringement procedure against five EU Member States for their failure to terminate their intra-EU BITs, "underlines once again that the Intra-EU BITs are valid and can only be terminated by the contracting states".[147]

245. The Claimants refute the Commission's submission that there is a conflict between the Treaty and EU law that affects the Treaty's validity. The Parties to the EU treaties and the BIT are distinct as are the protections provided. Other investment tribunals have come to the same conclusion.

246. The Claimants further submit that the reliance on Article 344 of the TFEU is misplaced. First, Article 344 only applies between two Member States of the EU. It does not apply between a Member State and an investor. Second, as Article 344 is limited to issues of interpretation and as EU law only applies as fact in this case, "any issue of interpretation, application or compatibility is irrelevant".[148]

247. Similarly, the Commission's invocation of Article 351 of the TFEU is inapposite. According to the Claimant, that provision applies to agreements between a Member State and a third country. Agreements concluded between a Member State and a State that only later becomes an EU Member are excluded.

248. Finally, the Claimants also dispute that there is a conflict with EU competences. Article 2(2) of the TFEU provides that, where there is a shared competence, Member States may act, provided that the EU has not acted. The EU has not exercised its competence in a way that would deprive the investor of its rights and protections arising under the Treaty. As such, there is no conflict with the substantive provisions of EU law.

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[147] Claimants' communication of 14 November 2016.

[148] Claimants' Comments on the Amicus Curiae Submission, §57.

c. The Respondent's position

249. Unlike the Commission, the Respondent does not consider that the applicability of EU law deprives this Tribunal of jurisdiction. Indeed, the Czech Republic "does not join the Commission's objections to this Tribunal's jurisdiction".[149]

d. Analysis

250. This jurisdictional objection has not been raised by the Parties to the present dispute, but by the Commission, an *amicus curiae*. Ordinarily, it is not open to a non-disputing party to raise a defense of lack of jurisdiction. However, because the Tribunal's jurisdiction arises from a treaty as opposed to a contract, the Tribunal believes that it can and should review its jurisdiction *ex officio*.[150] As a result, the Tribunal will address this objection.

251. Article 10 of the Treaty sets out the Czech Republic's standing offer to arbitrate disputes with German investors. In the Commission's opinion, this provision has become inoperative upon the Czech Republic's accession to the EU in 2004, or, at the latest, when the Lisbon Treaty entered into force. The Tribunal notes that – as the Commission itself recognizes – its principal arguments are not new. They have been rejected by other arbitral tribunals.[151]

252. The Commission's first objection is that the Treaty as a whole must be regarded as terminated pursuant to Article 59 of the VCLT. The Tribunal does not share this view. Article 59 of the VCLT provides the following rules applicable in a situation where a later treaty covers the same subject matter as an earlier treaty:

> "1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the

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[149] Respondent's Comments on the Amicus Curiae Submission, §4.

[150] See, for instance, *ICAO Council*, Judgment of 18 August 1972, ICJ Rep. 1972, p.52, §13 ("[T]he Court must […] always be satisfied that it has jurisdiction, and must if necessary go into that matter proprio motu.").

[151] See among others *Binder v. Czech Republic*, Ad Hoc, Award on Jurisdiction, 6 June 2007 ("*Binder*"); *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 ("*Eastern Sugar*"); *Achmea*; *Euram*. For a summary of the tribunals' treatment of the Commission's amicus arguments, see Exh. R-250, "Further attempts by the European Commission to eradicate intra-EU BITs", Volterra Fietta, October 2015.

provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intentions of the parties".

253. Article 59 of the VCLT thus comes into operation only if *inter alia* the treaty under consideration and the later treaty have the same subject matter. In the present case, this means that Article 59 of the VCLT will only come into play if the Treaty and the TFEU relate to the same subject matter.[152] This is obviously not the case. To take but one example, Article 10 of the Treaty allows an investor to sue a host state. No parallel provision exists in the TFEU.[153] Similarly, EU law does not provide a protection similar to the FET found in the BIT entered into by the Czech Republic.[154] Tribunals in *Eastern Sugar*[155] and *Oostergetel*[156] conducting a similar analysis came to the same conclusion.[157] Both tribunals went on to observe that the other prerequisites for applying Article 59 were not met either.[158]

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[152] The Tribunal agrees with the finding of the *Achmea* tribunal on the notion of "identity" in Art. 59 of the VLT: "Nothing in Article 59 requires that the two treaties should be in all respects coextensive; but the latter treaty must have more than a minor or incidental overlap with the earlier treaty." *Achmea,* §242.

[153] See for instance *Eastern Sugar*, §§164-165 ("The BIT also provides for a special procedural protection in the form of arbitration between the investor state and the host state and, especially arbitration of a "mixed" or "diagonal" type between the investor and the host state, as in the present case […] From the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties […] EU law does not provide such a guarantee.").

[154] The Tribunal agrees with the reasoning of the *Achmea* tribunal which observed the following in respect of the Dutch-Slovak BIT: "The Tribunal does not accept the submission that the protection afforded by the BIT provision on fair and equitable treatment is entirely covered by [EU law]. Respondent does not allege that there is any principle of EU law that specifically forbids treatment that is not fair and equitable. The Tribunal does not consider that any such principle independent of concepts of non-discrimination, proportionality, legitimate expectation and of procedural fairness, is yet established in EU law." *Achmea*, §250.

[155] *Eastern Sugar*, §§159-160 ("the Arbitral Tribunal does not accept the Czech Republic's argument that the EU treaty as the later treaty (as between the Czech Republic and the Netherlands) covers the same subject matter as the BIT, the earlier treaty. While it is true that European Union law deals with intra-EU cross border investment, say between the Netherlands and the Czech Republic, as does the BIT, the two regulations do not cover the same precise subject-matter.").

[156] *Oostergetel*, Decision on Jurisdiction, 30 April 2010, §74.

[157] *Id.*

[158] *Eastern Sugar*, §§167-168 ("the Czech Republic has not established that the common intention of the Czech Republic and the Kingdom of the Netherlands was that the EU Treaty should supersede the BIT. Third, the Arbitral Tribunal is of the view that the BIT and the EU Treaty are not incompatible"); *Oostergetel*, Decision on Jurisdiction, 30 April 2010, §74 ("there is no indication that the Parties would have intended for the BIT to be superseded by the EC Treaty […] the Tribunal does

254. The Commission's second objection is that the relevant provisions of the Treaty cannot be applied in light of Article 351 of the TFEU, which mandates the primacy of EU law in relation to international agreements. Here too, the Tribunal cannot follow this line of argument.

255. Article 351 of the TFEU (earlier Article 307 of the TEU) states that the EU treaties do not affect the international obligations of Member States assumed before a State's accession to the EU:

> "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties".

256. It is clear from such provision that Article 351 of the TFEU applies only to States. Here, the Claimants are not States. Further, the provision applies only between Member States and non-Member States. Here, both Germany and the Czech Republic are Member States. In the circumstances, Article 351 of the TFEU simply does not apply, and the Commission's argument must be rejected. The tribunal in *AES Summit* reached a similar conclusion.[159]

257. As a further ground related to its second objection, the Commission submits that Article 10 of the Treaty is incompatible with Article 344 of the TFEU. Here too, the Tribunal does not agree. Article 344 TFEU reads as follows:

> "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein".

258. On its face, this provision only applies to disputes involving two or more EU Member States. Further, Article 344 of the TFEU does not exclude the possibility of referring intra-EU investor-State disputes to international arbitration. As was held in *Mox Plant*,

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not see any direct conflict between the BIT and the relevant EU law provisions that would impede it from applying the two sets of legal norms simultaneously, should such a need arise.").

[159] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 ("*AES Summit*"), §7.6.10-7.6.11 ("the Tribunal concludes that Article 307 […] is not applicable, as such, in this arbitration […] Article 307 only applies to agreements between member states and non-member states, and Hungary and the United Kingdom are both member states. Moreover, the Claimants are not states, and even if sometimes individuals are granted rights under international law, Article 307 of the EC Treaty specifies that it only applies to states.").

Article 344 prohibits EU Member States from submitting inter-State disputes regarding the interpretation and application of EU law to a method of settlement not contained in the EU Treaties. It does not prohibit the submission of investor-State disputes to another method of settlement not contemplated in the EU Treaties.[160]

259. The third objection advanced by the Commission concerns the conflict rules in Article 30(3) of the VCLT. Here the Commission argues that specific provisions of the Treaty, including Article 10 (from which the Tribunal derives its jurisdiction) cannot be applied as they are incompatible with EU law, with the result that the Tribunal lacks jurisdiction to hear the present case. Once again, the Tribunal disagrees. Article 30 of the VCLT reads in relevant part as follows:

> "1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> […]
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

260. Article 30(3) is thus concerned with the priority between particular provisions of an earlier and a later treaty, as opposed to Article 59 which deals with the termination of an entire treaty. While Article 30(3) may thus be triggered "by the slightest incompatibility", Article 59 requires that the earlier treaty be "so far incompatible" with the later treaty that both treaties cannot be applied at the same time.[161]

261. As mentioned above, Article 10 of the Treaty is compatible with EU law, which is limited to inter-State disputes concerning the interpretation and application of EU law, and does not extend to investor-State arbitration as contemplated in Article 10 of the BIT. There is thus no question of incompatibility which would call for the application of Article 30(3) of the VCLT. The tribunal in *Binder v. Czech Republic*, which, like the

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[160] See also for instance *Electrabel*, §4.151 ("there is no provision equivalent to Article 292 EC (now Article 344 TFEU) dealing with arbitration between two or more private parties, nationals of Member States, or with mixed disputes settlement mechanisms such as investor-state arbitration between individuals, nationals of EU Member States and an EU Member State under the ICSID Convention or other international instruments. Article 292 EC is not applicable to these arbitration tribunals").

[161] *Achmea*, §§240-241.

Tribunal in the present case, was called upon to apply the provisions of the German-Czech BIT at issue here came to the same conclusion.[162]

262. Tribunals have repeatedly taken the view that the offer to arbitrate embodied in a treaty concluded between an EU Member State and a then Non-Member State which later acceded to the EU, i.e. an intra-EU BIT by virtue of accession, remained valid after the date of accession.[163] The Tribunal sees no reason to deviate from this line of cases. None of the "three new elements" advanced by the Commission serves to alter that position.

263. First, contrary to the Commission's submission, the operation of Article 351 of the TFEU (or its predecessor, Article 307 of the TEU) has not been "overlooked". As can be seen from the foregoing discussion, this Tribunal has considered and rejected its application. Other tribunals have done the same.[164]

264. Second, the Commission has not shown how the *Pringle* decision of 2012 would apply in the present case. The Tribunal understands that it only applies to the conclusion of future agreements between Member States. Since the Treaty has been in force since 1992, it is difficult to see how the decision could apply here, in the absence of any reason being provided to the contrary.

265. Finally, the Commission points out that after the entry into force of the Lisbon Treaty, the EU has exclusive competence for concluding international agreements on investment protection. As a result, pursuant to Article 59 or Article 30(3) of the VCLT, the relevant provisions of the Treaty on which the present case is founded, are inapplicable and the Tribunal lacks jurisdiction. The Tribunal has difficulty accepting this proposition. For Articles 59 or 30(3) of the VCLT to apply, the Commission would have to establish that the EU's new competence over "foreign direct investment" after the Lisbon Treaty covers the same subject matter as the Treaty. The Commission has not done so. In any event, as noted, one of the reasons for rejection of the Commission's intra-EU jurisdictional objections is that EU law contains no equivalent of

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[162] *Binder*, §65 ("The Arbitral Tribunal does not find either that Article 10(2) of the Czech-German BIT, which provides for a specific procedural protection in the form of arbitration between the investor and the host State, is in conflict with EC law.").

[163] See, for instance, *Eastern Sugar*; *Achmea*; *Binder*; *Oostergetel*, Decision on Jurisdiction of 30 April 2010.

[164] See, for instance, *Electrabel*, §4.178 et. seq.

the arbitration clause in the Treaty. The Lisbon Treaty has not changed this situation. Accordingly, for the same reasons as those mentioned above [§§252 et. seq.], the Commission's argument must be rejected.[165]

266. For all these reasons, the Tribunal concludes that the Commission's arguments opposing this Tribunal's jurisdiction are not well-founded.

267. It follows from the analysis above that the Tribunal has jurisdiction over the dispute before it. The Tribunal must therefore review the merits of the dispute. It will first consider the Respondent's arguments in respect of the police powers doctrine (section (C) below) and then the Claimants' allegations in respect of the Respondent's breaches of the Treaty (sections (D)-(E) below).

C. APPLICATION OF THE DOCTRINE OF POLICE POWERS

268. For the Respondent, it is "beyond doubt" that obligations in investment treaties must be interpreted against the background of the doctrine of police powers in general international law. This doctrine, so says the Respondent, applies especially to measures of taxation such as the Solar Levy, in respect of which international law permits only a "limited degree of scrutiny".

269. The Claimants oppose the Respondent's submissions, contending first that as the Solar Levy effectively results in a reduction of the FIT, which the Czech Republic could not have otherwise achieved, the Solar Levy is not a good faith taxation measure. Further, the Claimants point to the lack of indications that the Contracting States intended protections offered by general international law, to restrict the application of the BIT. In any event, the Respondent cannot rely on the doctrine of police powers to justify its breaches of the Treaty, because the doctrine "finds its limits [in cases] where the State has undertaken very specific commitments of stability".[166]

270. The Tribunal first notes the Parties' disagreement on whether the Solar Levy is a "good faith" taxation measure. In the Tribunal's view, the true nature of the Solar Levy would be relevant if the BIT contained a tax carve out ruling out or restricting the application

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[165] The tribunal in *WNC Factoring*, relying on *Eureko* reached the same conclusion (*WNC Factoring Limited v. The Czech Republic*, Award, 22 February 2017, §307).
[166] Reply, §296.

of the treaty to tax measures. This is not the case, save for the limited exception in Article 3(4)[167] which has no relevance here. In the absence of any cogent argument that the Treaty precludes the application of the umbrella clause, and the FET and FPS standards to tax measures, the Tribunal considers that it need not decide whether the Solar Levy is a "good faith" taxation measure or not. Further and in any event, the real nature of the Solar Levy is immaterial to the Tribunal's analysis. The dispute is principally on whether the relevant framework contains a stabilization commitment giving rise to legitimate expectations as claimed by the Claimants. As will be seen from the discussion that follows, the Tribunal comes to the conclusion that the applicable legal framework guarantees to solar PV investors a FIT level that provides (i) an adequate return on investment equal to at least 7% per year over the 15-year (later 20-year) life of the installation, and (ii) a payback of investment costs in no more than 15 years. These guarantees continue to be maintained in respect of the Claimants. This conclusion is indifferent to the characterization of the Solar Levy as a true taxation measure or otherwise.[168]

271. This does not mean, however, that the imposition of the Solar Levy – whether a true taxation measure or otherwise – did not affect the Claimants' revenue as a matter of fact. Indeed, while the grid operators continue to pay the FIT to solar RES producers, they do so after withholding the Solar Levy. Thus, while the Solar Levy as a matter of law did not directly reduce the FIT, the effect is that the Claimants' revenue is reduced by the amount of the Levy. The Constitutional Court came to the same conclusion,[169] which the Respondent also accepts.[170]

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[167] Article 3(4) of the Treaty: "The treatment granted under this Article shall not relate to advantages which either Contracting State accords to investors from third States by virtue of an agreement for the avoidance of double taxation in the field of taxes on income and assets or other agreements regarding matters of taxation."

[168] The Claimants agree. See Reply, §162 ("[E]ven if the solar levy was considered a taxation measure, then it would still be fully subject to the Respondent's obligations under the BIT. The same applies to the Respondent abolishing the tax regulations which were part of the Support Scheme.").

[169] Exh. R-084 §45, ("The Constitutional Court notes that although the provisions of Section 6 of Act No.180/2005 Coll., on Promotion of Electricity Production from Renewable Energy Sources and on Amendments to Certain Laws (Act on Promotion of Exploitation of Renewable Energy Sources), as amended by Act No. 137/2010 Coll., that set the amount of price of electricity from renewable sources and the amount of green bonuses were not affected by the amendments of Act No. 402/2010 Coll., there is no doubt that in consequence of the insertion of the new provisions of Section 7a and the following sections, which introduced the levy on electricity from solar radiation, this in effect changed the amount of support provided to operators of PVPP.").

[170] Tr. (Day 4) 680:9-16 ("I think there is this lingering question of is the Solar Levy really any different from a FIT reduction? And, you know, it depends on who you ask; right? We accept that it has similar limits on a similar impact on the cash flows for the investor, except, of course, you know, a FIT

272. The Respondent contends that the Tribunal must apply the doctrine of police powers in its analysis, to which the Claimants object. Again, the Tribunal can dispense with resolving this issue.[171] As already mentioned, the Tribunal is of the view that the regulatory framework contains no stabilization commitment of the content put forward by the Claimants. To reach this conclusion, the Tribunal need not to examine the status, role or applicability of the doctrine of police powers.

273. Having addressed the Respondent's reliance on the doctrine of police powers to excuse it from liability, the Tribunal will now examine the Claimants' submission that, by abrogating the Tax Incentives and introducing the Solar Levy, the Respondent violated Article 2(1) (fair and equitable treatment), Article 4(1) (full protection and security) and Article 7(2) (umbrella clause) of the Treaty.

D. FAIR AND EQUITABLE TREATMENT

1. The Claimants' Position

274. According to the Claimants, Article 2(1) of the Treaty requires a State "[n]ot to deliberately cause damage to foreign investors; and [t]o protect their legitimate expectations relied on when investing".[172] The Respondent has breached both these aspects of Article 2(1) of the Treaty.

a. The Respondent attracted and then deliberately harmed solar PV investors

275. The Claimants submit that the Support Scheme was created to attract foreign investors to the Czech Republic for the purpose of complying with the Republic's obligations under EU law. Once foreign investors had been attracted, the Respondent changed course and abrogated the Support Scheme. Doing so, it specifically targeted solar PV investors and required them to pay for a tariff deficit which was caused by the

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reduction would apply permanently and reduce your cash flow, but here the Solar Levy applied for three years at the 26% level.").

[171] The Claimants appear to agree. Tr. (Day 1) 35:4-20 ("Respondent contends that the introduction of the Solar Levy was a reasonable exercise of their regulatory power […] This defense is not only without merit, *it's also legally irrelevant*. We do not dispute that the State has the power to regulate for the good of its people. That's the purpose of a State but that power finds its limits in international law obligations (emphasis supplied).").

[172] SoC, §185.

government's own prior actions. The Respondent's conduct was neither fair nor equitable.

b. The Claimants' legitimate expectations

276. It is the Claimants' submission that they legitimately expected to benefit from the Tax Incentives and the fixed FIT for at least 15 years. They relied on these expectations when making their investments. By abrogating the Support Scheme, the Respondent breached the Claimants' legitimate expectations.

277. The Claimants contend that their legitimate expectations arose from the Support Scheme itself. Besides the terms of Article 6(1)(b), the 5% brake rule provided "additional stability and an additional guarantee for investors that there would be no unexpected changes, and it strengthened the value of the tariff guarantee given in Article 6(1)(b) [of Act 180]".[173] In addition, the Claimants also rely on a series of public statements by senior government officials, explanatory notes to the relevant laws and official communications, all of which, they submit, affirmed the existence of the guarantees conveyed by the Support Scheme.

278. In answer to the Respondent, the Claimants specify that they do not claim that every statutory provision gives rise to legitimate expectations. Rather, their position is that the very specific, long-term guarantees contained in the Support Scheme did create expectations. They also clarify that they do not rely on political statements as the primary source of their legitimate expectations. Yet, these statements confirm the "stability guarantee" contained in the Support Scheme.

c. Specific guarantees or representations made to the Claimants

279. The Claimants submit that the Support Scheme is a "very specific targeted legislation". In order to receive the benefits of the Support Scheme, producers were required to follow a number of steps including obtaining construction permits, signing construction contracts, fulfilling technical requirements, and entering into contracts with grid operators. Addressed only to investors who built a solar plant authorized and licensed by the Respondent and connected to the grid within a certain year, the Support Scheme is "the institutional equivalent of what [a] contractual stabilization clause would

[173] Tr. (Day 4) 630:18-21.

be, just in terms of modern regulation, where the actual contracts closing is delegated to private operators, in this case, the transmission system operators".[174]

280. According to the Claimants, through (i) the investors' right to choose between feed-in tariffs and green bonus, (ii) "[o]fficial price setting by the ERO for specific plants", (iii) grid operators' statutory duty to enter into contracts with qualifying RES producers, and (iv) ERO licenses, the "Support Scheme" created a "system of reliance", on which the Claimants precisely relied when making their investment.

281. The Claimants also point out that the 2003 Explanatory Report issued by the Respondent "confirms the already unambiguous wording of the Support Scheme and underscores "that the profit" for the energy sold to the grid operators "shall be guaranteed for 15 years"".[175]

d. The Solar Levy effectively ended the feed-in tariffs

282. The Claimants disagree with the Respondent's submission that the feed-in tariffs remained intact in spite of the Solar Levy. Since grid operators are under an obligation to deduct the Levy from the payments due to the solar PV producers, the Claimants effectively receive 26% less than the amount to which they are entitled under Act 180. Through the Solar Levy, so say the Claimants, the Respondent has "blatantly tried to mask a de facto reduction of the guaranteed feed-in tariffs".[176]

e. Guarantees in respect of taxation

283. The Claimants are in agreement that the tax exemptions already existed at the time when Act 180 entered into force. However, relying on the 2003 Explanatory Report issued by the Respondent, the Claimants submit that these incentives were made an "integral part" of the Support Scheme. The Claimants therefore legitimately expected "that an exemption that is part of the Support Scheme is not suddenly amended to reduce the impact of long term price guarantees contained in the Support Scheme and thereby circumventing the actual benefits received under the Support Scheme".[177]

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[174] Tr. (Day 1) 30:2-7.
[175] Reply, §31.
[176] SoC, §214.
[177] Reply, §66.

284. The Claimants also rebut the Respondent's argument that the Claimants could not rely on the prospective five year income tax exemption contained in Act 586/1992 Coll. on Income Tax ("Act 586"), because the Act was amended several times. They reply that only five amendments abolished tax exemptions and that none of these five amendments retroactively affected tax exemptions that were granted for a set period, save for the one presently in dispute. They maintain, therefore, that the abolition of the Tax Incentives was unprecedented.

f. Expectation to receive a 15-year payback

285. For the Claimants, the 15-year payback is only one of three independent guarantees which ERO was to respect when setting the tariff for the following year. The other two were the set tariff and the 5% brake rule. ERO must comply with all three guarantees cumulatively, not, as the Respondent suggests, with only one to the detriment of the others. Thus, the Respondent's argument that the 15-year payback period was the "operative basis" of the Support Scheme is "smoke and mirrors". This term is not found in the law itself and is "irreconcilable with the plain wording of the Support Scheme, the explicit intent of the legislator and the representations made by the Czech Republic at the time".[178] In fact, in its own documents, the Respondent made no mention of the 15-year pay-back guarantee as the "operative basis" of the Support Scheme.

286. The Claimants further challenge the Respondent's position as incompatible with the purpose of Act 180, which was meant to attract private investment into renewables, thereby helping the Respondent meet its indicative EU targets for renewable energy. According to the Claimants, "[n]o reasonable investor would have invested considerable sums of capital in a foreign country if they were only guaranteed a return of their investment within 15 years and nothing more".[179]

g. "Windfall profits"

287. In reply to the Respondent's argument that the drop in investment costs led to "windfall profits" for investors which could legitimately be curbed in order to alleviate budgetary constraints, the Claimants argue that there is no evidence that the Claimants benefited from that alleged drop. At least for the Claimants, the reduction of the feed-in tariff by

[178] Reply, §6.
[179] Reply, §36.

5% in 2010 meant that they only hypothetically benefited from a reduction in investment costs of around [redacted]%.

288. In any event, the Claimants deny that they received any "windfall profits". Their pre-amendment rate of return was between [redacted] and [redacted]% compared to the 7% allegedly promised by ERO. For the Claimants, "[t]his is not a case where the gold price escalated two or three times over the old price, increased six-fold within a couple of years only".[180] Furthermore, the level of the present rate of return is "currently irrelevant". After all, one cannot know what the situation will be in five or ten years – the plants may break down and there may be other technical issues.

289. The Claimants also dispute that they profited from the alleged price decrease in solar panels. The engineering, purchasing and construction contracts concluded between [redacted] and [redacted] for the construction of the three PV plants specified the costs for the purchase of solar panels. The contracts show that the overall investment costs between 2009 and 2010 were reduced by only [redacted]% compared to the alleged [redacted]% price drop for solar panels.

290. For the Claimants, the Respondent has failed to explain the link between the alleged windfall profits and the Solar Levy. In fact, the Explanatory Report to Act 402/2010 briefly mentioned a drop in investment prices, but did not correlate Solar Levy and "windfall profits". The real reason for the introduction of the Solar Levy, so say the Claimants, was that the Respondent considered solar power plants to be inefficient in relation to their cost.

h. Decisions of the Czech courts

291. The Claimants object to the Respondent's reliance on the decisions of its local courts. They regard these decisions as irrelevant for the issues of international law which have to be decided here. The Claimants also point out that these decisions were rendered after the Respondent abrogated its guarantees. Therefore, any interpretation of the Support Scheme by the domestic courts "[cannot] be reliably used to test Claimants' *ex ante* legitimate expectations".[181]

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[180] Tr. (Day 4) 642:18-20.
[181] Reply, §44.

i. Tariff reduction in the [redacted] lease

292. The Claimants submit that the Respondent's reliance on the tariff reduction provision in the [redacted] lease agreement (see below §330) is misguided. That provision was meant to address decreases in tariffs resulting from a failure to complete the [redacted] plant before the end of the calendar year. It is, therefore, inapposite to refer to it in the present dispute.

j. The Claimants' due diligence

293. The Claimants oppose the Respondent's submission that they could have no legitimate expectations because they failed to conduct a proper due diligence (see below §§331 et. seq.). In any event, they contend that the Respondent has not explained what the Claimants ought to have discovered as part of their due diligence. In addition, the Claimants point out that "none of the changes to the Support Scheme were foreseeable".

k. Opinion of Ueltzhöffer Balada

294. Prior to investing in the Czech Republic, the Claimants secured a legal opinion signed by Mr. Andreas Ueltzhöffer, a partner at the Czech law firm Ueltzhöffer Balada. On the letterhead of this firm, Mr. Ueltzhöffer confirmed to the Claimants that the principle of "Bestandsschutz" that prohibits retroactive changes in the law exists in Czech law. It was, *inter alia*, on the basis of this opinion that the Claimants eventually invested in the Czech Republic.

295. In answer to the Respondent's argument that the Claimants should not have relied on the opinion of Mr. Ueltzhöffer because he is a German lawyer, the Claimants observe that the advice was given by the Czech law firm Ueltzhöffer Balada (now Ueltzhöffer Klett Jakubec & Partneři), which was authorized to advise on matters of Czech law. They note that, in a subsequent letter of 18 August 2015, Ueltzhöffer Klett Jakubec & Partneři confirmed that Mr. Jan Balada, the second partner of the law firm at the time, was a fully qualified legal professional under Czech law and therefore entitled to advise on matters of Czech law.

296. The Claimants add that, although the opinion was only signed by Mr. Ueltzhöffer, it was given on the official letterhead of the law firm in the name of the firm, Mr. Ueltzhöffer having signed because the opinion was issued in German.

l. State aid

297. The Claimants consider that the legitimacy of their expectations cannot be questioned on the ground that the Support Scheme constitutes State aid. First, they contest that the Scheme can be characterized as State aid as it was initially financed by the ultimate consumers of electricity only. Second, they point out that, in its Decision, the Commission held that the Support Scheme was not incompatible with EU law on State aid.

298. In any event, the Claimants submit that what matters to assess their legitimate expectations is their knowledge when making the investment. At that time, there was no decision of the Commission declaring a feed-in tariff scheme to be incompatible State aid. In fact, while examining draft legislation which was later adopted as Act 180, the Commission itself concluded that the act would not constitute State aid. Further, in its 2003 Explanatory Report, the Czech Republic also considered that the Support Scheme was compatible with EU law.

299. For the Claimants, the Commission's submission that this Tribunal is bound by the Commission's decision on legitimate expectations is "evidently nonsense". The Commission does not have jurisdiction to decide this dispute.

m. The legislative changes were not foreseeable

300. For the Claimants, the contested measures were not foreseeable. Four small German investors cannot be expected to foresee retroactive legislative changes which even the government had not contemplated. No information was publicly available on the retroactive changes at the time of the investments. Only one document dated November 2010 envisaged such a change, but at that time the Claimants had already made their investments. The only change discussed at the time of the Claimants' investment was the removal of the 5% brake rule, which is why the Claimants took efforts to get their plants online in 2010.

301. The Claimants further submit that Mr. [redacted] admitted that ERO itself had no proper information available. It received details about the rise in capacity only in 2010. As the regulator itself did not have the relevant information, it was unreasonable to expect an investor to do so. The 2010 ERO Report only summarized ERO's activities in 2009 and

explained ERO's efforts in abolishing the 5% brake rule. The retroactive changes were not addressed.

302. It is wrong, so say the Claimants, for the Respondent to draw a comparison with the changes introduced in the German solar PV framework. While it was true that the amendment to the German Renewable Energy Act was passed in August 2010 and entered into force retroactively as of July 2010, such amendment served to implement a decision of the Federal Supreme Court of December 2009. Thus, since December 2009, operators in the German PV sector knew that changes were likely. In any event, the Claimants emphasize that the German framework is different and cannot be compared with that of the Czech Republic.

303. Finally, the Claimants assert that both ERO and the government should have taken action to inform investors of possible retroactive changes. Yet, no action was taken.

n. The Decision

304. The Claimants acknowledge that, in its Decision, the Commission has commented on possible breaches of the FET standard of the Treaty. For the Claimants, these views are irrelevant as "[t]he EU Commission has no jurisdiction to assess legitimate expectations of investors under the German-Czech BIT".[182]

2. The Respondent's Position

305. The Respondent essentially submits that the Claimants have not established (i) that the Czech Republic made "specific commitments" that its laws would not change, (ii) that the Claimants reasonably relied on such alleged specific commitments when making their investment, and (iii) that the Czech Republic abrogated these alleged commitments when it introduced the challenged measures. As a result, the FET claims should be dismissed.

a. The Respondent did not deliberately attract PV investors

306. The Czech Republic denies the Claimants' suggestion that it deliberately attracted PV investors in order to fulfill its obligations *vis-à-vis* the EU. Solar power is by far the most

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[182] Claimants' Comments on the Commission Decision, §1.

expensive source of renewable energy. Therefore, the legislature could never have anticipated that Act 180 would prompt any significant growth in the production of solar energy. The Explanatory Report to Act 402/2010 emphasized that the environmental conditions in the Czech Republic were unsuitable for solar generation and instead envisioned growth in other RES like wind mills. Further and in any event, the 8% target had already been superseded by a new target for 2020, and "it is hardly plausible that the Czech Republic would have intentionally committed electricity consumers and taxpayers to pay enormous subsidies for a period as long as 20 years simply to achieve a non-binding target".[183]

307. The Respondent submits that Act 180 was intended to provide cost-efficient subsidies for investment in renewable energy sources. Thus, the Claimants' "core" premise, i.e. that the Czech Republic deliberately attracted "large investments" into the PV sector and then "shortchanged" the investors once this goal was attained, is not correct. The Czech Republic never sought to attract foreign investors to investment in solar RES production in the first place.

308. In response to the Claimants' argument that the Czech Republic required solar investors to pay for a tariff deficit which was caused by the government's own actions, the Respondent submits that austerity measures designed to protect the State budget – in and of themselves – cannot constitute a violation of the FET standard. Moreover, the Claimants' argument effectively turns that standard into a mechanism by which investors can defeat any tax assessment, and that cannot be correct. States enjoy the sovereign right to change domestic laws, so long as such changes are not manifestly inconsistent, non-transparent, unreasonable, or discriminatory. The fact that, in retrospect, some aspects of the regulation proved difficult to manage does not mean that the Czech Republic acted wrongly.

b. The Claimants' expectations

309. At the outset, the Respondent submits that, EU law being part of the applicable law under the Treaty, the legitimate expectations standard under the Treaty must be interpreted in line with that standard under EU law. If the Treaty were to provide for a different standard than that known in EU law, then the latter should prevail.

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[183] Rej., §5(f).

310. On this basis, the Respondent submits that the measures complained of did not breach the Treaty because they did not violate a stabilization commitment owed to the Claimants or legitimate expectations held by them, and because the measures were reasonably tailored to achieve legitimate State objectives. For the Respondent, "[i]nvestment treaties [are not intended] to protect investors from what is properly business risk; to serve as the functional substitute of a stabilization clause or to fetter the power of [a] State to adopt rational and proportional measures in the public interest".[184]

311. To give rise to legitimate expectations, so says the Respondent, statements must be "clear", "definitive" and "unambiguous". This is not so here. The Solar Levy did not change the feed-in tariffs and, therefore, the question of stabilization does not arise. As for the Tax Incentives, "the 2003 Explanatory Report simply cannot be read as a promise to investors to maintain the [tax exemption], and it makes no mention at all of depreciation".[185] In addition, neither the Income Tax Act nor the 2003 Explanatory Report were "specific" to the Claimants.

312. Moreover, the Respondent points out that Section 6(1) of Act 180 begins with the words "[t]he Office" which is a reference to ERO. It then specifies the tariff-setting framework which ERO is bound to apply. Contrary to the Claimants' assertions, Section 6 contains no commitment that such section will not be amended. Nor does it include a stabilization guarantee guarding against other changes in law. The contested measures were adopted through primary legislation and did not involve an amendment of Section 6 of Act 180.

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[184] Rej., §9.
[185] Rej., §437.

c. Specific guarantees or representations made to the Claimants

313. The Respondent denies that it provided specific guarantees or representations to the Claimants. More specifically, it refutes the Claimants' argumentation as follows:

(i) Choice of two forms of subsidies

314. According to the Respondent, it is difficult to discern anything "specific" about the right of eligible RES investors to choose between tariffs and green bonus, a choice which was open to all investors.

(ii) ERO price decisions

315. Contrary to the Claimants' submissions, the Respondent is of the view that the ERO price decisions were not issued "for specific plants", but merely for different categories of RES plants, depending on the date of commissioning, the method of production of electricity, and the size of the plant.

(iii) Contracts with grid operators

316. For the same reasons, argues the Czech Republic, the contracts with the grid operators are also unhelpful to the Claimants' case. These contracts do not relate to the feed-in tariffs at all. They contemplate connections to the grid and the producer's entitlement to supply electricity. Moreover, the counterparty to the contract was one of the three regional grid operating companies, not the State.

(iv) ERO licenses

317. Similarly, continues the Respondent, the ERO licenses issued to the producers do not assist the Claimants either. The licenses only list details, such as the license holder's address, the name of the responsible representative, and the installed capacity of the plant. They do not confer on license holders any right other than the right to generate electricity. They do not mention the entitlement to the feed-in tariffs or to other elements of the Support Scheme. Their general format is universal, not specific to any particular license holder.

(v) Other documents

318. Finally, according to the Respondent, most of the other documents relied upon by the Claimants are not contemporaneous with the Claimants' investment. More importantly, the Claimants do not allege that they reviewed any of them prior to making their investment. In any event, none of these documents contain specific assurances or "guarantees" given by the Czech Republic.

d. The Solar Levy did not end the feed-in tariffs

319. The Respondent agrees that the Solar Levy impacts the cash flows of PV producers such as the Claimants. However, it does not agree that the Solar Levy ended the feed-in tariffs altogether. First, the Solar Levy applied at the 26% level for three years only, when a tariff reduction or suppression would apply permanently. Second, there is a difference from the perspective of the State budget, in the sense that, the general budget benefits from the revenues from the Solar Levy, but not from a reduction in tariffs. Third, there is also a difference from the perspective of the electricity consumers, as a cut in tariffs would reduce the burden on electricity consumers, which was not directly the case with the Solar Levy.

e. Guarantees in respect of taxation

320. Contrary to Claimants' submissions, the Respondent submits that neither Act 180 nor its implementing regulations specified any limitations on the taxation of RES producers. The Tax Incentives were part of the Income Tax Act for more than a decade before Act 180 entered into force. Nothing in the Czech legislation excludes or limits the legislator's ability to amend the Income Tax Act. In reality, it is amended frequently.

321. The Czech Republic also observes that there is nothing "unprecedented" about withdrawing tax exemptions. For instance, Act No. 338/1992 Coll., on Real Estate Tax provided a 15 year property tax exemption for owners of new dwellings who used them for permanent residence. That exemption, which existed since 1993, was subsequently withdrawn without providing any exceptions for existing homeowners.

322. The Respondent further draws attention to the fact that the only basis for the Claimants' position that they received guarantees in respect of taxation is (i) a single sentence in the 2003 Explanatory Report and (ii) the words "'tax holiday' - 1 + 5 years" in an October 2006 presentation by an ERO official at a workshop dedicated to the

promotion of biogas. For the Respondent, neither of these documents is equivalent to a guarantee restricting the fiscal powers of the Czech legislature. Further and in any event, both the 2003 Explanatory Report and the ERO presentation were publicly available, and the Claimants have not alleged that they reviewed, let alone relied on these documents prior to investing in the Czech Republic.

f. Expectation to receive a simple return on investment

323. The Respondent submits that the 15-year payback period was the operative basis of the Support Scheme. In its submission, two benchmarks must be considered in this connection: (i) an adequate return over the useful life of the investment (also referred to as "reasonable profit") and (ii) a simple return of capital expenditure within 15 years (also referred to as "payback"). Both benchmarks were met under the Support Scheme and continue to be met despite the Solar Levy and the changes to the income tax regime. In fact, the Claimants' plants continue to be profitable despite the adoption of the impugned measures.

324. The Respondent challenges the Claimants' position that nothing in the Support Scheme limits the returns of PV producers. It points to the Technical Regulation which sets the tariff as a function of costs to enable an adequate return, defined as a function of the WACC. For the Respondent, "any sophisticated investor who did adequate legal due diligence would have seen those references to the WACC and to the reasonable rate of return, and would not have assumed that they had no limit on the returns".[186]

325. According to the Respondent, the Claimants' only legitimate expectation could have been to receive a 15-year return on their investment, an expectation which was met. The Solar Levy was set at 26% to maintain the 7% rate of return over the 20-year useful life of the plant in accordance with the criteria specified in the Technical Regulation. With the Solar Levy, it was estimated that the payback would be achieved in approximately 11 years, considerably less than the 15-year period mentioned in Section 6 of Act 180.

326. In this context, the Respondent argues that Section 6(1)(b)(1) of Act 180 directed ERO to set the tariff "so that […] there is attained […] a fifteen year payback period on

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[186] Tr. (Day 1) 63:16-20.

capital expenditures […]"[187], which was the key to setting the appropriate tariff. The highest courts in the Czech Republic too found that under Act 180, the Claimants could legitimately expect a "simple return" of investment, i.e., a full return of capital, without profit. In fact, a reference to a guarantee of "reasonable profit" in addition to the 15-year return of capital contained in an early version of the draft Act was not taken over in the final version.

g. "Windfall profits"

327. The Respondent alleges that it introduced the Solar Levy on revenues of solar plants commissioned in 2009 and 2010 to partially offset the State's direct contribution to the costs of renewable electricity subsidies. The Solar Levy curtailed only the producers' windfall profits, leaving intact the guarantee of return contemplated in Act 180 and related regulations. The Tax Incentives too were revoked as part of a broader set of austerity measures, especially in light of the high profits earned by producers. In any event, the Respondent was under no obligation to maintain the existing tax regime.

328. The Respondent disputes that the Solar Levy or the revocation of the Tax Incentives breached any legislative promise or guarantee. To the contrary, these measures "struck an appropriate balance between protecting the long-term profitability of […] investments and the interests of other investors, consumers and the public at large".[188] They were carefully calibrated to preserve the original payment guarantees, as well as to provide a reasonable profit level over the 20-year life of the PV plants. Indeed, the tariff rate remained unaffected. Contrary to the Claimants' arguments, the challenged measures merely did "align profitability closer to the regime's original target and the level of return deemed acceptable for other regulated activities".[189]

h. Decisions of the Czech courts

329. The Respondent submits that most of the Claimants' submissions in respect of legitimate expectations, legal stability, non-retroactivity, and the alleged lack of justification of the challenged measures were exhaustively heard – and rejected – by the Constitutional Court and the Supreme Administrative Court. While conclusions

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[187] SoD, §§29-31.
[188] Rej., §5(k).
[189] Rej., §5(j).

under domestic law are not determinative for the Tribunal, the rationale of the Czech Courts is nonetheless relevant.

i. Tariff reduction in the [redacted] lease

330. The Respondent argues that the operator of the [redacted] plant, [redacted], and the local municipality agreed on a risk-sharing provision applying to a scenario in which feed-in tariffs would fall by over [redacted]% during the term of the lease.[190] For the Czech Republic, the existence of such a provision shows that the Claimants knew that the feed-in tariffs could be reduced at any time.

j. The Claimants' due diligence

331. The Respondent stresses that the Claimants had no prior experience in the solar PV sector. Had they acquired a proper understanding of the legal framework or given due regard to the circumstances at the time, they would not have formed the expectation that they would continue to benefit from excessive profits without any regulation limiting these profits.

332. The due diligence undertaken by the Claimants before investing in the Czech PV sector was, so says the Respondent, "woefully inadequate or non-existent". The decision to invest was based solely on: "(1) marketing materials provided by, and discussions with, a representative of a Spanish company that had no prior experience in the Czech solar market and little knowledge of the country's legal environment; (2) a one-and-a-half page legal opinion on Czech law signed by a German lawyer; and (3) Claimants' overall 'good experience with the Czech Republic'".[191]

333. According to the Czech Republic, had the Claimants carried out a proper due diligence exercise, they would have understood that the legislative and regulatory framework gave no guarantee of profitability, apart from seeking to ensure a 15-year return of

[190] Exh. R-241, Lease agreement between [redacted] and the city of [redacted], 5 March 2010, Article IV(7) ("If at any time during the term of this lease [i.e., approx. 20 years] the feed-in tariff applicable to the electricity produced in the PV plant shall be decreased by more than [redacted]%, as compared to the feed-in tariff in effect when this lease had been concluded, i.e. the feed-in tariff announced in the ERO Price Decision for the year 2009, the Lessee shall be entitled, subject to delivering a prior written notice to the Lessor, to demand a pro rata reduction of the amount of the agreed rent for the future, or to rescind this agreement.").

[191] Rej., §169.

capital and a reasonable profit for plants that met the parameters set. In particular, no guarantee was given that solar investments would not be subject to changes in taxation. Through a proper due diligence, the Claimants would have also discovered that the Support Scheme was out of balance with its underlying objectives, and that significant changes were thus likely.

334. The Respondent additionally notes that the Claimants' own Czech counsel (i) acknowledged the unexpected fall in the price of solar panels, (ii) noted that the feed-in-tariffs would be modified to adapt to economic conditions; and (iii) warned about the possibility of further changes in the law. What is more, the Claimants themselves were skeptical about the advice they received from their lawyers. For instance, even though the Claimants were told that the feed-in tariffs would remain in place for 20 years, they used a shorter period of 15 years in their business forecasts.

k. Opinion of Ueltzhöffer Balada

335. The Respondent asserts that the one and a half page opinion prepared by Mr. Ueltzhöffer does not suggest that the Claimants' investment would be free from regulation. The opinion says nothing of substance about the 'Bestandsschutz' or about its potential application to the measures at issue. Further, the Claimants could derive no expectation of "legislative stasis" from a statement about the Czech legal system by a German lawyer not qualified to give advice on Czech law. In fact, Mr. Ueltzhöffer was not even authorized to provide legal advice on matters of Czech law and could not be presumed to meet the conditions required to qualify as a Czech lawyer.

336. The letter from Ueltzhöffer, Klett, Jakubec & Partneři (the successor firm to Ueltzhöffer Balada) of August 2015 does not assist the Claimants. It has no evidentiary value as its authors have not presented themselves as experts or witnesses. Furthermore, Mr. Ueltzhöffer claims that his earlier advice was validly given because it was on the letterhead of Ueltzhöffer Balada, a "general partnership", and must be regarded as legal advice provided by the firm. Yet, Ueltzhöffer Balada is an "association (sdružení)", which lacks legal personality. As such, it cannot itself practice law. Finally, under Czech law, the presumption is that foreign registered lawyers like Mr. Ueltzhöffer do not have the necessary experience and knowledge in matters of Czech law.

I. State aid incompatible with EU Law

337. The Respondent submits that the Decision makes clear that the Support Scheme constitutes State aid within the meaning of Article 107(1) of the TFEU. The Claimants' submissions to the contrary must thus be rejected.

338. The Czech Republic further submits that, in its Decision, the Commission found that the Support Scheme constituted "unapproved" State aid since it was introduced in 2006. The Commission further found that under EU law, there was no "right" to State aid and no legitimate expectation to receive unapproved State aid.

339. Under EU State aid law, so says the Respondent, the Czech Republic is prohibited from paying subsidies to solar investors in excess of their cost of capital. Thus, beneficiaries of State aid – like the Claimants – cannot "invoke any 'legitimate expectations' to claim entitlement to more aid than currently granted".[192] The Commission held that the level of State was admissible only because it took into account the Solar Levy, the tax exemption and the reduced depreciation periods. Had it not done so, the "approval of the State aid by the Commission likely would have been impossible".[193]

340. The Respondent emphasizes that the Claimants are sophisticated businessmen with access to specialist legal advice. They cannot ignore EU State aid law. By investing in a subsidized regime within the EU, the Claimants accepted the risk that this regime may be contrary to EU law.

341. The Czech Republic also argues that the Claimants have not shown that they invested on the basis of assurances that the Support Scheme would not be characterized as incompatible State aid. The 2003 Explanatory Report dates from a time well before the Claimants' investment and was not addressed specifically to the Claimants. In any event, there is no evidence that the Claimants even reviewed the Report before investing in the Czech Republic. Further, the 2003 Explanatory Report was based on the Czech Republic's then understanding of State aid, which has since been considerably clarified.

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[192] Respondent's Comments on the Commission Decision, §31.
[193] Respondent's Comments on the Commission Decision, §19.

342. Moreover, according to the Respondent, the Claimants' reliance on the Czech Republic's views in 2003 as to the characterization of the Support Scheme under State aid law was misguided. State aid is an EU matter which the Czech Republic lacks the competence to assess. The Czech legislators are not the "competent authority" and their statements cannot give rise to legitimate expectations in this respect.

m. The legislative changes were foreseeable

343. The Respondent first submits that the impugned measures were not retroactive. It notes that, in its Decision, the Commission expressed the same view.

344. The Claimants are said to have misunderstood the Respondent's case on foreseeability: "[t]he Czech Republic has never argued that the Solar Levy was specifically foreseeable prior to middle of 2010".[194] Rather, the Respondent's position is that "investors who invest in a regime involving subsidized regulated tariffs must understand that regulatory intervention is possible to recalibrate a regime if it is known to be in imbalance with the purpose of the law".[195]

345. According to the Respondent, an imbalance did exist: the reasonable rate of return set out in the Technical Regulation was 7% per year over 20 years. Therefore, in respect of any solar installation commissioned after 1 January 2008, ERO sought to achieve (i) a reasonable rate of return equal to 7% per year over the 20-year life of the installation, and (ii) a payback of justified investment costs in no more than 15 years. However, the solar boom in combination with the 5% brake rule made it impossible for ERO to comply with these benchmarks, resulting in faster payback and higher rate of return for solar installations commissioned in 2009−2010. In these circumstances, the Claimants should have foreseen changes in the regulatory regime.

n. The measures taken by the Czech Republic were reasonable

346. The Respondent finally insists that the measures at issue were taken after earlier measures had failed to stop the ever-increasing investments in the solar sector. By late 2010, the Czech Republic was suffering from the effects of the global financial crisis and had a serious budget deficit. Given the Republic's efforts to put an end to the solar

[194] Tr. (Day 4) 662:6-8.
[195] Tr. (Day 4) 662:9-12.

boom as quickly as possible, at the time they invested, the Claimants "could not have had any legitimate expectations of legislative stasis".[196] This is all the more true as there was then a moratorium on new connections.

347. For the Respondent, a State measure is "reasonable" if it "bears a reasonable relationship to some rational policy". In assessing "reasonableness", two elements must be considered: "(1) the existence of a rational policy; and (2) the reasonableness of the act of the state in relation to the policy".[197] Here, the measures taken by the Czech Republic were reasonable.

348. The Respondent adds that, "[g]iven the significant 'mismatch of production and subsidies for PV', it was entirely rational for the Czech Republic to craft measures aimed at correcting the system and easing the burden on consumers. The solution adopted by the Czech Republic was appropriately tailored because it (1) allowed investors to continue making reasonable returns on their investments; (2) taxed only the "windfall" profits (i.e., those profits that were above the reasonable level of return), in an effort to mitigate the effects upon consumers, and the economy generally; (3) leveled the playing field among all RES producers generally; and (4) leveled the playing field among solar energy producers specifically (by targeting the amendments at the groups that were receiving the largest windfalls)".[198]

349. The Czech Republic also acted reasonably to rectify the good faith mistake in the mechanism established to calibrate the RES subsidies, the mistake being the 5% limit on FIT decreases for the solar plants commissioned in the following year. Moreover, rather than applying a blanket measure to all RES producers or to all PV producers, the Respondent carefully recalibrated the Support Scheme to target only those producers who benefited from the "greatest imbalance" between subsidy and costs.

350. Finally, the Respondent submits that the "realignment" of the Support Scheme was needed not only to respond to surging energy prices in circumstances of "economic turmoil", but was also needed to avoid overcompensation contrary to EU State aid law. This can hardly be considered arbitrary or unreasonable. Indeed, the Treaty cannot be

[196] Rej. §5(e).
[197] Rej., §455.
[198] Rej., §462 (internal citations removed).

interpreted as requiring the Czech Republic to maintain support to solar RES production contrary to its international obligations under EU law.

o. The Decision

351. The Respondent finally submits that, in its Decision, the Commission considered whether the impugned measures breached the FET standard under the Treaty. The Commission concluded that there was no violation, a conclusion which this Tribunal should reach as well.

3. The Commission's Position

352. On its part, the Commission submits that the Czech Republic has not violated its obligations under the Treaty. This is because under EU law, an investor cannot have legitimate expectations with regards to future payments of State aid, save in exceptional circumstances.

353. The Commission observes that producers of renewable energy had argued before the Commission that it should not approve the contested measures on the basis of Article 108(3) TFEU, or else it would violate the general principle of legitimate expectations under Union law and the Energy Charter Treaty, which forms part of Union law. These arguments were rejected. If renewable energy producers like the Claimants so wished, they could challenge the Decision before the Courts of the EU.

4. Analysis

354. Article 2(1) of the Treaty provides:

> "Each Contracting State shall in every case accord investment fair and equitable treatment."

355. As mentioned earlier, the Claimants allege that by abrogating the Tax Incentives and introducing the Solar Levy, the Respondent breached Article 2(1) of the Treaty.

356. The Tribunal notes that the claims under Article 2(1) of the Treaty are based on "the protection of Claimants' legitimate expectations" and on "the obligation not to

deliberately cause harm to Claimants' investments".[199] The Claimants have not precisely challenged the impugned measures as being arbitrary or discriminatory.

357. Before analyzing the Parties' arguments ((c) and (d) below), the Tribunal considers it useful to set out its understanding of the guarantees provided in Act 180 ((a) below) and describe the circumstances in which the contested measures were introduced ((b) below).

a. Act 180

358. As mentioned above, Act 180 was adopted in March 2005 to support the production of electricity from all forms of RES sources through tariff and non-tariff measures.

359. Section 6(1) of Act 180 starts by providing that the ERO will set the "buy-out price" or FIT,[200] for solar RES one calendar year in advance in the following terms:

> "Level of the prices for the electricity from the renewable sources and the green bonuses
>
> (1) The Authority defines the buy-out prices for the electricity from the renewable sources (hereinafter referred to as the "buy-out prices") separately for individual types of the renewable sources and the green bonuses always for the calendar year in advance in such way that […]"[201]

360. Subsection 6(1)(a) then stipulates that the buy-out prices or FIT must be set to allow the Czech Republic to meet its indicative target of 8% of energy from renewable sources out of the total electricity production by 2010:

> "[…] conditions are created for the fulfilment of the indicative target of the share of the generation of the electricity from the renewable sources in the gross consumption of the electricity amounting to 8 % in the year 2010 […]"[202]

361. Subsection 6 (1)(b) then provides that the "buy-out price" or FIT for solar RES must be such that the solar PV plants that fulfil technical and economic parameters can achieve

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[199] Reply, §216.

[200] The Claimants understand the term "buy out price" to refer to the FIT. See SoC, §206 ("Pursuant to Section 6(1) of Act 180, this guaranteed feed-in tariff (in the Act given the term "buy-out prices") […]".).

[201] Exh. C-031, Claimants' Translation of Article 6 of Act 180.

[202] Exh. C-031, Claimants' Translation of Article 6 of Act 180.

a "return of investment" in 15 years. It identifies some of these parameters, and refers to the implementing regulation for others:

> "b) for the devices put into operation
>
> 1. after the date of the effect of this Act, the fifteen-year period of time of return of investment is reached with support of the buy-out prices under the condition of the fulfilment of the technical and economic parameters, that are especially the costs for the installed unit of the output, the efficiency of the use of the primary content of the energy in the renewable source and the period of time of the use of the device and that are defined in the implementing regulation […]"[203]

362. The "implementing regulation" mentioned in Section 6(1)(b) refers to the Technical Regulation, which reads as follows:

> "In order for the 15-year pay-back period to be assured through the support by Purchasing Prices of electricity produced from renewable sources, technical and economic parameters of an installation producing electricity from renewable sources must be satisfied, where the producer of electricity from renewable sources shall achieve, with the given level of Purchasing Prices
>
> a) an adequate return on invested capital during the total life of the installation, such return to be determined by the weighted average cost of capital (WACC), and
>
> b) the net present value of the cash flows after tax over the total life of the installation, using a discount rate equal to WACC, at least equal to zero." [204]

363. In other words, the Technical Regulation provides that the FIT called here "Purchasing Prices" must be set at a level that ensures a return of the investment in 15 years (a) with an "adequate return" determined on the basis of WACC (b).

364. The methodology for calculating such adequate return is in turn contained in the ERO Methodology available on the ERO website, which reads as follows:

> "When determining purchasing prices [the ERO] proceeds on the basis of the fundamental rules stipulated in [Act 180] and related implementing legal regulations.
>
> 1.1 Methodology for deriving purchasing prices

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[203] *Id.,* Section 6 (1)(b)(1).

[204] Exh. R-013. Technical Regulation, Section 4(1).

> Purchasing prices for electricity are set for individual types of RES […] from data on reference projects. […]
>
> 1.2 Input data for projects – breakdown
>
> […] Useful life period and replacement period for parts of investments
>
> The minimum prices are calculated for the period of the useful life of the relevant investments. Such useful life period is stipulated for individual kinds of RES in the ERO Decree No. 475/2009 Coll., which implements certain provisions of [Act 180]
>
> 1.3 Assumptions concerning common economic parameters in the calculations
>
> […] Discount rate – return on capital
>
> This is a key assumption. The methodology used assumes an after-tax WACC of 7%, used as the discount rate (the IRR of projects = 7%). […]
>
> 1.4 Methodology for calculation of green bonuses for individual categories of RES […]
>
> The ERO has thus far used a nominal discount rate of 7% for setting purchasing prices."

365. The Technical Regulation and the ERO Methodology thus established that the ERO would set the FIT so as to allow producers to achieve a return on investment of 7% p.a. Applying these texts and taking into account that Act 180 set the duration of the payback period at 15 years, this meant that the level of the FIT to be set by the ERO was such that it would ensure (a) a 15 year simple payback of capital expenses and (b) a rate of return or profit of 7% per year for 15 years for those plants that could satisfy the ERO's technical and economic parameters.

366. Subsection 6(1)(b)(2) then provides that "the amount of revenue" will remain unchanged for electricity from renewable sources "with the support of the buy-out prices" for a period of 15 years from the date when the solar plant is put into operation "as a minimum":

> "2. after the date of the effect of this Act, the amount of the revenues stays unchanged for the unit of the electricity from the renewable sources with the support of the buy-out prices for the period of time of 15 years since the year, when the device was put into operation as minimum amount whilst taking the price index of the industrial producers into consideration; also the completion of the reconstruction of the technological part of the existing device, the change of the fuel or the

> completion of the modernisation, that increases the technical and ecological level of the existing device, are also regarded as putting the device into operation […]"[205]

367. In the Tribunal's view, when subsection 6(1)(b) is read in its entirety, it is clear that the language "amount of revenue stays unchanged" in section 6(1)(b)(2) was not an absolute guarantee of revenues to solar PV plants. Subsection (b)(2) makes reference to the "buy-out prices" mentioned in subsection (b)(1), expressly stating that they are to "support" the "revenues" of solar PV plants. The buy-out prices themselves are set following the criteria contained in the Technical Regulation and the ERO Methodology, which state that the price will ensure a 15 year payback of capital expenses and a return on investment of at least 7% per year over 15 years. Thus, there is no abstract promise of "revenues" to investors. The revenues are tied to the buy-out prices, and the buy-out prices are, in turn, tied to the guarantees of a 15 year payback of capital expenses and a return on investment or profit of at least 7% per year over 15 years.

368. This conclusion derives from the text of Act 180 and its supporting framework. Indeed, the only mention of the term "revenue" in Act 180 is in section 6(1)(b)(2), where it is used in the context of the buy-out prices. Further, neither the Technical Regulation nor the ERO Methodology provide a basis for calculating "the amount of revenues" of solar PV plants, as something different from the buy-out prices. By contrast, they do provide instructions on the calculation of the buy-out prices, specifying that these prices are to be set at a level that guarantees a 15 year payback of capital expenses and a return on investment of at least 7% per year over 15 years.

369. The Tribunal thus concludes that, through section 6(1) of Act 180 and its implementing regulations, the Czech Republic promised that the buy-out price or FIT would be set at a level ensuring a 15 year payback of capital expenses and a return on investment or profit of at least 7% per year over 15 years for those solar PV plants that met the relevant parameters.

370. The Constitutional Court reached a similar conclusion,[206] and its decision was cited with approval by the Supreme Administrative Court.[207]

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[205] Exh. C-031, Claimants' Translation of Article 6 of Act 180, Section 6 (1)(b)(2).
[206] Exh. R-084, Decision of the Constitutional Court, case no. Pl. ÚS 17/11, 15 May 2012, §68.
[207] Exh. R-124, Decision of the Supreme Administrative Court, case No. 2 Afs 13/2013-28, 15 August 2013, pp. 6 et. seq.

371. The Commission also concluded that Act 180 did not guarantee a fixed FIT:

> "Act No. 180/2005 Coll. did not guarantee a certain purchase price or green premium, but only a simple payback of the investment over a period of 15 years. The levy on photovoltaic producers has been calculated so as to ensure such simple payback, but no more."[208]

372. As a result, the Tribunal cannot agree with the Claimants' and the Dissent's suggestion of a separate guarantee of an absolute FIT price level in the abstract, set independently of the guarantees of a 15 year payback of capital expenses and an annual return on investment of at least 7% over 15 years. As was discussed above, the "revenues" of solar PV plants are dependent on the "buy-out" prices, which must be fixed at a level that guarantees a 15 year payback of capital expenses and a 7% profit over 15 years. Thus, so long as these two guarantees continue to be maintained, investors obtain the level of revenue promised by the Czech Republic and there cannot be a breach of section 6(1) of Act 180.

373. Moreover, contrary to the suggestion of the Claimants and the Dissent, these guarantees were sufficient to attract investment in solar RES production. [redacted], on whose advice the Claimants invested in the Czech Republic, found the guarantees of the Czech Republic "sufficiently attractive",[209] namely sufficient to attract investors' interest.[210] Similarly, while pursuing its own analysis, the Commission also deemed the rates of return guaranteed in Act 180 reasonable and in line with the renewable support schemes of other EU member States.[211]

374. It follows from this review that neither the legislation nor the implementing framework capped the returns of solar RES producers at 7%. If investors were able to invest and operate efficiently, their returns could well be over 7% per year. The Claimants' own returns were in excess of 7% per year, both before and after the contested measures.

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[208] Exh. R-277, §135.

[209] [redacted] WS I, §12 ("In conjunction with the solar radiation in the Czech Republic and the then existing investment costs per megawatt peak for PV plants, the guaranteed feed in tariffs resulted in a rate of return which was sufficiently attractive.").

[210] Tr. (Day 1) 230:19-20.

[211] Commission Decision, §99.

b. Context of introduction of Solar Levy and withdrawal of income tax incentives

375. As was stated earlier, the Respondent adopted Act 180 in March 2005 to support the production of electricity from all RES sources including windmills, biomass plants and solar energy.[212] Solar electricity generation was not foreseen to contribute a significant part of RES generation: it was predicted that solar RES production would account for 15 GWh of electricity generation in 2010, as compared to 2,200 GWh from power plants using biomass.[213] Further, the solar sector was generally expected to consist of "small producers" with a "very low economic rate of return."[214] This is not surprising, as the geographic location and climatic conditions of the Czech Republic make solar electricity generation there relatively inefficient.[215] Finally, while prices were expected to rise because of the subsidies given to RES producers through Act 180, the Czech Republic expected this increase to be "manageable", in the range of 1% per year.[216]

376. In the years following the adoption of Act 180 until about September 2008, there was no significant increase in solar electricity generation.[217] The vast majority of electricity from RES was generated by hydro and biomass power plants, with wind power growing in importance towards the end of that period.[218]

377. As was seen earlier, the parameters for calculating the FIT for solar RES producers were set out in the Technical Regulation[219] and included the cost of solar panels, which

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[212] Exh. R-147, 2003 Bill and Explanatory Report (Respondent's translation), p. 14.

[213] Exh. R-147, 2003 Bill and Explanatory Report (Respondent's translation), p. 14. See also Exh. R-148, M. Bursík, "Renewable resources: the new law is an opportunity for modern municipalities" (moderniobec.cz), 1 June 2005, which presents some similar figures, and Exh. C-099, Report on meeting the indicative target for the production of electricity from renewable sources in 2004, September 2005, p.21, §6 ("Having regard to the availability of usable energy potential, the key to meeting the indicative target is to build installed capacities in terms of biomass (about 150 MW), small hydropower plants (about 100 MW) wind power (about 600 MW) and biogas. As for the other renewable sources, either their potential is already being fully exploited or their use is impracticable in the timeframe in question").

[214] Exh. R-147, 2003 Bill and Explanatory Report (Respondent's translation), p.19.

[215] Exh. R-151, Juraj Beták and others, "Solar resource and photovoltaic electricity potential in EU-MENA region," 2012, Figures 1 and 2 and Tables I and II.

[216] Exh. R-147, 2003 Bill and Explanatory Report (Respondent's translation), p.24.

[217] Exh. R-162, 2007 Report on the Achievement of the Indicative Target for Renewable Electricity Production, September 2008, §7.

[218] [redacted] WS, §10.

[219] Exh. R-013, Technical Regulation.

was the largest capital expense associated with solar power projects.[220] By late 2008, the cost of solar panels had decreased by approximately 40% from the levels in 2005.[221] As a result, solar RES producers could set up generation facilities at a considerably lower cost, which is depicted in a study of the Czech Renewable Energy Agency:[222]

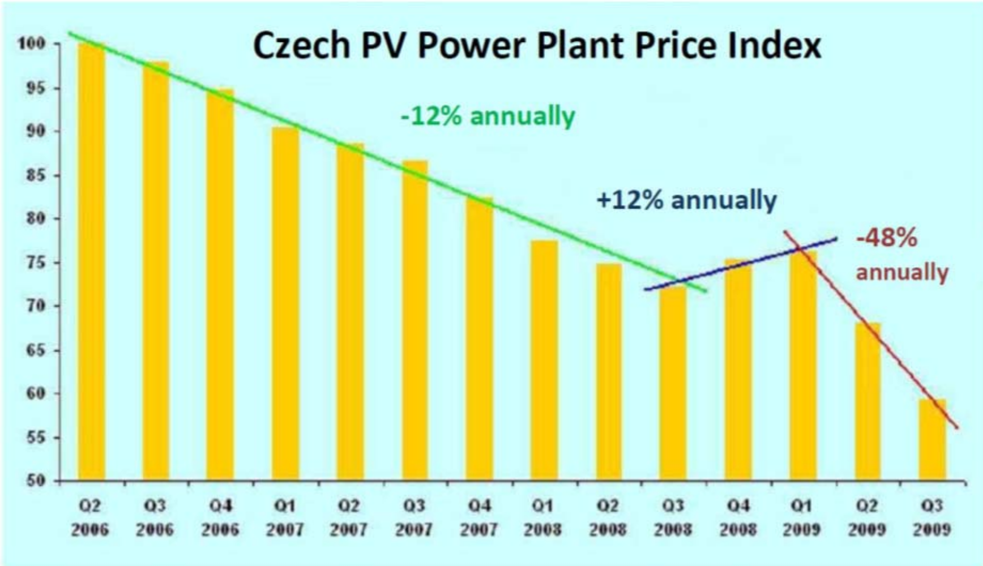

Chart: The same data converted using the CZK/EUR exchange rate

378. The Agency observed that the reduction in the cost of solar panels could go down to 50% of the levels seen before 2008. It also noted that the fall in prices should lead to a decline of the FIT by 30% for large installations and 10% for small installations.

379. Pursuant to Section 6(3) of Act 180 and Section 4 of the Technical Regulation, the FIT was determined once a year – for plants to be commissioned in the year ahead – by reference to the producers' costs. As the principal capital expense for solar power projects was the price of the solar panels, the reduction in solar panel prices should

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220 Solar panels take up to 74% of the capital outlays required to construct a solar generation facility. See Jones ER 1, §5.15, relying on Annex 3, Solar panel price data from PVExchange.com.

221 Jones ER 1, Figure 7, Annex 3. The Claimants dispute this position, contending that the Respondent's submission is "completely devoid of any substantiation" and pointing out that the Respondent has not explained whether and to what extent investors benefited from the decrease in prices of solar panels (Reply, §§71-72). The Tribunal does not find this to be the case.

222 Exh. R-178, Photovoltaic power plants – installed capacity in 2009, preliminary estimate, Czech RE Agency, September 2009, p.4.

have led to a lower FIT for the solar producers in the range identified by the Czech Renewable Energy Agency.

380. However, the Czech Republic could not reduce FIT prices because of the 5% brake rule, which required that the FIT for any new plant put into operation would not be lower than 95% of the FIT payable to plants put into operation in the previous year. Accordingly, the ERO was unable to reduce the FIT by more than 5% for plants commissioned in 2009 and further no more than 5% for those commissioned in 2010. As a result, the FIT remained high, even though producers' costs had dropped by over 30% since 2008.

381. The resulting imbalance between the cost of setting up solar generation facilities and the profits generated from such facilities meant that solar RES producers who invested in the Czech Republic in 2009 and 2010 stood to benefit from a level of profitability that exceeded the rate of return that was originally contemplated by the Support Scheme. As a result, solar producers rushed in to set up solar plants in the Czech Republic, which is described as a "solar boom". The Claimants made their investment in this period.

382. The resulting solar energy production vastly exceeded original expectations; it was 40 times higher than envisioned when enacting Act 180.[223] Instead of the expected 15 GWh production,[224] the actual production in 2010 was 616 GWh and the actual production in 2011 was 2,182 GWh, more than three and a half times higher than the 2010 figure.[225] Similarly, while in September 2008 installed capacity was predicted to be 10 MW by the end of 2010, the real figure turned out to be almost 200 times higher, at 1,960 MW.

383. The "solar boom" had several deleterious effects, which were noted by Mr. [redacted], the then chairman of the ERO:

> "First, a geometric growth in the highest-priced RES electricity generation would greatly increase the price of RES support paid by consumers, leading to unsustainably high electricity prices for households and

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[223] Jones ER 1, §6.16, Table 4.

[224] Exh. R-162, §7, The 2007 Report on the Achievement of the Indicative Target for Renewable Electricity Production, September 2008, estimated an annual production of 6GWh.

[225] Jones ER 1, Table 4.

businesses, which were already suffering from the effects of the financial crisis. Second, the situation would result in significant and unjustified profit increase of solar investors vis-à-vis other RES producers and other price-regulated entities. Third, a solar boom would threaten the stability of the grid, given the unpredictable and volatile nature of solar electricity production."[226]

384. In these circumstances, the Czech Republic took several measures to curb the solar boom. First, in or before July 2009, the national transmission system operator and the regional distribution system operators responsible for handling applications to connect new photovoltaic installations to the electricity grid started refusing applications.[227] Later, in February 2010, they agreed to a moratorium on approving applications to connect new photovoltaic installations to the grid.[228]

385. Second, after more than a year of discussion, by amending Act 180 on 21 April 2010, the 5% brake rule was abolished. As a result, the ERO could reduce the FIT by more than 5% for plants connected in the following year i.e. in 2011. The reasons for doing so were stated in a press release of the Ministry of Industry and Trade of 24 August 2009:[229]

> "The reason for the amendment of the act is primarily the situation in the area of photovoltaic devices, where the grant policy from the part of the state has ceased to fulfil its primary function
>
> […]
>
> The ongoing reduction in the prices of photovoltaic panels is leading to the uncontrolled development of solar power stations. Whereas technological advances have reduced the price of photovoltaic panels by more than 40%, by law the Energy Regulation Office can only reduce the purchase price of electricity for new renewable sources by 5% per year. So at present a significant advantage is being provided to newly built photovoltaic power stations compared to other sources of renewable energy.
>
> […]
>
> [I]f the current state were maintained the price for the delivery of electricity would rise by more than CZK 50/MWh for all customers in the

226 [redacted] WS, §13.

227 Rej. §94, relying on Exh. R-171, Letter from J. Fiřt to the Minister of Industry and Trade, V. Tošovský, 1 July 2009.

228 [redacted] WS, §21.

229 The press release stated the intent of the Ministry to abolish the 5% brake rule starting from 1 January 2010, but the limit was eventually abolished from 1 January 2011 by Act 137/2010.

> Czech Republic just as a result of increase in photovoltaic devices. In 2011 the price for customers would be even higher.
>
> The purchase prices for electricity from photovoltaic devices are guaranteed for 15 years, but thanks to new technology in certain cases the return on the investment is a mere 5 years. The level of the purchase price for electricity from a photovoltaic device is almost CZK 13/kWh, whereas the market price for electricity is around CZK 2/kWh."[230]

386. Third, through its National Renewable Energy Action Plan of July 2010, the State indicated that hardly any additional solar generation capacity would be added during the entire decade from 2010 until 2020.[231] It was said that the Plan "would basically exterminate the development of solar energy."[232]

387. Fourth, in September 2010, the Government submitted a draft Act 330/2010 Coll. for Parliament's approval calling for a withdrawal of subsidies from all solar RES producers except the smallest rooftop solar installations that had an installed capacity of up to 30 kWh.[233] The draft was approved by Parliament on 3 November 2010 and the Act came into effect from 1 January 2011; however, the provisions limiting the support only to the producers with that small capacity entered into force on 1 March 2011.

388. Yet, these measures failed to stem the tide of investment in solar RES. By contrast they led to a "perverse dynamic" – to use the Respondent's words – which saw an increase in the number of solar PV projects before 1 January 2011, when most of the measures just mentioned would come into effect.

389. As mentioned above, the FIT was funded through a compulsory surcharge set by the ERO in its yearly price decisions and invoiced to all electricity consumers by the grid operators as part of the electricity bill.[234] The increased number of solar PV

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[230] Exh. R-175, Ministry of Industry and Trade will Equalize the Support of Renewable Energy Sources, Ministry of Industry and Trade Press Release (www.mpo.cz), 24 August 2009.

[231] Exh. R-142, Czech National Renewable Energy Action Plan, July 2010, pp. 77–79 (projecting 1650 MW of installed solar capacity in 2010 and 1695 MW installed by 2020).

[232] Exh. R-198, J. Vlková, "Solar business will slow down, yet the price of electricity will soar," Mlada Fronta Dnes, 16 September 2010.

[233] Exh. R-201, Explanatory Report to Draft Act No. 330/2010 Coll., 15 September 2010, p. 8. Act 330/2010 Coll. The Act did not affect installations put in operation before March 2011 and therefore is not one of the measures challenged in this dispute.

[234] Exh. R-037, ERO Price Decision No. 14/2005, 30 November 2005; Exh. R-038, ERO Price Decision No. 9/2006, 27 November 2006; Exh. R-039, ERO Price Decision No. 9/2007 26 November

investments thus meant that Czech electricity consumers (including businesses and households) would face considerable increases in electricity prices. On its part, the Government would have to contribute to a portion of the FIT from its general budget at a time when the Czech Republic was not only struggling with the effects of the global financial crisis, but also suffering from a political crisis, which resulted in the appointment of a technocratic caretaker government from May 2009 to July 2010, as the early elections planned for 9 and 10 October 2009 had to be postponed to 29 and 30 May 2010, as a result of the Constitutional Court decision rendered on 10 September 2009.

390. The problems caused by the rising costs to the State of supporting the solar PV plants as a consequence of the solar boom experienced in 2009 and 2010, were highlighted in an "Explanatory Report to a proposed Act amending the Act on Promotion" dated 13 October 2010:

> "According to the analyses of ERO made in cooperation with distribution system operators in September […] there would be increase in the electricity prices by 12.7 % for households and by 18.4 % for industrial consumers as a result of the annual increase in the amount of the contribution from the present CZK 166 per MWh to CZK 547 per MWh.
>
> It is clear from the analysis of the impact of the contribution in the amount of CZK 500 per MWh, which was prepared by the Coordination Committee established by the Government on 22 September 2010, that this level of contribution becomes liquidating for the Czech industry. If this amount of contribution is actually included [in] the price of electricity, there will be:
>
> - A massive drop in tax revenues of the State, because due to the increased costs for electricity numerous businesses will end up in loss instead of having a planned profit;
>
> - Immediate layoffs in major industrial enterprises amounting to tens of thousands of employees who will be subsequently entitled to unemployment benefits, housing assistance, etc. (the chemical industry estimates up to 10 000 employees);
>
> - Termination of business activities of some large industrial enterprises in the Czech Republic and transfer of production to other countries."[235]

2007; Exh. R-031, ERO Price Decision No. 9/2008, 18 November 2010; Exh. R-033, ERO Price Decision No. 7/2009, 25 November 2009.

[235] Exh. R-028, Explanatory Report to a proposed Act amending the Act on Promotion, 13 October 2010, pp. 2-3.

391. It was therefore thought necessary to take additional financial measures to limit the rise of electricity prices and alleviate the burden on the Czech economy. Discussions on these issues had commenced in November 2009.[236] In fact, already on 23 September 2010, the Minister of Finance mentioned the three measures at issue in this arbitration, i.e. the Solar Levy, the withdrawal of the tax exemption and the change to the depreciation period:

> "[t]he budget is the priority for the minister and new losses will be filled by the novelty called solar tax.
>
> […]
>
> My proposal cancels the 5-year tax exemption. This applies to all facilities, not only those that are yet to be connected. The last year when this tax exemption can be applied is 2010. In addition, I am moving the technology which is now in the second or third depreciation group [to] the fourth depreciation group. This means that things that used to depreciated over 5 to 10 years, will be depreciated over 20 years.
>
> […]
>
> In some places we tightened the screws, in others we released them and the result [on the budget] is zero."[237]

392. It was in these particular circumstances that the Czech Government withdrew the Tax Incentives (i) and introduced the Solar Levy (ii).

(i) Withdrawal of the Tax Incentives

393. On 8 December 2010, through Act 346/2010, the Czech Republic adopted changes to the Income Tax Act, abolishing the five-year income tax exemption and amending the tax depreciation period for solar panels.

394. The reasons for withdrawing the tax exemption were mentioned in the Explanatory Report accompanying Act 346/2010:

> "The proposed changes are in response to the need to eliminate all legal means for the indirect support of electric power generation from renewable resources (mainly solar power plants) that is no longer justified, and therefore they are making taxation on environmentally

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[236] See, for instance, Exh. R-202, "Additional payments for solar energy reached three billion; the state may curtail their boom" (Novinky.cz), 2 November 2009.

[237] Exh. R-206, P. Vašek, "We made concessions but it will not put the budget at risk," Hospodářské Noviny, 24 September 2010.

friendly power generation sources and facilities stricter and eliminating the tax-exempt status of income from the operation of environmentally friendly power generation facilities. In order to simplify legal regulation and enable easier administration, the elimination of this exempt status for other environmentally friendly facilities has also been proposed."[238]

395. Similarly, the rationale for amending the depreciation provisions were stated as follows:

> "Since more than three quarters of costs need to be spent for the technological part of solar power facilities and only one quarter needs to be spent for the construction part of solar power facilities, and the construction part is usually included in depreciation group 4 with a depreciation period of 20 years (and in the case of construction projects for a definite period even 30 years), the specified changes have been proposed only for the technological part of the assets. For the purpose of easier application of the proposal, the technological part, which consists particularly of solar panels, converters and switches, is defined by its inclusion in the Standard Production Classification groups with code 31.10, 31.20 or 32.10. The change has been proposed in view of the fact that in the case of solar technology there has been a sharp decrease in acquisition prices, particularly for solar panels, and an increase in their efficiency."[239]

396. Both the withdrawal of the tax exemption and the amendment to the depreciation provision of the Income Tax Act were measures that had been taken before by the Czech Republic in different contexts.[240]

(ii) Introduction of the Solar Levy

397. On 14 December 2010, through Act 402/2010, the Czech Republic introduced the Solar Levy. When doing so, it was careful not to alter the framework of Act 180.

398. First, only those producers who benefited the most from the solar boom, i.e. solar plants commissioned in 2009 and 2010 were subject to the Solar Levy. Initially, the Solar Levy only applied for three years from 1 January 2011 for the PV plants put into operation between 1 January 2009 and 31 December 2010.

[238] Exh. R-221, Explanatory Report to Draft Act No. 346/2010 Coll., 26 October 2010, pp. 27−28.
[239] Id., p.28.
[240] See Rej., §164, and the examples cited therein.

399. Second, when setting the Solar Levy, care was taken to ensure that the initial payback period of 15 years for capital expenses and the reasonable profit of 7% promised through Act 180 would be retained. As Mr. [redacted] explained:

> "Before settling on a Solar Levy, the Ministry of Industry and Trade requested ERO to assess whether simple payback and return on investment parameters would still be met. We assessed the proposed levy and determined that investors would still receive simple payback of their investment in less than 15 years and that return over the life of the investment would remain appropriate, i.e. above the 7% WACC. We therefore considered that the levy was properly calibrated to reduce the excessive profit provided by the Subsidies."[241]

400. Eventually, the Solar Levy was set at 26% initially for a period of three years to ensure that these elements of Act 180 were maintained. The Government resolution accompanying Act 402 explained this as follows:

> "The ERO in the determination of the purchase prices mainly acts according to Act No. 180/2005 Sb. on support of electricity production from RES, as well as related implementing regulations. One of the significant documents is Decree of ERO No. 475/2005 Coll., as amended, which among other things stipulates the technical and economic parameters applied to the calculation of the prices for a given type of plant for production of electricity from RES and the concerned calendar year. Typically this concerns measurable investment costs, assumed period of usage and lifecycle of the given type of source.
>
> The ERO last time amended this Decree in mid-2009 under Decree No. 409/2009 Coll.), in which it responded to the decline in the prices of solar technology and on the basis of evaluation of concrete projects from the first half of 2009, it set reference investment costs for installed sources with an output above 30 kWp in the amount of 90 thousand CZK/kWp, respectively 90 million CZK/MWp.
>
> If we use this binding legislative condition to calculate the purchase price and if we set the next ROI parameter at 11 years at 7% discount, we get a purchase price of CZK 9000/MWh. This value is 26 % lower than the purchase price set for 2010 in the amount of CZK 12150/MWh (due to the limitation of decline to only 5 %). While the ROI guaranteed by law is 15 years.

[241] [redacted] WS, §25.

> The simple ROI of 11 years for calculation of the size of the withholding tax was chosen in view of the fact that the same period was chosen in the amendment bill to Act No. 180/2005 Coll. (No. 137/20101 Coll.) as the threshold value, which if exceeded makes it possible to choose an extraordinary (steeper) drop of the price, than the standard maximum of 5%".[242]

401. As mentioned above, the Czech Constitutional Court observed that despite the withdrawal of the Tax Incentives and the introduction of the Solar Levy, a PV plant meeting the ERO's technical parameters would achieve a simple payback of capital expenses within 15 years and a 7% adequate return.[243]

402. This conclusion was confirmed by the Respondent's expert Mr. Peer. He replicated the model used by the ERO in setting the FIT and assessed whether, following the adoption of the contested measures (including the Solar Levy), a model PV plant with the technical parameters specified by the ERO would achieve (i) simple payback of capital expenses within 15 years; and (ii) the 7% adequate return. According to his analysis, a plant commissioned in 2010 and meeting the ERO's technical parameters would achieve a simple payback in [redacted] years and would obtain a rate of return of [redacted]% per year over its 20-year useful life.[244] His analysis was not refuted. Thus, even after the introduction of the Solar Levy, the rate of return and the payback period mentioned in Act 180 and its implementing regulations remained for those solar PV plants that met the ERO's technical parameters.

403. Third, as mentioned above, the Czech Republic also provided an opportunity for individual solar producers to seek relief if the Solar Levy affected them adversely. Indeed, the Ministry of Finance established a procedure under which solar RES producers on whom the Solar Levy had a "strangling effect" could pay the Solar Levy over a longer period of time.[245]

404. The withdrawal of the Tax Incentives and the introduction of the Solar Levy did produce the intended effects. Indeed, while the ERO first set the surcharge for

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[242] Exh. R-216, Draft Government resolution on the problem of electricity price increases due to RES support presented by Ministry of Finance for Government session of 20 October 2010, p. 4.
[243] Exh. R-084, §68.
[244] Peer ER 1, Table 3; Peer ER 2, Table 1 (showing the simple payback period and rates of return for the Claimants' plants as well as the ERO reference plants commissioned in 2009 and 2010).
[245] Exh. R-225, Decision of the Grand Chamber of the Czech Supreme Administrative Court, case No. 1 Afs 76/2013-57, 17 December 2013.

electricity support at CZK 578 per MWh,[246] after Act 402 was published, it reduced the surcharge by 36% to 370 CZK per MWh, limiting electricity price growth to around 5%[247] and bringing it in line with the expectations of the Government when Act 180 was enacted.

405. As mentioned above, Act 180 was repealed and replaced by Act 165/2012 as of 1 January 2013. Act 165 did not address the Solar Levy. Act 310/2013, however, which amended Act 165/2012, extended the Solar Levy for solar plants commissioned in 2010 at a rate of 10%, for the whole period during which the solar PV plant was entitled to the support. The possible extension of the Solar Levy had been contemplated when it was introduced.[248] In any event, despite the extension of the Solar Levy, it was anticipated that a plant operating in accordance with the parameters set by the ERO would achieve a 15 year payback of capital expenses and a return of 7% as guaranteed in the framework of Act 180.[249]

406. On the basis of the foregoing analysis, the Tribunal concludes that under the framework established through Act 180, the Czech Republic guaranteed solar RES producers meeting specific technical and economic parameters a level of revenue through a FIT system ensuring a 15 year payback of capital expenses and an annual return on investment of at least 7% for 15 years. The contested measures were reasonable, being a carefully calibrated response to developments in the Czech solar sector at a time of economic and political uncertainty.[250] The foregoing analysis shows that the measures left the guarantees of payback and return intact for plants meeting the required parameters.

c. Legitimate expectations

407. It is common ground that the FET obligation is breached when the legitimate expectations of an investor are not met. These expectations must arise from

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[246] Exh. R-035, ERO Price Decision No. 04/2010, 30 November 2010, Art. 5.1.

[247] Exh. R-220, "Energy Regulatory Office amended its November decision as expected," ERO Press Release, 29 December 2010.

[248] Exh. R-108, R. Šitner and Z. Kubátová, "The state will tax the solar power plant operators only for three years," Hospodárské Noviny, 3 November 2010.

[249] Peer ER 2, §2.2.2 and Table 3.

[250] This was also the conclusion of the Czech Constitutional Court (Exh. R-084). The Commission observed that the Levy was introduced by the Czech Republic to ensure that solar RES producers were not overcompensated (Exh. 277, Commission Decision, §51).

representations made by the state, on which the investor relied at the time of its investment. They must be objectively reasonable[251] and must take into account all relevant circumstances:

> "To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest".[252]

408. It is also common ground that an investor can have no legitimate expectation that the host State's laws will not change.[253] Indeed, as observed by the tribunal in *Micula*:

> "The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation".[254]

409. To ascertain whether the state has granted a stabilization commitment or given a specific assurance, the form, the content and the clarity of the alleged promise are of critical relevance.[255] As observed in *Total v. Argentina*:

> "the form and specific content of the undertaking of stability invoked are crucial. No less relevant is the clarity with which the authorities have expressed their intention to bind themselves for the future".[256]

410. In line with this jurisprudence, the Claimants admit that "any general legal provision" cannot give rise to legitimate expectations,[257] and that "commitments must […] be specific to have such effect".[258]

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[251] *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain,* SCC Case No 062/2012, Final Award, 21 January 2016, ("*Charanne*"), Exh. RLA-165, §495.

[252] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, §340.

[253] Tr. (Day 1) 25:11-15 ("[I]t is not our contention that an investor can legitimately expect that the laws at the time of investment will not be changed. That would be foolish to expect. Even investment treaties do not cause a freezing of the law.").

[254] *Micula et al. v. Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013 ("Micula"),* §666.

[255] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, §121. See also *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, §547 (stating that the state's promise or representation must be "precise as to its content and clear as to its form").

[256] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, §121.

411. Accordingly, all relevant circumstances must be taken into account to determine whether an investor's expectations of stability are legitimate, including the form and content of the promise of stability. The investor's expectations are to be examined objectively, and the investor must have relied on the state's promises of stability at the time of making its investment.

(i) Solar Levy

412. The Claimants submit that the plain language of Article 6(1)(b)(2) of Act 180 relating to revenues per unit of electricity amounts to a stabilization guarantee.[259] For them, Act 180 contains "a statutory promise that plants connected to the grid would receive a fixed tariff for 20 years"[260] and "investors could expect that the Support Scheme gave price guarantees on specific revenues for 20 years."[261] On the basis of the Respondent's commitment in Act 180, the Claimants, so they say, legitimately expected the FIT to be stable for the first 20 years of operation. However, the Respondent introduced the Solar Levy, which, in effect, reduced the FIT by the amount of the Levy, thereby breaching the Claimants' legitimate expectations.

413. The Tribunal does not agree with the Claimants' position. The Tribunal has extensively reviewed Section 6(1) of Act 180 above [§§358 et. seq.] and concluded that it contains no separate guarantee of an absolute level of revenue, set independently of the FIT system that guarantees a 15 year payback of capital expenses and a return on investment of at least 7% per year over 15 (later 20) years. Indeed, section 6(1)(b)(2), particularly the words "amount of the revenues stays unchanged", cannot be read in isolation. The provision must be read in context with the rest of section 6(1). As explained above [§§358 et. seq.], section 6(1) of Act 180 guarantees, through a FIT system, solar PV plants put into operation after Act 180 (such as the Claimants' plants), a level of revenue ensuring a 15 year payback of capital expenses and a profit of 7% per year over a period of 15 (later 20) years, provided these plants meet specific

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257 Reply, §227.
258 Reply, §227.
259 Reply, §175, ("Act 180/2005 provided […] an express stabilisation: the tariffs applicable at the time of connecting a solar plant to the grid would remain unchanged for 15[20] years. It is an express promise by the State that a certain status of the law would not be changed, i.e. remain stabilized.").
260 Reply, §93.
261 Reply, §42.

parameters. Interpreting this provision in any other fashion would do violence to the text of the provision, and to the broader context of section 6(1).[262]

414. The Claimants should have been aware that the Support Scheme only guaranteed a 15 year payback of capital expenses and at least a 7% return for 15 years.[263] This is because both Act 180 and the Technical Regulation were referred to in the legal opinion of Ueltzhöffer Balada.[264] Further, Mr. [redacted]'s presentation of June 2009 also mentioned the Technical Regulation.[265]

415. It is not disputed that the Claimants continue to receive a FIT that ensures a 15 year payback of capital expenses and at least a 7% return on investment per year. In his First Report, Mr. Peer estimated the Claimants' payback period and rate of return on the basis of the 7% WACC provided by the ERO, as well as the lower WACC used by the Claimants' expert Mr. [redacted]. He concluded that even after the contested measures, the Claimants' revenue remained at a level that would allow a payback within less than 15 years and a rate of return exceeding 7%.[266] In his Second Report, Mr. Peer calculated the payback period and the rate of return on the basis of the Claimants' own inputs for OPEX growth, tax rates and PV panel degradation rates in lieu of utilizing the regulatory rates assumed by the ERO for these parameters, as he had done in his First Report. Like in his First Report, he again found that the Claimants' plants achieved a level of revenue that would allow a payback of capital expenses in less than 15 years and a profit above 7%.[267] The Claimants did not seek to rebut these findings; they gave no instructions to opine on them to their expert Mr. [redacted].[268]

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[262] The 5% brake rule does not alter the guarantees contained in Act 180 and its supporting framework. Indeed, even if any expectations was created by this provision, it remains that through Act 180 and its supporting framework, the Czech Republic only promised a 15 year payback of capital expenses and a return on investment of at least 7% per year over a period of 15 (later 20) years.

[263] SoC §64 ("The presentation by Mr. [redacted] […] made also explicit reference to the Public Notices 475/2005 and 150 of the ERO specifying the implementation of the Support Scheme. In other words, the full Support Scheme was discussed and deliberated, allowing Stefan and Jürgen Wirtgen to get the full picture of the legal framework in force at that time.").

[264] Exh. C-054, Legal opinion concerning the duration of power feed-in remuneration when erecting photovoltaic systems in the Czech Republic by Ueltzhoffer Balada, 2009, p.2.

[265] Exh.C-53, p.9.

[266] Peer ER 1, §§4.4.2-4.4.3.

[267] Peer ER 2, §§3.3.6, 3.3.8.

[268] Tr. (Day 3) 531:25-532:1-5 ("I have not been instructed to review Mr. Peer's calculations of payback periods or implied rate of returns. I have read the Report but I have not done anything to scrutinize the results or even reviewed the inputs going into that calculation. So I, from the bottom of my heart, I just don't know.").

Neither did they question them during Mr. Peer's cross-examination. In fact, Mr. [redacted] himself did confirm that the Claimants were satisfied with their investment:

> "Q. Now, you're a very seasoned businessman, I think, and you must have an idea whether this was a good investment or was it not. Can you share with us what your present impression is?
>
> "A. Well, basically, I would say that, up till now, we are satisfied with the investment but looking at the technical part of the plants, now, in the first years we had not a lot of repairs to do".[269]

416. On the basis of this analysis, the Tribunal concludes that, even after the contested measures, the Claimants' revenue remains within the parameters set by Act 180 and its supporting framework, i.e. the Claimants continue to receive a level of revenue through the FIT system that ensures a 15 year payback of capital expenses and a return on investment of at least 7% per year over a period of 15 (later 20) years. In the circumstances, as the guarantees given by the Czech Republic continue to be complied with in respect of the Claimants, there can be no breach of the Claimants' legitimate expectations.

417. The Claimants have specifically referred to the Support Scheme as the basis of their alleged expectations.[270] The Tribunal has held that the Support Scheme could not legitimately have given rise to such expectations. It has also held that the expectations that the Support Scheme could have legitimately created continue to be met. Thus, the Tribunal could dispense with reviewing the other alleged representations on which the Claimants rely as a source of their expectations, especially in circumstances where the latter consider this exercise unnecessary and view these other representations as merely confirming their expectations arising out of the Support Scheme.[271] For the sake of completeness however, the Tribunal nevertheless proceeds to examine these representations.

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[269] Tr. (Day 1) 192:11-18.

[270] SoC, §205, cited in Reply, §238 ("Claimants specifically referred to this Suport [sic] Scheme as the basis of their legitimate expectations.").

[271] Reply, §238 ("Even though, in view of the unambiguous language of the Support Scheme itself, there was no further need to show that these provisions were objectively to be understood to contain a guarantee to remain unchanged, Claimants also pointed to a series of public statements by senior government members, explanatory notes to the relevant laws and official communications which affirmed the existence of these guarantees.").

418. Besides the text of Act 180, the Claimants submit that the "intention of the legislator" confirms that solar RES producers were to be guaranteed a fixed FIT, for which they rely on an "Explanatory Report to Act 180".[272] The Tribunal sees no merit in this submission. First, there is no "Explanatory Report to Act 180". The 2003 Explanatory Report which the Claimants invoke was submitted to the Czech Parliament along with the initial bill which evolved into Act 180 16 months later. In any event, while the wording and in part the content[273] is different, section 8(1)(b)(1) of the bill referred to a "guarantee" of return of investment costs within 15 years and "reasonable profit."[274]

419. The Claimants also rely on the following language in the 2003 Explanatory Report :

> "[The] Promotion system is based on: […] Provision of guarantees to investors and owners of facilities producing electricity from renewable sources which are beneficiaries of the promotion pursuant to the bill that the profit for one unit of energy produced from renewable sources, for the benefit of producers, shall be guaranteed for 15 years since the putting into operation (or 15 years for facilities which were put into operation before the act comes into effect, respectively)."[275]

420. The Tribunal fails to discern in that report and the bill a commitment that goes beyond the guarantee of a FIT at a level permitting a 15 year return of capital expenses and a "reasonable profit" which later became the "adequate return" measured at a WACC of 7%. As was just seen above, the Claimants continue to benefit from these guarantees despite the Solar Levy.

421. This being so, even if one were to accept that the 2003 Explanatory Report had a different content, *quod non*, the Claimants have not alleged that they had reviewed, let alone relied on the report when making the investment. At the same time, they themselves recognize that an investor must rely on the alleged representations at the

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[272] See, for instance, Claimants' Closing Presentation, p.14 citing Exh. C-041, Explanatory Report ("These conditions were designed in the way so that the provided support created a favorable climate for investors with a sufficiently long and effective guarantees (15 years) […].").

[273] See, for instance, Rej., §58 where the Respondent points out that the bill contemplates a system of tradeable green certificates, which the Explanatory Act considers as one of the "bases" of the "Promotion System." Act 180 however introduces a system of green bonuses instead of tradeable certificates.

[274] Exh. C-041, Explanatory Note of November 12, 2003 to Act 180/2005.

[275] Exh. C-041, Explanatory Note of November 12, 2003 to Act 180/2005, p. 7.

time it makes its investment.[276] The requirement that an investor must have relied on a representation was well-explained in *Invesmart v. Czech Republic*:

> "there is a temporal dimension to evaluating a claimed expectation […]
>
> [I]t is not appropriate to base a claimed expectation upon the content of [documents/discussions] to which the investor was not privy at the time. […] [I]f [an investor] was not privy to [documents/discussions] nor informed of its results, the investor cannot use [them] as proof of its expectation at the time. Such documents can confirm a claimed expectation, but they cannot be used to establish a particular factual element of a claimed expectation if such element was unknown to the investor at the time".[277]

422. The Claimants also invoke other documents, which – according to them – show that the Czech Republic made "specific representations" guaranteeing a fixed FIT.[278] Here again, the Claimants' arguments fail to convince. Most of these "representations" state that Act 180 guarantees a FIT for a period of 15 (later 20) years.[279] This says nothing more than what the Tribunal understands the regulatory framework to guarantee. It

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[276] SoC, §194 ("It should be common ground between the parties that [the FET] standard is breached if [t]he investor relied on certain expectations when making the investment."). See also for e.g. Reply, §225 where the Claimants rely (for the second time) on *CME v. Czech Republic*, §611: "[legitimate expectations are violated] by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest."

[277] *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 ("*Invesmart*"), §§252-253.

[278] For instance, the 2006 Report on Meeting the Indicative Target for the Production of Electricity from Renewable Sources (Exh. C-100), which mentioned that a "key feature" of the Support Scheme was "the preservation of the level of feed-in tariffs for 15 years for plants already in operation". See also Exh. C-035, Statement of Mr. Urban, the Minister of Industry and Trade, during the parliamentary deliberations of the Support Scheme on 31 March 2005 ("In the field of the support of electricity from renewable energy sources, the bill brings especially the long-term guarantee of feed-in tariffs and therefore it secures a stable business environment, which the potential investors call for intensively.").

[279] See, for instance, Exh. CE-035 (Statement of Milan Urban, Minister of Industry and Trade of the Czech Republic, during the Parliamentary deliberations of the support scheme in the Chamber of Deputies on 31 March 2005), p. 1: "In the field of the support of electricity from renewable energy sources, the bill brings especially the long-term guarantee of feed-in tariffs and therefore it secures a stable business environment, which the potential investors call for intensively."; Exh. CE-099 (2004 Report on the Achievement of the Indicative Target for Renewable Electricity), p. 3: "[Act 180] guarantees a level of return on each unit of electricity produced for a period of 15 years."; Exh. CE-044 (Information from the Czech Renewable Energy Agency about the support system of the Act on Support), p. 2: "The amount of the feed-in tariffs is guaranteed for period of 15 years […]. In contrast to green bonuses, the fifteen-year guarantee of amount of revenues for electricity unit since the year of putting the facility for production of electricity from renewable energy sources into operation must not be influenced."; Exh. CE-046 (Presentation given by the ERO in Prague on 26 January 2006), p. 2: "keeping of support for 15 years in due consideration of price index of industry producers (regarding feed-in tariffs)."; Exh. CE-048 (Presentation given by the Czech Energy Agency), p. 1: "guarantee for tariffs for 15 years (tariff assessments of ER[O])."; Exh. CE-040 (Excerpt from the FAQ section on the Energy Regulatory Office's homepage dated 15 November 2009), p. 1: "feed-in-tariffs and green bonus for the photovoltaic systems commissioned after 1 January 2008 may be claimed for 20 years."

does not refer to a promise exceeding a 15 year payback of capital expenses and a 7% rate of return. The statements invoked by the Claimants contain no details of the level of the FIT that is guaranteed; that information is found in Act 180 and the supporting framework, which was publicly available and which any potential investor would refer to when deciding whether to invest in the Czech Republic. While some representations admittedly do ambiguously mention "preservation of the level of feed-in tariffs for 15 years for plants already in operation",[280] this language cannot change the text of Act 180 and its supporting framework.

423. Further, the Claimants again have not alleged that they reviewed and relied on these documents before making their investments in the Czech Republic. As a result, assuming that the content of these statements contained promises beyond those accepted by the Tribunal, *quod non*, the Claimants could have derived no legitimate expectations from these sources. In fact, the Claimants admit, that *ex post* interpretations of the Support Scheme cannot be used to test the Claimants' *ex ante* legitimate expectations.[281]

424. Finally, the Claimants rely on what they call "acts of state" as a source of their expectations. They submit that they received guarantees through the licences, price decisions made by the ERO, and individual contracts. However, these instruments provide no representation of the sort claimed by the Claimants.

425. The Tribunal thus concludes that Act 180 did not guarantee fixed revenues as alleged by the Claimants. Hence, the Claimants had no legitimate expectations and there can be no issue of breach of any such expectations.

426. Having thus examined – and rejected – the Claimants' arguments concerning the breach of their legitimate expectations in respect of the Solar Levy, the Tribunal proceeds to examine the Claimants' submissions in respect of the Tax Incentives.

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[280] Exh. CE-100, 2006 Report on Meeting the Indicative Target for the Production of Electricity from Renewable Sources, p.19.

[281] Reply, §44.

(ii) Tax Incentives

427. The second set of measures challenged by the Claimants concern the discontinuation of the Tax Incentives granted by the Czech Republic. As in the case of the Solar Levy, the Claimants submit that the Czech Republic had made a commitment that the Tax Incentives, i.e. the preferential depreciation period and the tax exemption, would remain unchanged for the life of the PV plants:[282] "[the Tax Incentives] amount to a prospective guarantee promising an investor a certain tax treatment for a certain number of years".[283]

428. It is not disputed that the Tax Incentives existed before the Support Scheme came into force. In respect of the preferential depreciation period, the Claimants assert that "the tax depreciation provisions [that apply] prospectively for a certain period into the future […] amount to very clear stabilization assurances."[284] The Respondent opposes this position and points out that because solar panels did not fall under any of the defined asset classes under the original provisions of the Income Tax Act, they fell under a residual category of "other tangible assets" for which the Act simply lists the depreciation period.[285]

429. The Claimants have not relied on any statutory language promising that solar panels would be depreciated over a particular period of time and there is indeed no mention that the provisions would not be changed. In fact, the depreciation provisions of the Act have frequently been amended and the Claimants initially appeared uncertain about the precise regime applicable to solar panels.[286] In the circumstances, the Tribunal cannot accept that the Claimants had a legitimate expectation that the depreciation periods would not be altered.

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[282] The Tribunal understands the Claimants' submission to address both the tax exemption and the preferential tax depreciation period.
[283] Rej., §407.
[284] Reply, §303.
[285] Exh. R-006, Act 586/1992 Coll. on Income Tax, §30 and Annex 1 (original depreciation provisions).
[286] SoC, fn. 39 ("the distinction between parts falling under the 5 year or 10 year depreciation period is not always entirely clear").

430. In respect of the tax exemption, the Claimants rely on Section 19(1)(d) of the Income Tax Act, which reads as follows:

> "Section 19. Tax Exemptions
>
> (1) Exempted from Tax shall be […]
>
> (d) revenues from […] solar facilities […] in the calendar year in which they were put into operation for the first time and the five years immediately following.[287]

431. The Claimants submit that the "Explanatory Report to Act 180" "unequivocally confirmed and indeed preserved the already existing tax exemptions"[288], as a result of which the tax exemption "became an integral part of the Support Scheme".[289]

432. For the reasons mentioned above [§§418 et. seq,], the Tribunal does not consider it appropriate to rely on the so-called Explanatory Report of Act 180. In any event, even if it were to do so, the Tribunal would find nothing in that report resembling a stabilization guarantee. Indeed, the 2003 Explanatory Report merely states that:

> "[The] Promotion System is based on: […] [the] Preservation of tax allowances in the extent determined in the Income Tax Act, Real Estate Tax Act, Value Added Tax Act, […]"[290]

433. The Explanatory Report contains no representation that the tax exemption would continue to apply throughout the lifetime of the solar PV plants. The Claimants have not cited any rule of Czech law excluding or limiting the legislators' powers to amend a tax exemption. In reality, the Czech tax legislation has frequently been amended, including, as Claimants admit, through no less than five withdrawals of tax exemptions.[291]

434. As a source of their expectations that the tax exemption would continue, the Claimants also refer to a presentation which the ERO made in October 2006 which had a mention

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[287] SoC, fn. 104 (citing Act 586/1992 Coll. On Income Tax, §19(d) (original tax exemption provision)).
[288] Reply, §63.
[289] Reply, §64.
[290] Exh. C-041, Explanatory Note of November 12, 2003 to Act 180/2005.
[291] Reply, §69.

"'tax holiday' - 1 + 5 years".[292] For the same reasons as those mentioned above, the Tribunal cannot see a stabilization guarantee in these words. The presentation simply notes the existence of a "tax 'holiday'" without more. This note cannot be read as a promise on the part of the Czech legislators not to change the country's tax laws in the future.

435. The Czech Constitutional Court too rejected the challenge on the tax exemptions for the same reasons that it upheld the imposition of the Solar Levy.[293]

436. In any event, as was already noted earlier, legitimate expectations can only arise if the investor relies on the representations made by the State at the time of its investment. Here, the Claimants have not shown that they relied on the 2003 Explanatory Report or the ERO presentation when they made this investment.

437. In the absence of a commitment by the Respondent that the Tax Incentives would not be altered, the Claimants should expect that the laws in force at the time of its investment would change. The expectations which the Claimants might have had cannot be deemed legitimate and, therefore, cannot benefit from the protection of the Treaty. As the Claimants recognize: "an investor can[not] legitimately expect that the laws at the time of investment will not be changed."[294]

d. Deliberate harm

438. The Claimants' allege that the Respondent "deliberately caused harm to Claimants" in violation of the Treaty's FET standard.[295] They insist that the Czech Republic attracted investors in the solar PV sector on the basis of the guarantees provided in Act 180 in order to meet the EU's targets and, once those targets were met, the Republic revoked those guarantees, a conduct that is neither fair nor equitable. The situation was "self-inflicted" and the Respondent "can hardly plead ignorance".[296] These claims were not specifically addressed at the hearing.

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[292] SoC, §49, citing Exh. C-048, "Support of renewable energy sources and energy saving", ERO Presentation, slide 1. The Claimants also refer to another ERO presentation of 26 January 2006 (Exh. C-047), but that presentation does not mention of the Income Tax Act.
[293] Exh. R-084, §84.
[294] Tr. (Day 1) 25:12-14.
[295] Reply, §269.
[296] Claimants' Comments on the New Evidence, §32.

439. The Tribunal cannot agree with the Claimants. While it is, of course, true that the FET standard may be breached if a state's conduct is not "substantively proper" – to use the words of the *Micula* tribunal – the Tribunal sees no impropriety here.[297] The circumstances of this case are not those contemplated by the tribunal in *Waste Management v. Mexico,* when it observed that a "deliberate act" by a state to "set out to destroy or frustrate" an investment by "improper means" could constitute a violation of the fair and equitable treatment standard under the North American Free Trade Agreement.[298] Neither are the circumstances here comparable with those in *Vivendi II*, where the Tribunal concluded that the respondent "improperly and without justification" pursued an "illegitimate campaign" against the investment. The circumstances here are quite different.[299]

440. First, there is no evidence that Act 180 was designed to promote "foreign" investment, or that the Respondent attracted the Claimants' investment in particular. In reality, the Czech legislature did not anticipate that the Act would prompt significant growth in solar PV plants among a much larger group of electricity producers from other RES. It is thus not correct to say that the Czech Republic "deliberately" offered a high FIT to attract solar PV investors like the Claimants. Neither is it correct to say that solar PV investors were "specifically targeted" so that the Czech Republic could meet the targets required by the 2001 EU Directive. Indeed, this Directive is not strictly binding, as Mr. [redacted], the Claimants' expert admitted.[300] The Czech Republic was thus under no obligation to increase its solar PV capacity in 2005 when Act 180 was introduced. Further, the National Renewable Energy Action Plan of July 2010 made clear that the targets set under the 2009 EU Directive would not be met by increased investments in solar PV plants.

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[297] *Micula,* §529 ("In the Tribunal's view, the correct position is that the state may always change its legislation, being aware and thus taking into consideration that: (i) an investor's legitimate expectations must be protected; (ii) the state's conduct must be substantively proper (e.g., not arbitrary or discriminatory); and (iii) the state's conduct must be procedurally proper (e.g., in compliance with due process and fair administration").

[298] SoC, §188 relying on *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, §138.

[299] SoC, §189 relying on *Compania de Aguas de Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, §§7.4.19 and 7.4.39.

[300] [redacted] ER 1, §17 ("Mr. Jones makes a point in his report that the First EU Directive targets were not legally binding. While this is true, based on the regulatory developments put in place, there is no doubt that the Government was committed to reaching this target, be it a legally binding one or not.").

441. Second, the Claimants have not made a case that they were discriminated against.[301] The withdrawal of the Tax Incentives and the imposition of the Solar Levy equally affected all domestic and foreign producers that had commissioned solar PV plants in 2009 and 2010. They did not single out the Claimants.

442. Third, the contested measures are not – as the *Vivendi II* tribunal would have it – "improper and without justification". The Tribunal has reviewed the context in which these measures were introduced above. It has found that the Czech Republic introduced the measures in pursuit of legitimate objectives including restoring equilibrium in the solar sector, protecting consumers from substantial electricity bill increases and augmenting budgetary resources in a time of global financial crisis. The measures were carefully tailored to limit their effects to those solar RES producers that had benefited from the solar boom. In the circumstances, the Tribunal cannot agree that the disputed measures were either arbitrary or unreasonable.

443. In conclusion, no "deliberate harm" was caused to the Claimants. As a result, the Claimants' FET claims in this respect cannot succeed.[302]

444. In their later submissions and in course of the hearing, the Claimants appeared to suggest a different breach of the FET standard. They contended that the Czech Republic failed to act promptly and adequately address the solar boom.[303] They also suggested that the Respondent knew earlier that it would introduce the contested measures, but chose not to do so, a conduct which "would be the equivalent of bad faith and be squarely incompatible with the [FET] obligation". Neither argument was fully substantiated. In the absence of further detail, the Tribunal cannot but reject both arguments. In any event, as mentioned above, the measures complained of were introduced in 2010 pursuant to discussions that had begun in 2009, and were taken in

[301] See, for e.g. SoC, §165, where the Claimants allege that the Respondent has breached its obligations under Article 7(2) (umbrella clause), 2(2) (fair and equitable treatment) and 4(1) (full protection and security) of the Treaty. See also Tr. (Day 1) 91:24-25 where the Respondent noted that the Claimants have not asserted a discrimination claim under the BIT. This submission was not specifically refuted.

[302] In their RfA, the Claimants alleged that the contested measures "also violated the prohibition of arbitrary or discriminatory treatment" (§62), repeated this allegation in a one line sentence in their SoC (§17). This claim was not reiterated in their later submissions or at the hearing. Further, the Respondent's submission that the Claimants had not asserted a discrimination claim under the Treaty was not specifically refuted. Thus, the Tribunal believes that the Claimants no longer pursue this claim. To the extent that they do, the reasoning above would equally apply to reject the claim.

[303] Claimants' Comments on the New Evidence, section B.II.

response to the solar boom of late 2008, 2009 and 2010, which is when the Claimants' invested. Thus, it is unclear to the Tribunal how the challenged measures could have been introduced earlier. Further and in any event, it is not the role of this Tribunal to second-guess the Czech Republic's discretion in the manner in which it carries out its policies. Its role is to examine the propriety of the impugned measures, which it has done above.

445. For the foregoing reasons, the Tribunal dismisses the FET claims. It finds that the Czech Republic had not furnished any guarantees of the kind alleged by the Claimants. Neither had the Czech Republic "deliberately attracted" and then harmed solar RES producers.

446. The Claimants accept that, absent a stabilization guarantee, changes to domestic law for a legitimate public purpose would not entail liability.[304] As the Tribunal has found no stabilization guarantee of the kind suggested by the Claimants and has held that the contested measures were introduced for a legitimate purpose, the Tribunal could stop its analysis here. Indeed, on the Claimants' own case, it need not review the other alleged violations of the Treaty. For the sake of completeness however, the Tribunal will briefly review the Claimants' full protection and security and umbrella clause claims below.

E. FULL PROTECTION AND SECURITY

1. The Claimants' Position

447. The Claimants submit that many tribunals have accepted that the standard of full protection and security includes the obligation to provide legal security, as well as the obligation "not to (partially) rescind rights granted under the respective legal regime".[305] On this basis, they claim that by taking the impugned measures, the Respondent breached its obligation under Article 4(1) of the Treaty.

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[304] Reply, §§297-301 ("[A]rbitral tribunals clearly emphasize the following: on the one hand, the legislator may exercise its sovereign regulatory powers by changing the law for a legitimate public purpose. On the other hand, it cannot do so with respect to the foreign investor to whom, in the exercise of the same sovereign powers, it has promised the contrary, otherwise compensation for damages is due.").

[305] Reply, §280.

2. The Respondent's Position

448. The Respondent denies the Claimants' submissions. According to it, the FPS standard cannot serve to hold a State liable for changes in its domestic law.

3. Analysis

449. Article 4(1) of the Treaty reads as follows:

> "Investments by investors from either Contracting State shall enjoy full protection and security in the territory of the respective other Contracting State".

450. The Claimants submit that the full protection and security obligation reflected in Article 4(1) of the Treaty requires the Respondent to provide both physical and legal security. The latter contains an obligation "not to (partially) rescind rights granted under the respective legal regime".[306] The Respondent breached Article 4(2) of the Treaty when it abrogated the "legal protection" offered to the Claimants which consisted of "the [Tax Incentives] and the guarantees of Act 180/2005".[307]

451. The full protection and security standard requires a state to provide a framework that protects an investment from adverse interference. On the basis of the analysis above, there has been no adverse interference with the Claimants' investment. Indeed, the Tribunal has found that the Czech Republic had not furnished any guarantees of the kind alleged by the Claimants. What it had guaranteed was that solar PV plants that met specific technical and economic parameters could expect a FIT set at a level that allowed a 15 year payback of capital expenses and at least a 7% rate of return over a period of 15 years. These guarantees continue to be met for the Claimants. As a result, the question of the Respondent breaching its guarantees does not arise.[308]

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[306] Reply, §280.
[307] SoC, §218. See also Reply, §277.
[308] To the extent relevant, the Tribunal notes that both the introduction of the Solar Levy as well as the withdrawal of the Tax Incentives were reasonable.

F. UMBRELLA CLAUSE

1. The Claimants' Position

452. The Claimants submit that, pursuant to Article 7(2) of the Treaty, the Respondent is under an obligation to comply with its contractual and statutory obligations. By abrogating and circumventing the guarantees given in Act 180, the Respondent has breached such obligations.[309]

453. For the Claimants, the wording of Article 7(2) of the Treaty is clear. It applies to both contractual and statutory commitments of the Respondent. This is all the more evident when one looks at the language, which speaks of other obligations "entered into with regard to investments in its territory by investors", which only requires that the Respondent's obligations relate to investments. It does not require that such obligations be entered into with a particular investor. This interpretation is supported by Article 7(1) of the Treaty, which identifies legal obligations under domestic law as a potential source of obligations.

454. The Claimants dispute the Respondent's argument according to which, read with Article 7(1), Article 7(2) is limited to contractual obligations. They contend that Article 7(1) is a "conflict clause" that "regulates conflicts between – potential conflicts between the Treaty and national laws which have treatment in line with the Treaty but which is more favorable or conflicts between the treaty and other treaties which are more favorable".[310] Article 7(1) and 7(2) thus address different issues. Furthermore, the Claimants emphasize that Article 7(2) refers to "any" other obligation, which shows that statutory obligations fall under Article 7(2) of the Treaty.

455. In addition, the Claimants challenge the Respondent's view that the umbrella clause only applies to a specific obligation vis-à-vis an investor or to an obligation relating to an individual investment. According to them, the umbrella clause applies whenever a statutory commitment is made to induce investments. Article 7(2) in particular applies in respect of obligations "entered into with regard to investments". In any event, even accepting the Czech Republic's position, by granting the ERO licenses, the Respondent entered into a specific obligation with regard to the Claimants'

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[309] SoC, §170.
[310] Tr. (Day 4) 609:5-10.

investments. According to the Claimants, “Section 6(1)(b)(2) of Act 180/2005 is the functional equivalent of an offer. It’s not made directly an offer to conclude a contract because Respondent chose to regulate renewables differently, but nevertheless it is an offer made to investors because it’s not valid immediately for everyone […] you first have to fulfill certain conditions”.[311]

456. The Claimants further reject the Respondent’s position that the impugned measures cannot constitute a breach of the umbrella clause because the Respondent was “entitled” to change its laws. They assert that the umbrella clause would be deprived of meaning if a state could simply change its laws. According to the Claimants, “what is crucial is whether the State lawfully invokes the law as it existed at the time of investment – or whether it changes the law subsequently in order to escape its obligations. In the former case, there is no breach of the umbrella clause. In the latter case, and in the case at hand, there is such a breach”.[312]

457. Moreover, the Claimants deny that the Constitutional Court settled the issue, as the Court undertook a limited review and did not address individual cases.

458. Finally, for the Claimants, the legal authorities invoked by the Respondent are irrelevant because they merely distinguish contractual obligations from “general commitments” or “general requirements” under domestic law. The authorities do not consider “whether specific guarantees for a specific period given in a law qualify as an obligation in terms of the given umbrella clause”.[313]

2. The Respondent’s Position

459. The Respondent submits that Article 7(1) of the Treaty contains the words “legislation” as well as “obligations”. If the Contracting Parties had meant the term “obligations” to include “legislation”, they would not have used two different terms in Article 7(1). Doing so, they showed that the term “obligations” used in Article 7(2) of the Treaty cannot be understood to include “legislation”. This is further demonstrated by the use of the word “other” in Article 7(2), which excludes “legislation” identified in Article 7(1).

[311] Tr. (Day 4) 615:18-24.
[312] Reply, §§212-213.
[313] Reply, §167.

460. According to the Respondent, the obligations allegedly breached must first exist under Czech law. The Claimants have failed to identify any relevant obligation. In particular, the Claimants have not shown "that they ha[ve] either a vested or actionable right to: (1) freedom from any measures that would affect a solar plant's excess profits but leave intact the targeted profitability benchmarks and tariff levels; and (2) freedom from any changes at all to the Income Tax Provisions (either for a particular period of time, or indefinitely").[314]

461. The Respondent further argues that, even if Article 7(2) of the Treaty were to apply to the breach of a statutory provision, such provision should be directed to specific investments and investors. Here, the Claimants have identified Act 180 as the only source of the obligations which the Czech Republic entered into with respect to their investments. Yet, Act 180 was neither directed specifically to the Claimants, nor to their investments. Section 6 of Act 180 was merely a direction given to the regulator, namely to the ERO.

462. The Respondent finally asserts that, even assuming that obligations under general Czech law were covered by Article 7(2), the Claimants must establish that these obligations were breached, which they have not done. In addition, the alleged breach of a statutory provision must be assessed "in the context of the legal order of which it forms a part"[315]. As the Constitutional Court and the Supreme Administrative Court have both held that the Czech Parliament did not breach Act 180, it would be incorrect to consider that the Respondent breached Article 7(2) of the Treaty by introducing the Solar Levy.

3. Analysis

463. Article 7 of the Treaty reads as follows:

> "(1) If the legislation of either Contracting State or international obligations existing at present or established hereafter between the Contracting States in addition to this Treaty contain any provisions, whether general or specific, entitling investments by investors from the other Contracting State to a treatment more favourable than is provided for by this Treaty, such provisions shall prevail over this Treaty to the extent that they are more favourable.

[314] Rej. §425.
[315] SoD, §240.

> (2) Each Contracting State shall fulfil any other obligations it may have entered into with regard to investments in its territory by investors from the respective other Contracting State".[316]

464. Article 7(2) of the Treaty imposes an obligation on each Contracting Party to fulfill its "other obligation[s]" with regard to investments. If a Contracting Party does not fulfill its obligations, an investor may claim a breach of Article 7(2) of the Treaty. In other words, for Article 7(2) to come into operation, the Contracting Party must first be obliged to do something. If there is no obligation, *a fortiori*, there can be no breach. In the words of the *Oxus Gold* tribunal:

> "For a claim to be based on an umbrella clause […] the claimant must establish, among others, that it is the creditor of the "obligation" at stake and this requirement has two aspects:
>
> First of all, the obligation which is alleged to be breached must exist. If the obligation brought forward by the claimant does not exist, it can a fortiori not be breached."[317]

465. The Claimants submit that "[t]he 20-year fixed feed-in tariff established by Act 180/2005 and Public notices 150/2007 as well as the tax exemption constitute "obligations" covered by Article 7(2) BIT."[318] However, the Tribunal has already held that Act 180 imposes no obligation on the Czech Republic to set or retain the FIT at a level above that which allows a 15 year payback of capital expenses and a 7% return for solar RES producers that met prescribed conditions. The Tribunal has also held that the Respondent was not obliged to maintain the Tax Incentives as they existed at the time of the Claimants' investment. Consequently, in the absence of an obligation of the Respondent, the claim for breach of such (non-existing) obligation must fail. Accordingly, the Claimants' umbrella clause claim is dismissed.

466. In closing, the Tribunal notes that the decision in *Invesmart v. Czech Republic* also dismissed the umbrella clause claim on the basis that the claimant had not established the existence of an obligation of the Czech Republic to provide state aid.[319]

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[316] Exh. C-078, Art. 7. The translation offered by the Respondent is substantially similar: "Each Contracting Party shall fulfil any other obligations it may have entered into with regard to investments in its territory by investors from the respective other Contracting Party." SoD, §216. In any event, the Respondent seems to accept the Claimants' translation. See Rej., §418.

[317] *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, §§366-367.

[318] SoC, §179.

[319] *Invesmart*, §526 ("The Tribunal is of the opinion that the claim founded on Article 3(4) of the BIT cannot succeed. Even if the existence of an "umbrella clause" elevates breaches of a contract to

G. CONCLUSION

467. On the basis of the foregoing analysis, the Tribunal reaches the conclusion that the Respondent did not breach the substantive standards invoked by the Claimants, i.e. FET, FPS, and the umbrella clause.

468. Having reached the conclusions above, the Tribunal need not decide on the Respondent's arguments that "even if Claimants succeed to persuade the Tribunal on issues of liability, the Tribunal would still be precluded under the applicable EU law from rendering a binding damages award in Claimants' favor".[320]

469. In reaching this conclusion, the majority has considered the content of the dissenting opinion. Expressed in no uncertain terms, the dissenter's arguments have given the majority the opportunity to test the resilience of its legal analysis and the validity of its conclusions. Having revisited its views in light of the dissent, the majority cannot but confirm the result of its analysis, according to which the Czech Republic guaranteed to the Claimants (i) a return of their investment or payback of capital expenses in 15 years and (ii) a return *on* investment or profit of at least 7% p.a. over 15 and later 20 years, which guarantees were met in the present case. This result derives from Section 6 of Act 180 and the implementing regulation to which it refers, and is shared by the Czech Republic's highest courts.

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breaches of the BIT, a point on which tribunals before and after Eureko have reached opposite conclusions, or extends beyond contractual breaches, the Claimant has not established that there was any firm, unconditional undertaking, whether contractual or not, to provide state aid. An "obligation" to provide aid would require the establishment of a clear, unconditional commitment which would specify its essential terms including the amount of aid, the date to be provided and so on. No such obligation has been proven by the Claimant.").

[320] Respondent's Comments on the Amicus Curiae Submission, §42. The Commission made similar arguments (Commission's Application, §§186 et. seq.), which need not be addressed for the same reasons.

VI. COSTS

470. In their cost submission, the Claimants sought the following relief:

> "Claimants seek the reimbursement of its costs incurred in this arbitration until 15 June 2016 in the value of:
>
> Costs of legal representation: [redacted] €
> Expert fees: [redacted] €
> Costs for translations: [redacted] €
> Travel and accommodation expenses for legal team and witnesses: [redacted] €
> Total costs as of June 15, 2016: [redacted] €"

471. The Claimants subsequently added the costs incurred by them since their submission. The total costs claimed by the Claimants increased to EUR [redacted].[321]

472. For their part, the Respondent sought the following relief:

> "[The] Claimants be ordered to pay all of the Czech Republic's costs and expenses incurred in connection with this proceeding (including attorney fees and expenses), in the amount of USD [redacted], as well as the Czech Republic's share of the costs incurred by the Tribunal and the PCA, in the amount of EUR [redacted] to date."

473. Section 13 of the Terms of Appointment provides that the members of the Tribunal shall be paid at the rate of EUR [redacted] per hour for the time spent on the arbitration, but in any event not in excess of EUR [redacted] in the aggregate. Computed at these rates but then significantly reduced so as not to exceed the capped amount, the fees of the members of the Tribunal amount to: Mr. Gary Born EUR [redacted]; Judge Peter Tomka EUR [redacted]; and Prof. Gabrielle Kaufmann-Kohler EUR [redacted].[322] The fees of the Secretary of the Tribunal amount to EUR 30,000 reduced from EUR [redacted], to comply with the agreed cap.

474. Arbitrators and Tribunal Secretary expenses amount to EUR [redacted]. The PCA has charged fees in the amount of EUR [redacted] for its registry services. Other costs of

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[321] Claimants Comments on the Commission Decision, p.6.

[322] The recording of the time spent was stopped in the summer of 2017, in view of the fact that there were no funds advanced by the Claimants left.

the arbitration amount to EUR [redacted]. The PCA will shortly provide the Parties with a final statement of account.

475. As a consequence, the total of arbitration costs amounts to EUR [redacted] rounded to EUR [redacted].

476. The Claimants request the Tribunal to order the Respondent to bear the Claimants' costs for legal representation and assistance of EUR [redacted], while, on their part, the Respondent insists that the Claimants should bear the Respondent's costs of USD [redacted] and EUR [redacted].

477. As mentioned above, this is an *ad hoc* investment arbitration governed by the procedural rules contained in the Treaty and Chapter 12 of the PILA. Article 10(2) of the Treaty provides that the procedural rules contained in Article 9(5) of the Treaty in respect of interstate disputes "appropriately" apply in investor-states cases. Article 9(5) provides the following guidance regarding costs:

> "Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in arbitration proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitral tribunal may decide on a different allocation of costs."

478. Article 9(5) of the Treaty applies if the Parties have not agreed otherwise. The coincidence that each Party claims that its opponent should bear the costs of the arbitration cannot be regarded as a meeting of the minds to deviate from the solution agreed by the Contracting States. Noting that Chapter 12 of the PILA contains no guidance on cost allocation either, the Tribunal considers that the Treaty governs the cost allocation.

479. Article 9(5) means that, in addition to the costs which it incurred in connection with the arbitration, each side bears (i) 50% of the fees of the President of the Tribunal; (ii) 50% of all costs and expenses of the arbitration (which includes the fees and expenses of the institution and of the Secretary); and (iii) 100% of the fees of the arbitrator whom it appointed. Article 9(5) also empowers the Tribunal to apply a different allocation, for which the Tribunal sees no reason under the circumstances.

480. Accordingly, in application of the BIT and taking into account the caps agreed with the Parties, the Claimants shall bear, in addition to their own legal fees and other expenses, the following costs:

(i) 50% of the president's fees, i.e. EUR [redacted];

(ii) 100% of its party-appointed arbitrator's fees, i.e. EUR [redacted] and expenses of EUR [redacted].

(iii) 50% of all other expenses, comprising EUR [redacted] (Secretary's fees), EUR [redacted] (PCA fees), EUR [redacted] (President and Secretary's expenses) and other expenses of EUR [redacted].

Total: EUR [redacted], rounded to [redacted].

481. As for the Respondent, it shall bear, in addition to its own fees and expenses, the following costs:

(i) 50% of the president's fees, i.e. EUR [redacted];

(ii) 100% of its party-appointed arbitrator's fees, i.e. EUR [redacted] and expenses of EUR [redacted];

(iii) 50% of all other expenses, as set out in subparagraph 480 (iii);

Total: EUR [redacted], rounded to [redacted].

482. Each side has advanced EUR [redacted] on account of fees and expenses. From such deposits, the PCA shall pay the fees and expenses of the Arbitrators, the Secretary and its own fees and costs, in accordance with the provisions of the BIT, as implemented above. The remaining balance of EUR [redacted] shall be returned to the Respondent.

VII. DECISION

483. For the reasons set forth above, the Tribunal:

i. Decides that it has jurisdiction over Claimant 4 JSW Solar (zwei) GmbH & Co. KG;

ii. Decides that the Respondent has not acted in breach of Articles 2(1), 4(1) or 7(2) of the Treaty between the Federal Republic of Germany and the Czech and Slovak Federal Republic on Encouragement and Reciprocal Protection of Investments of 2 October 1990;

iii. Fixes the costs of the arbitration at EUR [redacted];

iv. Decides that the Claimants shall pay EUR [redacted] for the costs of the proceedings;

v. Decides that the Respondent shall pay EUR [redacted] for the costs of the proceedings;

vi. Decides that each Party shall bear the costs of its legal representation and other expenses incurred in connection with this proceeding; and,

vii. Dismisses all other claims.

Seat of the Arbitration: Geneva, Switzerland

Date: 11 October 2017

Mr. Gary Born
Subject to the attached dissenting opinion

Judge Peter Tomka

Prof. Gabrielle Kaufmann-Kohler