In the arbitration proceeding between

MATHIAS KRUCK AND OTHERS

Claimants

and

KINGDOM OF SPAIN

Respondent

ICSID Case No. ARB/15/23

DECISION ON JURISDICTION AND ADMISSIBILITY

Members of the Tribunal
Professor Vaughan Lowe, QC, President
Dr. Michael Pryles AO, PBM, Arbitrator
Professor Zachary Douglas, QC, Arbitrator

Secretary of the Tribunal
Mr. Paul-Jean Le Cannu

Date of dispatch to the Parties: 19 April 2021
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I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Energy Charter Treaty, which entered into force on 16 April 1998 (the "ECT") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "ICSID Convention").

2. The names of the Claimants, as provided by counsel, are as follows:

   1. Solar Andaluz 1 GmbH & Co. KG
   2. Solar Andaluz 2 GmbH & Co. KG
   3. Solar Andaluz 3 GmbH & Co. KG
   4. Solar Andaluz 4 GmbH & Co. KG
   5. Solar Andaluz 5 GmbH & Co. KG
   7. Solar Andaluz 7 GmbH & Co. KG
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   18. Solar Andaluz 18 GmbH & Co. KG
   19. Solar Andaluz 19 GmbH & Co. KG
   20. Solar Andaluz 20 GmbH & Co. KG
   21. Solarpark Calasparra 251 GmbH & Co. KG
   22. Solarpark Calasparra 252 GmbH & Co. KG
   23. Solarpark Calasparra 253 GmbH & Co. KG
   24. Solarpark Calasparra 254 GmbH & Co. KG
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   27. Solarpark Calasparra 257 GmbH & Co. KG
   28. Solarpark Calasparra 258 GmbH & Co. KG
   29. Solarpark Calasparra 259 GmbH & Co. KG
   30. Solarpark Calasparra 260 GmbH & Co. KG
   31. Solarpark Tordesillas 424 GmbH & Co. KG
   32. Solarpark Tordesillas 425 GmbH & Co. KG
   33. Solarpark Tordesillas 426 GmbH & Co. KG
   34. Solarpark Tordesillas 427 GmbH & Co. KG
   35. Solarpark Tordesillas 428 GmbH & Co. KG
   36. Solarpark Tordesillas 429 GmbH & Co. KG
   37. Solarpark Tordesillas 430 GmbH & Co. KG
   38. Solarpark Tordesillas 431 GmbH & Co. KG
   39. DSG Deutsche Solargesellschaft mbH
   40. DSG Spanien Verwaltungs GmbH
   41. Mr. Mathias Kruck
   42. Mr. Joachim Kruck
   43. Mr. Peter Flachsman
   44. Mr. Ralf Hofmann
   45. Mr. Rolf Schumm
   46. Mr. Frank Schumm
   47. TS Abuzaderas 1 GmbH
   48. TS Abuzaderas 2 GmbH
   49. TS Abuzaderas 3 GmbH
   50. TS Abuzaderas 4 GmbH
   51. TS Abuzaderas 5 GmbH
   52. TS Abuzaderas 6 GmbH
   53. TS Abuzaderas 7 GmbH
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   56. TS Abuzaderas 10 GmbH
   57. TS Abuzaderas 11 GmbH
   58. TS Abuzaderas 12 GmbH
   59. TS Abuzaderas 13 GmbH
   60. TS Abuzaderas 14 GmbH
   61. TS Abuzaderas 15 GmbH
   62. TS Abuzaderas 16 GmbH
   63. TS Abuzaderas 17 GmbH
   64. TS Abuzaderas 18 GmbH
   65. TS Abuzaderas 19 GmbH
   66. TS Abuzaderas 20 GmbH

1 Kruck Beteiligungs GmbH was renamed as DSG Spanien Verwaltungs GmbH on 13 October 2015 (see Claimants' Response to Respondent’s Preliminary Objections under ICSID Arbitration Rule 41(5), p. 3, fn. 8; Cl. Reply, fn. 6).
Further details on the nationality and legal nature of the Claimants are included below under Section V.A. It is convenient to consider the Claimants as constituting two distinct groups of investors. One is the group of 73 “DSG Claimants”, which invested in three photovoltaic energy (“PV”) projects in Spain registered under Spanish Royal Decree (“RD”) 661/2007, and which share common developers and management.\(^2\) The projects are the Andaluz, Calasparra and Tordesillas projects, and the corresponding Claimants are numbered 1-20, 21-35, and 36-65 in the list in the previous paragraph. Also in that group

\(^2\) See Cl. Mem., pp. 16-18, 23-24. For Solar Andaluz 1 – 20 GmbH & Co. KG, see C-002; for Solarpark Calasparra 251 – 265 GmbH & Co. KG, see C-003; for Solarpark Tordesillas 401 – 430 GmbH & Co. KG, see C-004; for DSG Deutsche Solargesellschaft mbH, see C-005; for DSG Spanien Verwaltungs GmbH, see C-005, C-016; for Messrs. Mathias Kruck, Joachim Kruck, Peter Flachsmann, Ralf Hofmann, Rolf Schumm, Frank Schumm, see C-006; for TS Abuzaderas 1 – 30 GmbH, TS Avila eins GmbH, TRC Energy GmbH, TS Cuenca zwei GmbH, WBG GmbH, Sunburn Verwaltungs GmbH, TS Villalba GmbH, Tauber-Solar Sierra GmbH, ZKS GmbH, TS Cuenca 20 GmbH, TS Valtou GmbH, TS Cuenca 40 GmbH, see C-007; for Messrs. Karsten Reiss, Jürgen Reiss, see C-008.

\(^3\) Cl. Mem., ¶ 21.
are Claimants 66-73 in the above list: Kruck Beteiligungs GmbH (later renamed DSG Spanien Verwaltungs GmbH); DSG Deutsche Solargesellschaft mbH; Mr. Mathias Kruck; Mr. Joachim Kruck; Mr. Peter Flachsmann; Mr. Ralf Hofmann; Mr. Rolf Schumm; and Mr. Frank Schumm. The second group consists of the 43 “TS Claimants”, which invested in ten other PV projects in Spain under RD 661/2007 and RD 1578/2008. They are Claimants 115, Mr. Karsten Reiss, and 116, Mr. Jürgen Reiss, and the companies listed as Claimants 76–114 in the list above. There are 116 Claimants in total.

4. The Respondent is the Kingdom of Spain, hereinafter referred to as “Spain” or the “Respondent.”

5. The Claimants and the Respondent are collectively referred to as the “Parties.” The Parties’ representatives and their addresses are listed above on page (i).

6. The dispute relates to the Claimants’ alleged investment in a number of photovoltaic power facilities (solar energy) in Spain. According to the Claimants, between 1994 and 2008, Spain enacted renewable energy incentive legislation to attract foreign investment. The Claimants contend, inter alia, that they invested in Spain in reliance of this legislation starting in 2006. The Claimants further allege that by 2010, Spain began introducing regulatory changes that impacted the applicable incentives and financial regime under which they had invested, thereby affecting and causing significant damage to their investments, principally by reducing their profits and revenues.

II. OVERVIEW OF THE DISPUTE AND REQUESTS FOR RELIEF

7. This Section offers a brief overview of the dispute and recalls the Parties’ requests for relief.

A. OVERVIEW OF THE DISPUTE

8. The essence of the dispute, in broad terms, lies in the Claimants’ allegation that they invested in the PV plants in Spain in reliance upon what they understood to be the firm undertakings by Spain that there would be no significant detrimental alteration in the terms on which they would be paid for the electricity generated by their plants, but that Spain did
subsequently make such an alteration, causing them to receive considerably less income than they had expected and thus causing them economic loss. Spain, on the other hand, maintains that no such firm undertakings were given, and that the Claimants were only ever entitled to expect a reasonable return on their investments, which they did in fact receive despite the changes in the regulatory regime.

B. THE PARTIES’ REQUESTS FOR RELIEF

(1) The Claimants’ Requests for Relief

9. In their Memorial on the Merits, the Claimants requested the following relief:

- a declaration that the Tribunal has jurisdiction under the ECT and the ICSID Convention;

- a declaration that Spain has violated Part III of the ECT and international law with respect to Claimants’ investments;

- compensation to Claimants for all damages they have suffered as set forth in this Memorial and as will be further developed and quantified in the course of this proceeding;

- all costs of this proceeding, including (but not limited to) Claimants’ attorneys’ fees and expenses, the fees and expenses of Claimants’ experts, and the fees and expenses of the Tribunal and ICSID;

- pre- and post-award compound interest at the highest lawful rate from the Date of Assessment until Spain’s full and final satisfaction of the Award; and

- any other relief the Tribunal deems just and proper.\(^4\)

10. In their Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, the Claimants requested that the Tribunal grant the following relief:

- a declaration that the Tribunal had jurisdiction under the ECT and the ICSID Convention;

\(^4\) Cl. Mem., ¶ 526.
• a declaration that Spain has violated Part III of the ECT and international law with respect to Claimants’ investments;

• compensation to Claimants for all damages they have suffered as set forth in this Reply and Claimants’ Memorial on the Merits and as will be further developed and quantified in the course of this proceeding;

• all costs of this proceeding, including (but not limited to) Claimants’ attorneys’ fees and expenses, the fees and expenses of Claimants’ experts, and the fees and expenses of the Tribunal and ICSID;

• pre- and post-award compound interest at the highest lawful rate from the Date of Assessment until Spain’s full and final satisfaction of the Award; and

• any other relief the Tribunal deems just and proper.\(^5\)

11. In their Rejoinder on Jurisdiction, the Claimants requested that the Tribunal grant the following relief:

• a declaration that the Tribunal has jurisdiction under the ECT and the ICSID Convention for all of Claimants’ claims, thereby rejecting Respondent’s jurisdictional objections in full;

• a declaration that Spain has violated Part III of the ECT and international law with respect to Claimants’ investments;

• compensation to Claimants for all damages they have suffered as set forth in their Memorial on the Merits and in their Reply Memorial on the Merits and as may be further developed and quantified during the course of this proceeding;

• all costs of this proceeding, including (but not limited to) Claimants’ attorneys’ fees and expenses, the fees and expenses of Claimants’ experts, and the fees and expenses of the Tribunal and ICSID;

• pre- and post-award compound interest at the highest lawful rate from the Date of Assessment until Spain’s full and final satisfaction of the Award; and

\(^5\) Cl. Reply, ¶ 614.
• any other relief the Tribunal deems just and proper.⁶

12. In their Post-Hearing Brief, the Claimants requested by way of relief:

• a declaration that the Tribunal had jurisdiction under the ECT and the ICSID Convention;

• a declaration that Spain has violated Part III of the ECT and international law with respect to Claimants’ investments;

• compensation to Claimants for all damages they have suffered as set forth in their submissions;

• all costs of this proceeding, including (but not limited to) Claimants’ attorneys’ fees and expenses, the fees and expenses of Claimants’ experts, and the fees and expenses of the Tribunal and ICSID;

• pre- and post-award compound interest at the highest lawful rate from the Date of Assessment until Spain’s full and final satisfaction of the Award; and

• any other relief the Tribunal deems just and proper.⁷

(2) The Respondent’s Requests for Relief

13. In its Counter-Memorial on the Merits and Memorial on Jurisdiction, the Respondent requested that the Tribunal:

   a) To declare its lack of jurisdiction over the claims of the Claimant Party or, if applicable, the inadmissibility of said claims.

   b) Subsidiarily, in the event that the Arbitral Tribunal decides that it has jurisdiction to hear this dispute, to dismiss all the claims of the Claimant Party regarding the Merits, as the Kingdom of Spain has not breached the ECT in any way, pursuant to section IV herein, with regard to the Merits.

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⁶ Cl. Rej., ¶ 77.
⁷ Cl. PHB, ¶ 123.
c) Subsidiarily, to dismiss all the Claimant Party's claims for damages as the Claimant has no right to compensation, in accordance with section V herein; and

d) Order the Claimant Party to pay all costs and expenses derived from this arbitration, including ICSID administrative expenses, arbitrators' fees and the fees of the legal representatives of the Kingdom of Spain, their experts and advisors, as well as any other cost or expense that has been incurred, all of this including a reasonable rate of interest from the date on which these costs are incurred until the date of their actual payment.8

14. In its Memorial of Rejoinder on the Merits and Reply on Jurisdiction, the Respondent requested the Tribunal to:

a) Declare its lacks [sic] of jurisdiction to settle the claims of the Claimants, or if the case may be, their inadmissibility, in accordance with what is set forth in section III of this Document, referred to Jurisdictional Objections;

b) Alternatively, in the event that the Arbitral Tribunal decides that it has jurisdiction to hear this dispute, to dismiss all the Claimants' claims regarding the Merits of the case, as the Kingdom of Spain has not breached the ECT in any way, pursuant to sections IV and V herein, referred to the Facts and the Merits, respectively;

c) Alternatively, to dismiss all the Claimants' claims for damages as they are not entitled to compensation, in accordance with section V of this Document; and

d) Sentence the Claimants to pay all costs and expenses derived from this arbitration, including ICSID administrative expenses, arbitrators' fees, and the fees of the legal representatives of the Kingdom of Spain, their experts and advisors, as well as any other cost or expense that has been incurred, all of this including a reasonable rate of interest from the date on which these costs are incurred and up to the date of their actual payment.9

8 Resp. C-Mem., § VI.
9 Resp. Rej., ¶ 1299.
In its Post-Hearing Brief, the Respondent requested the Tribunal that:

a) It declares its lack of jurisdiction to hear the claims of the Claimants, or where appropriate, their inadmissibility, in accordance with what is stated in section II of this Respondent’s Post-Hearing Brief in reference to Jurisdictional Objections;

b) Secondarily in the event that the Arbitration Tribunal were to decide that it has jurisdiction to hear the present dispute, that it rejects all the claims of the Claimants on the merits, since the Kingdom of Spain has not in any way breached the ECT, in accordance with what is set forth in sections III and IV of the present Brief, regarding the Facts and the Merits of the case.

c) Secondarily, that it dismisses all of the Claimants’ compensatory claims, as the Claimants have no right to compensation, pursuant to that stated in section V herein; and

d) To Order the Claimants’ to pay all costs and expenses derived from this arbitration, including ICSID administrative expenses, arbitrators’ fees, and the fees of the legal representatives of the Kingdom of Spain, their experts and advisors, as well as any other cost or expense that has been incurred, all of this including a reasonable rate of interest from the date on which these costs are incurred and the date of their actual payment.\(^\text{10}\)

III. PROCEDURAL HISTORY

On 19 March 2015, ICSID received a request for arbitration that was said to be submitted on behalf of DSG Deutsche Solargesellschaft Group (the “DSG Group”) and the Tauber Solar Investors Group (the “TS Investors Group”) against the Kingdom of Spain.

Paragraph 1 of the request read as follows:

1. The DSG Deutsche Solargesellschaft Group (the “DSG Group”) and the Tauber Solar Investors Group (the “TS Investors Group”) as defined herein (collectively, “Claimants”) hereby request the initiation of an arbitration proceeding against the Kingdom of Spain (“Spain”) under the Convention and Rules of the International Centre for Settlement of Investment Disputes (“ICSID”). Claimants file this Request for Arbitration pursuant to Article 25 of the ICSID Convention, ICSID Institution Rules 1

\(^{10}\) Resp. PHB, ¶ 157.
18. The request for arbitration stated that “[t]he DSG Group is comprised of (a) sixty-five limited liability partnerships and two private companies, all duly established under the laws of Germany and (b) six individuals of German nationality,” and “[t]he TS Investors Group is comprised of (a) forty-one private companies duly incorporated under the laws of Germany and (b) two individuals of German nationality.” In each case, the individual limited liability partnerships, private companies, and individuals of German nationality were identified in the request.

19. By letters dated 9 April 2015 and 1 May 2015 ICSID posed questions to the Claimants in an attempt to clarify the legal nature of the requesting parties. The Claimants’ counsel responded by letters of 17 April 2015, 24 April 2015, 8 May 2015, and 21 May 2015. In those letters the Claimants stated, **inter alia**, that the terms “DSG Group” and “TS Investors Group” had been “employed for the purpose of simplifying reference to two distinct sets of German investors and their respective investments in Spain.” Counsel also listed each of the 116 Claimants in this proceeding.

20. With their letters, the Claimants also submitted a substitute cover page for its original request for arbitration, and asked that the case caption be changed to *Mathias Kruck and others v. Kingdom of Spain* (the “Request”).

21. On 4 June 2015, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the

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11 RfA, ¶ 2.
12 RfA, ¶ 6.
13 RfA, ¶¶ 3–5, 7–8, and footnotes 2, 3, 4, and 7.
14 In addition, on 27 March 2015 the Respondent wrote a letter to ICSID opposing registration of the Request on the ground that “DSG Group” and “TS Investors Group” “… do not hold the status of ‘national of another Contracting State’ for the purposes of Article 25 of the ICSID Convention.” See Letter from the Respondent to ICSID, 27 March 2015 (R-005). The Respondent further objected to registration of the request for arbitration by letters of 22 April, 12 May and 28 May 2015. See Letter from the Respondent to ICSID, 22 April 2015 (R-009); Letter from the Respondent to ICSID, 12 May 2015 (R-013); Letter from the Respondent to ICSID, 28 May 2015 (R-015).
15 Letter from the Claimants to ICSID, 17 April 2015 (R-008). See also ¶ 2 and fn. 1, supra.
Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

22. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, who would preside the Tribunal, to be appointed by agreement of the Parties.

23. The Tribunal was composed of Professor Vaughan Lowe, QC, a national of the United Kingdom, President, appointed by agreement of the Parties; Mr. Gary Born, a national of the United States, appointed by the Claimant; and Professor Zachary Douglas, QC, a national of Australia, appointed by the Respondent.

24. On 19 January 2016, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”). Ms. Mairée Uran Bidegain, ICSID, was designated to serve as Secretary of the Tribunal.

25. By letter of 9 February 2016, the Centre informed the Parties that a first session would be held with the Tribunal on 14 March 2016 and circulated a draft Agenda and Procedural Order No. 1. The Parties were also invited to inform the Tribunal of their agreements or points of disagreement on the proposed procedural issues by no later than 2 March 2016.

26. On 19 February 2016, the Respondent made an application under ICSID Arbitration Rule 41(5), alleging that the claim was “manifestly without legal merit” (the “Respondent’s Rule 41(5) Objection”). On 2 March 2016, the Claimants filed observations on the Respondent’s Rule 41(5) Objection.

27. On 8 March 2016, the Parties submitted their joint comments on the draft Procedural Order No. 1 and advised the Centre that they would propose a calendar shortly thereafter.
28. By letter of 9 March 2016, the Tribunal informed the Parties of its decision to dismiss the Respondent’s Rule 41(5) Objection and that a reasoned decision would follow. On 14 March 2016, the Tribunal issued the reasoned decision on the Respondent’s Rule 41(5) Objection. In its Decision, the Tribunal dismissed the Respondent’s preliminary objections, as well as its application for costs and for an order for security for costs.

29. In its 9 March 2016 letter, the Tribunal also asked the Parties to confirm whether they foresaw any practical difficulties in handling questions (including, but not limited to, questions of liability and/or quantum if the case should proceed to a merits phase), if all 116 Claimants proceeded as if they had a single claim; and if so, what practical steps might be taken to minimize those difficulties.

30. On 11 March 2016, the Parties submitted their replies to the Tribunal’s letter of 9 March 2016. The Claimants confirmed that they did not foresee any practical difficulties that would arise by proceeding together in a single arbitration. The Respondent stated that at this procedural stage, it was not possible to examine in depth the difficulties which may arise if the 116 Claimants were to proceed as if they had only one claim, and requested that the Tribunal enable it to defer its reply and include it in its Request for Bifurcation, if any.

31. On 15 March 2016, the Tribunal held a first session with the Parties by teleconference in accordance with ICSID Arbitration Rule 13(1).

32. On 30 March 2016, following the first session, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties and the Tribunal’s decisions on procedural matters. Procedural Order No. 1 provides, inter alia, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington, D.C. Procedural Order No. 1 also sets out the agreed schedule for the jurisdictional/merits phase of the proceedings.

33. On 18 April 2016, the European Commission filed an Application for leave to intervene as a non-disputing party pursuant to ICSID Arbitration Rule 37(2) (the “European Commission’s Application”).
34. On 5 May 2016, the Parties submitted their observations on the European Commission’s Application. The Respondent asked the Tribunal to grant the Commission leave to file the non-disputing party (“NDP”) submission. The Claimants objected to the Commission’s intervention and requested the Tribunal to deny the European Commission’s Application.

35. On 13 May 2016, the Tribunal “decided to allow the European Commission to make written submissions, limited to questions of the Tribunal’s jurisdiction, by 27 June 2016. The Tribunal propose[d] for that purpose to transmit to the European Commission a copy of the Request for Arbitration dated 19 March 2016, and a copy of the ICSID Convention and Arbitration Rules, but no other documents from the case file.”¹⁶

36. On 19 May 2016, in accordance with the Tribunal’s decision, and in the absence of the Parties’ objections, the European Commission received a copy of the Request for Arbitration.

37. On 27 June 2016, the European Commission filed its NDP submission.

38. On 28 July 2016, the Claimants filed their Memorial on the Merits, accompanied by:

- Witness Statements of:
  - Joachim Kruck, dated 21 July 2016
  - Peter Flachsmann, dated 11 July 2016
  - Klaus Matuschke, dated 28 July 2016
  - Markus Karl, dated 19 July 2016
  - Klaus-Bruno Flech, dated 18 July 2016
  - Karsten Reiss, dated 19 July 2016

- Expert Reports by:
  - Brattle Group Quantum Report, dated 27 July 2016, with exhibits BQR-001 to BQR-174
  - Brattle Group Regulatory Report, dated 27 July 2016, with exhibits BRR-001 to BRR-131
  - Manuel Aragón Reyes, dated 7 July 2016
  - Jaume Margarit, dated 7 July 2016

- Exhibits C-001 to C-342

¹⁶ Letter from ICSID to the Parties, 13 May 2016.
39. On 29 July 2016, the Claimants submitted their observations on the European Commission’s NDP submission.

40. On 31 October 2016, the Respondent filed its Counter-Memorial on the Merits and Memorial on Jurisdiction, accompanied by:
   - Witness Statement of:
     - Carlos Montoya, dated 27 October 2016, with exhibits\textsuperscript{17}
   - Expert Reports by:
     - Pablo Pérez Tremps and Marcos Vaquer Caballería, dated 25 July 2016
     - Grant Geatrex, David Pérez López, Jesús Fernández Salguero and Carlos Montojo González, dated 31 October 2016, with exhibits DOC-001 to DOC-046
   - Exhibits R-016 to R-243
   - Legal Authorities RL-030 to RL-096.

41. On 13 January 2017, each Party submitted its respective Request to Produce Documents in a Redfern Schedule for decision by the Tribunal.

42. On 31 January 2017, the Tribunal issued Procedural Order No. 2 on document production.

43. On 26 April 2017, the Claimants filed their Reply on the Merits and Counter-Memorial on Jurisdiction, accompanied by:
   - Second Witness Statements of:
     - Joachim Kruck, dated 25 April 2017
     - Markus Karl, dated 25 April 2017
     - Karsten Reiss, dated 20 April 2017
   - Rebuttal Expert Reports by:
     - Brattle Group Rebuttal Quantum Report, dated 26 April 2017, with exhibits BQR-175 to BQR-188

- Brattle Group Rebuttal Regulatory Report, dated 26 April 2017, with exhibits BRR-132 to BRR-209
- Manuel Aragón Reyes, dated 5 April 2017
- Jaume Margarit, dated 18 April 2017
  - Exhibits C-343 to C-490
  - Legal Authorities CL-135 to CL-179.

44. On 27 June 2017, the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction, accompanied by:

  - Second Witness Statement of:
    - Carlos Montoya, dated 27 June 2017, with exhibits\(^{18}\)
  - Rebuttal Expert Reports by:
    - Pablo Pérez Tremps and Marcos Vaquer Caballería, dated 21 June 2017
    - Grant Greatrex, David Pérez López, Jesús Fernández Salguero and Carlos Montojo González, dated 27 June 2017, with exhibits DOC-048 to DOC-093
  - Exhibits R-244 to R-361
  - Legal Authorities RL-097 to RL-112.

45. On 23 July 2017, the Claimants filed their Rejoinder on Jurisdiction, together with exhibits C-491 to C-498, and Legal Authorities CL-180 to CL-189.

46. On 8 February 2018, the President held a pre-hearing organizational meeting with the Parties by telephone conference.

47. On 12 February 2018, pursuant to Article 16.3 of Procedural Order No. 1, the Parties submitted requests to add documents to the record to the Tribunal.

48. On 13 February 2018, the Respondent proposed the disqualification of Mr. Gary Born, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the

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“First Proposal”). On that date, the Centre informed the Parties that the proceeding had been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6).

49. The Parties were also informed that the Proposal would be decided by Professors Lowe and Douglas (the “Two Members”), in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

50. On 14 February 2018, the Claimants submitted preliminary observations to the First Proposal, to which the Respondent responded by 15 February 2018.

51. Pursuant to Annex A, of Procedural Order No. 1, as modified by agreement of the Parties, the hearing on jurisdiction and merits was scheduled to take place from 26 February to 1 March 2018. On 15 February 2018, the Two Members ordered that the hearing dates be vacated and established a procedural calendar for the Parties to submit their observations on the Proposal.

52. On 20 February 2018, the Claimants filed observations on the First Proposal.

53. On 27 February 2018, Mr. Gary Born furnished his explanations regarding the First Proposal in accordance with ICSID Arbitration Rule 9(3).

54. On 5 March 2018, each Party filed additional observations on the First Proposal.

55. On 16 March 2018, the Two Members issued their decision on the First Proposal, rejecting Respondent’s proposal, urging the Parties to make every effort to reschedule the proceedings as quickly and as soon as possible, and determining that a final decision on the costs associated with the First Proposal will be made at a later stage. In their Decision, the Two Members invited the Claimants to file “a more complete and detailed explanation … of what those costs are and how they arose directly from the challenge rather than from the general preparation of the case,” and invited the Respondent to file “a further submission … on the reasons why the challenge could not have been made earlier.”

19 Decision on the Proposal to Disqualify Mr. Gary Born, 16 March 2018, ¶ 59.
the same date, the proceeding was resumed pursuant to ICSID Arbitration Rules 53 and 9(6).

56. On 26 March 2018, the Tribunal invited the Parties to produce the judgment rendered by the Court of Justice of the European Union on 6 March 2018, in Case No. C-284/16, Slovak Republic v. Achmea B.V (the “Achmea Judgment”). The Parties were also invited to make written submissions on the implications for the present case of the Achmea Judgment by 27 April 2018.

57. On 27 March 2018, the Respondent filed a request for the Tribunal to admit new documents into the record.

58. On 29 March 2018, the Claimants produced the Achmea Judgment, as legal authority CL-190. On the same date, the Claimants stated they had no objection to the Respondent’s request of 27 March 2018 and submitted their own request to add new documents to the record.

59. On 30 March 2018, the Tribunal decided to admit all the new documents requested by the Parties on 27 March 2018 and 29 March 2018.

60. On the same date, the Parties made written submissions on the implications for the present case of the Achmea Judgment, as requested by the Tribunal.

61. On 30 April 2018, the Parties made additional written submissions as requested in the decision on the proposal to disqualify Mr. Gary Born. Accordingly, the Claimants filed a submission on costs associated with the First Proposal and the Respondent filed a submission on the reasons why the First Proposal could not have been made earlier.


63. On 18 May 2018, after consultation with the Parties, the Tribunal notified them of its decision to hold the hearing in Paris from 25 February to 1 March 2019.
64. On 23 May 2018, the Tribunal invited the Parties “to prepare an agreed chronology of events and separate lists of issues in dispute” and asked that it be provided with an approximate date when those submissions may be ready.

65. On 30 May 2018, the Parties submitted their observations on the European Commission’s Proposal to update its NDP submission.

66. On 12 June 2018, the Tribunal notified the Parties of its decision to accept the Commission’s invitation, in light of the Achmea Judgment, as well as of the decisions of other investment tribunals on this matter. The Tribunal specified that the “Commission’s updated observations would be limited to commenting on the consequences and implications of the aforementioned ECJ decision on arbitrations brought under the Energy Charter Treaty, as well as on other recent developments that the Commission might think material to the jurisdictional questions before this Tribunal.”

67. On 13 June 2018, the European Commission was notified of the Tribunal’s decision.

68. On 22 June 2018, Mr. Gary Born submitted his resignation to the Secretary General of ICSID, and to Professors Lowe and Douglas, in accordance with ICSID Arbitration Rule 8(2).


70. On that same date, the Parties were notified of Mr. Born’s resignation and of the suspension of the proceeding. The Claimants were further invited to appoint an arbitrator in accordance with ICSID Arbitration Rule 11(1).

71. On 16 July 2018, the European Commission filed its updated NDP submission. The Secretariat circulated the updated NDP submission to the Parties on 19 July 2018 and to the reconstituted Tribunal and the Parties on 8 August 2018.

72. On 6 August 2018, the Claimants’ appointed Dr. Michael Pryles to replace Mr. Born.
On 8 August 2018, Dr. Michael Pryles accepted his appointment as co-arbitrator in this case, and the Tribunal was reconstituted. Its members are Prof. Vaughan Lowe, QC, a national of the United Kingdom, President, appointed by agreement of the Parties; Dr. Michael Pryles AO, PBM, a national of Australia, appointed by the Claimant; and Prof. Zachary Douglas, QC, a national of Australia, appointed by the Respondent. The proceeding was resumed in accordance with ICSID Arbitration Rule 12.

On the same date, the Centre informed the Parties of the departure of Ms. Mairée Uran Bidegain from the ICSID Secretariat, and of the designation of Mr. Paul Jean Le Cannu to serve as Secretary of the Tribunal.

On 5 October 2018, after consultation with the Parties, the Tribunal confirmed that the hearing on jurisdiction and merits was rescheduled to be held from 3 June to 7 June 2019.

On 6 November 2018, the Claimants referred to the Parties’ 12 February 2018 requests to add documents to the record and informed the Tribunal as follows:

The Parties have agreed that they will exchange further requests to add documents to the record in May 2019, prior to the hearing. Further, the Parties have agreed that they waive any objection to the timeliness of such requests under Procedural Order No. 1 on the basis that the opposing Party could have requested to add a document prior to May 2019, in the months after the Tribunal was reconstituted. This waiver of objections to timeliness will apply only to new legal authorities and exhibits regarding Spain’s regulatory regime that have been made public after the Parties’ original 12 February 2018 requests.

The Claimants inquired on behalf of the Parties whether the Tribunal would prefer to rule on the Parties’ 12 February 2018 requests now, or together with the Parties’ May 2019 scheduled requests to add documents to the record. On 7 November 2018, the Respondent confirmed the Parties’ agreement regarding the Parties’ requests to add documents to the record.

On 8 November 2018, the Secretariat informed the Parties that the Tribunal would prefer to address the 12 February 2018 applications together with the Parties’ May 2019 scheduled requests to add documents to the record.
On 16 April 2019, the Respondent proposed the disqualification of Prof. Vaughan Lowe pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the “Second Proposal”). By letter of the same date, the Secretariat confirmed receipt of the Second Proposal and informed the Parties that (i) the Second Proposal would be decided by the other members of the Tribunal (the “Unchallenged Arbitrators”) and (ii) the proceeding would be suspended until a decision had been taken on the Second Proposal.

On 17 April 2019, the Claimants submitted preliminary observations to the Second Proposal, and proposed a schedule for the parties’ submissions.

On 18 April 2019, the Unchallenged Arbitrators established a schedule for the parties’ submissions on the Second Proposal.

On 26 April 2019, the Claimants submitted observations on the Second Proposal.

On 28 April 2019, Prof. Lowe furnished his explanations on regarding the Second Proposal in accordance with ICSID Arbitration Rule 9(3).

On 6 May 2019, the Parties filed a simultaneous round of additional observations on the Second Proposal.

On 14 May 2019, the Unchallenged Arbitrators notified the Parties of their decision to reject the Second Proposal, and stated that a reasoned decision would follow.

On 17 May 2019, the Unchallenged Arbitrators issued their reasoned decision on the Second Proposal.

On 23 May 2019, the Respondent notified the Tribunal that their expert Prof. Pablo Pérez Tremps would be unable to attend the hearing due to medical reasons. Their witness Mr. Carlos Montoya would be unable to attend the hearing as well due to “personal and professional reasons.” On the same date, the Claimants submitted their observations regarding Mr. Montoya’s inability to attend the hearing, and requested the Tribunal to strike both of his witness statements from the record, in accordance with Section 18.5 of Procedural Order No. 1.
88. On 28 May 2019, the Respondent filed a request for the Tribunal to admit new documents into the record.

89. On 29 May 2019, the Claimants filed a request for the Tribunal to admit new documents into the record.

90. On 30 May 2019, the Tribunal decided to admit all the new documents requested by the Parties on 28 and 29 May 2019, respectively.

91. On the same date, in regard to the Claimants request of 23 May 2019, the Tribunal notified the Parties of its decision that Mr. Montoya’s witness statements would remain in the record but would not be relied upon by the Tribunal if Mr. Montoya failed to appear at the hearing without a valid reason.

92. On 31 May 2019, the Tribunal issued Procedural Order No. 3 on the organization of the hearing on jurisdiction and merits.

93. A hearing on jurisdiction and merits was held in Paris, France from 3 June to 7 June 2019 (the “Hearing”). The following persons were present at the Hearing:

*Tribunal:*
Prof. Vaughan Lowe QC President
Dr. Michael Pryles AO, PBM Arbitrator
Prof. Zachary Douglas QC Arbitrator

*ICSID Secretariat:*
Mr. Paul-Jean Le Cannu Secretary of the Tribunal

*For the Claimants:*
*Counsel:*
Mr. Reginald Smith King & Spalding
Mr. Kevin Mohr King & Spalding
Ms. Amy Frey King & Spalding
Mr. Jan Schäfer King & Spalding
Mr. Christopher Smith King & Spalding
Ms. Violeta Valicenti King & Spalding
Mr. Karam Farah King & Spalding
Mr. Cristian Boruzi King & Spalding
Ms. Inés Vazquez García Gómez-Acebo & Pombo
Ms. Inés Puig-Samper Gómez-Acebo & Pombo
Ms. Cristina Matia Garay  
Gómez-Acebo & Pombo

**Parties:**
Mr. Andreas Nagel  
DSG
Ms. Mafalda Soto  
DSG / Brenes Abogados
Mr. Joachim Kruck (after examination)  
DSG
Mr. Peter Flachmann (after examination)  
DSG / KACO
Mr. Klaus Matuschke (after examination)  
DSG
Mr. Markus Schreck  
Tauber Solar
Mr. Antonio Jiménez Abraham  
Monereo Meyer Marinel-lo Abogados; Tauber Solar
Mr. Klaus-Bruno Fleck (after examination)  
Tauber Solar

**For the Respondent:**

**Counsel:**
Ms. María José Ruiz Sánchez  
Abogación General del Estado
Mr. Pablo Elena Abad  
Abogación General del Estado
Mr. Roberto Fernández Castilla  
Abogación General del Estado
Ms. Almudena Pérez-Zurita Gutiérrez  
Abogación General del Estado
Mr. Alberto Torró Molés  
Abogación General del Estado

**Court Reporter(s):**
Mr. Dante Rinaldi  
D-R Esteno, Spanish Court Reporter
Ms. María Eliana Da Silva  
D-R Esteno, Spanish Court Reporter
Ms. Luciana Sosa  
D-R Esteno, Spanish Court Reporter
Mr. Trevor McGowan  
The Court Reporter Ltd

**Interpreters:**
Mr. Jesús Getan Bornn  
English-Spanish
Ms. Amalia Thaler de Klemm  
English-Spanish
Mr. Marc Viscovi  
English-Spanish
Mr. Ralph Gerhardt  
English-German
Ms. Silke Schoenbuchner  
English-German
Ms. Barbara Weller  
English-German

94. During the Hearing, the following persons were examined:

**On behalf of the Claimant(s):**

**Witness(es):**
Mr. Joachim Kruck  
DSG
Mr. Peter Flachmann  
DSG / KACO
Mr. Klaus Matuschke  
DSG
Mr. Klaus-Bruno Fleck  
Tauber Solar
Mr. Markus Karl  
Tauber Solar
Mr. Karsten Reiss  
hagebau; Tauber Solar
Expert(s):
Mr. Jaume Margarit
Independent Consultant, formerly
Director of Renewable Energy at the
IDAE

Dr. Manuel Aragón Reyes
Autonomous University of Madrid
(Professor of Constitutional Law)

Mr. Carlos Lapuerta
Brattle

Mr. Jose Antonio Garcia
Brattle

Mr. Richard Caldwell
Brattle

Mr. Alejandro Zerain
Brattle

Ms. Aurora Velente
Brattle

On behalf of the Respondent(s):
Expert(s):
Dr. Marcos Vaquer Caballería
Universidad Carlos III Madrid

Mr. Grant Greatrex
Altran MaC Group

Mr. David Pérez López
Altran MaC Group

Mr. Jesús Fernández Salguero
Altran MaC Group

Mr. Carlos Montojo González
Altran MaC Group

Mr. Antonio Sanchis Boscá
Altran MaC Group

95. On 6 June 2019, at the hearing, each Party objected to certain slides in the presentations of the other Party’s experts (the “Contested Slides”). On the same date, the Parties provided explanations on said slides in accordance with the Tribunal’s instructions.

96. On 19 June 2019, further to the Tribunal’s instructions, the Parties submitted additional observations on the Contested Slides.

97. On 26 June 2019, each Party submitted its response to the other Party’s 19 June observations on the Contested Slides. Having considered the Parties’ respective submissions, the Tribunal subsequently decided during its deliberations that all the slides would be admitted, but that any propositions or data relied upon by the Tribunal would be drawn from the submissions of the Parties to which the slides refer and not from the slides themselves.

98. On 1 August 2019, as indicated by the Tribunal at the hearing, the Centre transmitted the Tribunal’s questions that the Parties were invited to address in their respective post-hearing briefs, in addition to the questions raised by the Tribunal at the hearing.

99. On 19 September 2019, the Parties filed simultaneous post-hearing briefs.
100. On 4 December 2019, pursuant to Section 16.3 of Procedural Order No. 1, the Respondent sought leave to file the *Stadtwerke* Award$^{20}$ and the *BayWa* Decision (the “4 December Section 16.3 Request”).$^{21}$ Further to the Tribunal’s invitation, the Claimants submitted comments on the 4 December Section 16.3 Request on 18 December 2019, along with their own request for leave to file additional legal authorities$^{22}$ and a factual exhibit. The Respondent filed a response to the Claimants’ 18 December 2019 comments, including a request to file an additional legal authority,$^{23}$ on 9 January 2020.

101. On 24 January 2020, the Tribunal ruled as follows:

*The Tribunal notes that the Parties agree that the BayWa Decision and the Stadtwerke, OperaFund and Cube Awards should be admitted into the record by the Tribunal. By contrast, there is no agreement between the Parties as to the admission of the Claimants’ proposed new factual exhibits, Royal Decree-Law (RDL) 17/2019 and statements by the Minister of Ecological Transition to the Spanish Parliament regarding RDL 17/2019.*

*The Tribunal has decided to allow the Parties to enter into the record the above-referred Decisions and Awards, including dissents, to the extent that they are publicly and freely available via the Internet and that either Party considers that the Tribunal should review them. As contemplated in Section 13 of PO1, the Tribunal does not require hard copies: it will be sufficient to send a list of such Decisions and Awards together with an indication of their legal authority number and where on the Internet they are to be found. The Tribunal does not wish to receive comments on these additional legal authorities.*

*The Tribunal further considers that no exceptional circumstances have been shown that would justify the admission of additional factual exhibits at this*

$^{20}$ *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1), Award, 2 December 2019 (RL-146).

$^{21}$ *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/16), Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 (RL-144).

$^{22}$ *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1), Dissenting Opinion Prof. Kaj Hobér, 2 December 2019 (RL-147); *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/16), Dissenting Opinion Dr. Horacio Grigera Naón, 2 December 2019 (RL-145); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36), Award and Dissent on Liability and Quantum, 6 September 2019 (CL-221); *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain* (ICSID Case No. ARB/15/20), Award, 15 July 2019 (CL-222).

$^{23}$ *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain* (ICSID Case No. ARB/14/34), Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019 (the “RWE Decision”) (RL-148).
late stage. The Claimants’ request for admission of further factual exhibits is therefore dismissed.

102. On 29 January 2020, the Respondent sought confirmation that its 9 January 2020 request for leave to file the RWE Decision had been granted. On 30 January 2020, the Claimants filed a request for leave to file the Watkins Award. The Claimants also submitted their Consolidated Legal Authorities Index and legal authorities CL-221 and CL-222.

103. On 7 February 2020, having noted that the Claimants had no objection to Spain’s additional request to add the RWE Decision to the record so long as Spain has no objection to adding the Watkins Award to the record as well, the Tribunal invited Spain to confirm its consent to the admission of the Watkins Award into the record as soon as possible. In addition, in light of the Parties’ recent correspondence on this matter, the Tribunal confirmed that it would admit into the record any additional published decision or award issued in treaty arbitrations to which Spain is a party, on the conditions set forth in the email from the Secretariat dated 24 January 2020.

104. On 11 February 2020, Spain submitted a consolidated list of legal authorities, along with legal authorities RL-144 to RL-148. Spain also confirmed that it did not object to the submission of the Watkins Award, provided that the Dissenting Opinion of Prof. Dr. Hélène Ruiz Fabri was also added to the record. On the same date, further to the Tribunal’s 7 February 2020 communication, the Claimants submitted their updated Consolidated Legal Authority Index, along with legal authority CL-223 (the Watkins Award and Dissent).

105. On 5 March 2020, the Respondent filed a request for leave to file the PV Investors Award under Section 16.3 of PO1. The Claimants submitted comments on the Respondent’s request on 9 March 2020.

106. On 11 March 2020, the Tribunal referred to the Secretariat’s communication of 7 February 2020 and confirmed that it would admit into the record any additional published decision

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24 Watkins Holdings S.A.r.l. and others v. Kingdom of Spain (ICSID Case No. ARB/15/44), Award and Dissent on Liability and Quantum, 21 January 2020 (CL-223).

25 The PV Investors v. Kingdom of Spain (PCA Case No. 2012-14), Final Award, 28 February 2020 (RL-149).
or award issued in treaty arbitrations to which Spain is a party, on the conditions set forth in the Secretariat’s email of 24 January 2020. The Tribunal further informed the Parties that it did not wish to receive comments on these additional legal authorities at this stage, but proposed to invite a final comment, of limited length, from each Party on this and any other award that has been published since the hearing before closing the proceeding.

107. On 18 March 2020, the Respondent submitted legal authorities RL-149 and 150 (the PV Investors Award and Judge Brower’s Dissenting Opinion) and the Respondent’s consolidated list of legal authorities.

108. On 16 June 2020, the Respondent sought leave to submit the Decision on the Kingdom of Spain’s Application for Annulment rendered on 11 June 2020 in Eiser Infrastructure Limited and Energía Solar Luxembourg S.á r.l. v. Kingdom of Spain (ICSID Case ARB/13/36) (the “Eiser Decision”).

109. On 19 June 2020, the Tribunal conveyed the following message to the Parties through its Secretary:

_The Tribunal recalls the Secretariat’s communication of 7 February 2020, which said that the Tribunal ‘will admit into the record any additional published decision or award issued in treaty arbitrations to which Spain is a party, on the conditions set forth in the Secretariat’s email of 24 January 2020.’ Those conditions are that the Parties are allowed ‘to enter into the record the above-referred Decisions and Awards, including dissents, to the extent that they are publicly and freely available via the Internet and that either Party considers that the Tribunal should review them. As contemplated in Section 13 of PO1, the Tribunal does not require hard copies: it will be sufficient to send a list of such Decisions and Awards together with an indication of their legal authority number and where on the Internet they are to be found.’_

_The Tribunal confirms that it does not wish to receive comments from either Party on this additional legal authority immediately, and that it will invite a final comment, of limited length, from each Party on this and any other award or decision that has been published since the hearing. Those comments will be invited in the coming weeks, after which the Tribunal will formally close the proceedings._
110. On 23 June 2020, the Respondent submitted the *Eiser* Decision as legal authority RL-151.

111. On 26 October 2020, the Respondent submitted legal authorities RL-152 and 153 (the Decision on Jurisdiction, Liability and Directions on Quantum and the Dissenting Opinion of Mr. David R. Haigh Q.C., both issued on 31 August 2020 in *Cavalum SGPS SA v. Kingdom of Spain* (ICSID Case No. ARB/15/34)) and the Respondent’s consolidated list of legal authorities. The following day, the Claimants submitted Legal Authority CL-224 (the Decision on Jurisdiction, Liability and Directions on Quantum and the Dissenting Opinion of Prof. Pierre-Marie Dupuy, both issued on 8 October 2020 in *STEAG GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/4)) and the Claimants’ Consolidated List of Legal Authorities.

112. Recalling its emails of 11 March 2020 and 19 June 2020 concerning the submission of comments on Awards and Decisions filed after the oral hearing, the Tribunal informed the Parties, through its Secretary, on 11 November 2020 that

*The Tribunal has decided that it would now be helpful to receive these submissions, in the form of a link to an on-line version of the Decision or Award in question and a brief comment (limited to 500 words for each Decision or Award) of its relevance to the case pleaded by the Party adducing the Decision or Award. The Parties should submit their comments simultaneously to the Tribunal secretary, by close of business (Washington DC) on Friday 04 December 2020.* [Emphasis in the original]

113. The Parties and the Tribunal subsequently agreed that comments would be submitted on 11 December 2020, and both Parties submitted their comments accordingly.

114. On 22 March 2021, the Respondent submitted as legal authority RL-154 the Final Award rendered 8 March 2021 in *Freif Eurowind Holdings Ltd. (United Kingdom) v. Kingdom of Spain*, SCC Case V 2017/060, along with a consolidated List of Legal Authorities (RL). On 25 March 2021, the Respondent submitted an additional legal authority, the Decision on Jurisdiction and Liability issued on 17 March 2021 in *Eurus Energy Holdings Corporation v. Kingdom of Spain* (ICSID Case No. ARB/16/4) (legal authority RL-0155), and a consolidated List of Legal Authorities (RL). On 26 March 2021, the Tribunal through
its Secretary acknowledged receipt of legal authorities RL-0154 and RL-0155, and indicated that it did not wish to receive any comment on them from either Party. The Tribunal also invited the Parties to confirm the accuracy of the lists of Party representatives and June 2019 hearing participants as provided to the Parties. On 29 March 2021, the Claimants confirmed the accuracy of the list of hearing participants with respect to the Claimants’ counsel, party representatives, fact witnesses, and experts, and requested certain modifications to the list of Claimants’ representatives. They also requested that the Respondent be required to submit the Partial Dissent of Arbitrator Oscar Garibaldi in the *Eurus v. Spain* case, which in their view the Respondent ought to have included with the Decision on Jurisdiction and Liability. By email of 4 April 2021 from the Secretariat, the Respondent was requested on behalf of the Tribunal to submit a copy of Mr. Garibaldi’s Partial Dissent in the interest of having a complete file. The Respondent submitted the Partial Dissent as legal authority RL-156 on 5 April 2021.

115. The Tribunal wishes to record that the succinct comments submitted at this stage by the Parties have a particular value in the context of the overall system of international investment arbitration. While there can be no doctrine of binding precedent among the *ad hoc* tribunals adjudicating upon investment disputes, the consistency and predictability of legal decisions is a goal of the most fundamental importance. No tribunal is an island entire of itself. It is one element of a much more extensive, evolving system for the protection of parties’ rights; and individual tribunals are, rightly, slow to depart from principles and analyses that are generally accepted and established within the system. This axiomatic point has a particular poignancy in investment arbitration, given the roles placed by the principles of non-discrimination and of fair and equitable treatment within the applicable substantive law. The point has, moreover, a special significance in situations where one and the same factual matrix has given rise to many arbitrated disputes. The Tribunal has, accordingly, given very careful consideration to the decisions of other tribunals, including those to which the Parties have referred in their December 2020 comments.
116. Finally, for reasons that are explained below, the Tribunal decided during the course of its deliberations that the fairest and most efficient way in which to proceed would be to issue an initial decision addressing questions of jurisdiction and admissibility before proceeding to decide upon questions of liability and quantum.

IV. FACTUAL BACKGROUND

117. This section describes the main features of the Spanish regulatory regime applicable to the Claimants’ investments, and the changes in the regime which underlie the claims in this case. Additional detail is given as necessary in the subsequent chapters that discuss the objections to jurisdiction and admissibility and the specific claims and defences put forward.

118. As was noted above, the Claimants may, at this stage and without prejudice to the more detailed analysis of the positions of the various Claimants that follows below, be considered as two groups of German investors: the DSG Claimants, and the TS Claimants. Indeed, as was noted above, the Request for Arbitration dated 19 March 2015 was initially put forward in the names of the “DSG Group” and the “TS Investors Group”, although the title of the case was subsequently amended to include the name of each of the 116 Claimants. All of the Claimants say that they invested in renewable energy plants in Spain, in the context of the efforts of EU Member States to increase their use of renewable energy.

119. Spain had set its national energy policy in a series of National Energy Plans, beginning in 1975, with the Plan for the years 1991-2000 (“PEN 1991”) including provisions regarding the development of renewable energy production. The need for such development was brought into sharper focus by the work associated with the 1992 United Nations Framework Convention on Climate Change, and in particular by the 1997 Kyoto Protocol.

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26 See ¶¶ 184 ff., infra.
27 See ¶ 3, supra.
28 See ¶ 16, supra.
on greenhouse gases. In 2001, EU Directive 2001/77/EC, set targets for the proportion of its energy that each Member State was to derive from renewable sources. Spain, which in 1997 derived around 19.8% of its energy from renewable sources, was given a target of 29.4%, to be achieved by 2020.30 That target sat alongside Spain’s obligations under EU Law, which limit the grant of State Aid.31

120. Investment in the renewable energy sector is front-loaded, with most of the expenditure being incurred as capital costs at the start of a project and the subsequent running and maintenance costs being relatively low, with the result that (as the Claimants put it) “the cost of electricity produced from renewable sources is essentially fixed at the time of construction, whereas the cost of electricity from hydrocarbon sources is more variable depending on the cost over time of the fuel source and other inputs.”32 That cost is largely fixed at the time of construction, even if the costs of the technology subsequently fall (as they did in the case of PV plants). Renewable energy plants are, moreover, exposed to the vagaries of wind, sun and rain; and as it is difficult to store electricity on a large scale it is important that renewable power producers be able to sell their electricity when it is produced. Furthermore, the environmental and energy security benefits of renewable energy are economic externalities, not naturally reflected in the market price of the energy.33

121. It was necessary for Spain to devise a scheme to attract the necessary investment in renewable energy. The background was provided by the main Spanish legislation, the Act or Law 54/1997 on the Electricity Sector.34 That Law distinguished between an “Ordinary Regime” applicable to electricity production from non-renewable sources and a “Special Regime” applicable to renewable energy production. The Special Regime, implemented

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31 Resp. C-Mem., ¶ 347.
32 Cl. Mem. ¶ 114.
33 First Witness Statement of Joachim Kruck, 21 July 2016 (“Joachim Kruck WS”), ¶ 6; Cl. Mem. ¶¶ 112–118.
through RD 2818/1998, provided two options for producers: (i) a Feed-In Tariff (“FIT”) setting the price at which a producer would sell its entire production to electricity distributors, or alternatively (ii) a specified premium to be paid to producers who chose to sell their production on the wholesale electricity market. The tariffs and premium were expressly made subject to change. Provision was made for their revision every four years: “without prejudice to the stipulations of the eighth transitory provision of the 1997 Electricity Act, by taking into account the evolution of the price of electric power on the market, the participation of these facilities in coverage of demand and their impact on the technical management of the system.”

The “eighth transitory provision” of the 1997 Electricity Law required the Government to set premiums at rates that would provide certain renewable electricity plants with “reasonable profitability rates with reference to the cost of money on the capital market.” Similarly, Article 30(4) of the 1997 Law stated:

To work out the premiums, the voltage level on delivery of the power to the network, the effective contribution to environmental improvement, to primary energy saving and energy efficiency, the generation of economically justifiable useful heat and the investment costs incurred shall all be taken into account so as to achieve reasonable profitability.

Those provisions did not succeed in attracting the investment necessary for Spain to reach its targets for renewable energy production. By 2002, it had reached only 19.7% of the target to be reached in 2006 in relation to solar photovoltaic energy production. A new regime was established in March 2004 by RD 436/2004, replacing RD 2818/1998. The new regime allowed operators of renewable energy installations to choose between two remuneration mechanisms: (a) assigning their electricity to distributors at a fixed tariff which would be a single flat-rate in euro cents per kilowatt hour (the “fixed tariff” option); and (b) selling the electricity to distributors by participating in the market and receiving

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35 Royal Decree 2818/1998 on the production of electrical energy by facilities supplied with renewable energy, waste or cogeneration resources or sources, 23 December 1998 (“RD 2818/1998”) (R-082/C-067)
36 RD 2818/1998 (R-082/C-067), Article 32.
37 Law 54/1997 (R-074/C-066), Eighth transitory provision.
38 Law 54/1997 (R-074/C-066), Article 30(4).
39 Cl. Mem., Table 4.1 and ¶¶ 131-134.
the market price supplemented by an incentive for participating in the market\textsuperscript{40} and a premium (the “market price + premium” option).\textsuperscript{41} The choice would be made annually by each operator, according to its own best interests. The Preamble to RD 436/2004 stated that “Whichever remuneration mechanism is chosen, the Royal Decree guarantees operators of special regime installations fair remuneration for their investments and an equally fair allocation to electricity consumers of the costs that can be attributed to the electricity system ….” It also stated that the Special Regime for renewable energy made it “possible to reach the goal set out in the 1997 Electricity Act, i.e. to ensure that by the year 2010 renewable energy sources cover at least 12% of total energy demand in Spain.”\textsuperscript{42}

123. Tariffs, premiums and incentives for each plant, which were significantly higher than those offered previously, were set for a period of 25 years, after which they were reduced to around 80% of their previous level.\textsuperscript{43} Article 40 of RD 436/2004 made provision for four-yearly revisions of the tariffs, premiums, incentives and supplements payable to operators, with the revisions coming into force on January 1\textsuperscript{st} of the second year subsequent to the year in which the revision was carried out. Article 40(3) contained an important provision. It stated that:

\begin{quote}
3. The tariffs, premiums, incentives and supplements resulting from any of the revisions provided for in this section shall apply solely to the plants that commence operating subsequent to the date of the entry into force referred to in the paragraph above and shall not have a backdated effect on any previous tariffs and premiums.
\end{quote}

124. Thus, the revised rates would not be applicable to existing plants, which would continue to operate under the rates previously set for them; and operators of plants to which the revised

\textsuperscript{40} Because this was considered “the way to minimise administrative intervention in the setting of electricity prices as well as to better, and more efficiently allocate the system costs.” Royal Decree 436/2004 establishing the methodology for the updating and systematisation of the legal and economic regime for electric power production in the special regime, 12 March 2004 (“RD 436/2004”) (R-084/C-075), Preamble.

\textsuperscript{41} RD 436/2004 (R-084/C-075), Article 22.

\textsuperscript{42} RD 436/2004 (R-084/C-075), Preamble.

\textsuperscript{43} RD 436/2004 (R-084/C-075), Article 33; Joachim Kruck WS, ¶ 12.
rates would be applicable would have at least twelve months’ notice of that fact, so that they could adjust their plans prior to the commencement of operation of those plants.

125. RD 436/2004 governed Spain’s PV sector at the time that Mr. Joachim Kruck began considering an investment in that sector in Spain, in the mid-2000s. Joachim Kruck already had experience of investment in renewable energy, including PV projects, in Germany through the family-owned business established by him and his father, Mathias Kruck. The company develops and manages commercial and residential properties as well as PV and wind projects, and maintains PV projects in Canada, Spain and Italy. Joachim Kruck learned that Spain was offering incentives for investment in the renewable energy sector. In 2006, there were indications that changes in the Spanish regulatory regime were being considered, in order to accelerate investment in the renewable energy sector and enable Spain to reach its renewable energy targets. In the course of 2006, Mr. Kruck contacted and was contacted by a number of people, including a company that already had the rights to a 2.0 MW development in Alcolea de Calatrava, south of Madrid. He spoke on several occasions to Ms. Mafalda Soto, a Spanish attorney fluent in German, about the proposed new regulatory regime, having already read about it in the German media and specialist magazines discussing the PV industry. Those changes in the regulatory regime eventually materialized as RD 661/2007, adopted on 25 May 2007 and published in the State Bulletin (the Boletín Oficial del Estado or “BOE”) the following day.

126. The Claimants assert in the Request for Arbitration that the DSG Claimants began acquiring and developing projects in Spain in November 2006, and that the TS Claimants began in June 2008. Thus, the Claimants place the dates of some investments before, and some after, the date of enactment of RD 661/2007. The question of the precise dates and nature of the Claimants’ investments is considered in more detail below.

44 Joachim Kruck WS, ¶¶ 11-14.
45 Cl. Mem. ¶¶156-161.
46 Joachim Kruck WS, ¶ 16.
127. The Preamble to RD 661/2007 noted that targets for certain renewable energy technologies “are still far from being reached”, and described how the new regulatory regime would operate in developing renewable energy:

The economic framework established in the present Royal Decree develops the principles provided in Law 54/1997, of 27 November, on the Electricity Sector, guaranteeing the owners of facilities under the special regime a reasonable return on their investments, and the consumers of electricity an assignment of the costs attributable to the electricity system which is also reasonable, although incentives are provided to playing a part in this market since it is considered that in this manner lower government intervention will be achieved in the setting of prices, together with better, more efficient, attribution of the costs of the system, particularly in respect of the handling of diversions and the provisions of supplementary services.

To this effect, a system which is analogous to that provided in Royal Decree 436/2004, of 12 March, is maintained, in which the owner of the facility may opt to sell their energy at a regulated tariff, which will be the same for all scheduling periods, or alternatively to sell this energy directly on the daily market, the term market, or through a bilateral contract, in this case receiving the price negotiated in the market plus a premium. In this latter case, an innovation is introduced for certain technologies, namely upper and lower limits for the sum of the hourly price in the daily market, plus a reference premium, such that the premium to be received for each hour may be limited in accordance with these values. This new system protects the promoter when the revenues deriving from the market price falls excessively low, and eliminates the premium when the market price is sufficiently high to guarantee that their costs will be covered, thus eliminating irrationalities in the payment for the technologies the costs of which are not directly related to the prices of petroleum in the international markets.

128. Thus, RD 661/2007 provided most operators of renewable electricity with an annual choice between fixed tariffs – the FIT option – and the market price + premium mechanism; but PV operators were eligible only for the FIT option. The tariffs were significantly higher – 82% higher – than those payable under RD 436/2004, and were linked to Spain’s Consumer Price Index (“CPI”), an objective reference point, rather than to a variable

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48 RD 661/2007 (R-086/C-098), Articles 24.1, 25.
49 Margarit Report, pp. 28-29; RD 661/2007 (R-086/C-098), Article 36, Table 3. (The relevant lines of the Table, relating to group b.1.1 (PV installations) are available in the Spanish version and in the improved English version of C-098).
reference tariff that was fixed annually by a formula that allowed considerable discretion to the Government, as had been the case under RD 436/2004.\textsuperscript{50} Other supplements were also available under RD 661/2007.\textsuperscript{51} The tariffs were said to be payable to registered facilities for 25 years, and thereafter a tariff of 80% of the previous tariff would be paid.\textsuperscript{52} No limit was placed on the period for which the tariffs were available: they were understood to be available throughout the operational life of a facility, thus providing what was referred to as “legal certainty”, enabling the commercial viability of a project to be determined with some certainty and precision.\textsuperscript{53}

129. RD 661/2007 stipulated that these tariffs were to be reviewed in 2010, and every four years thereafter. They could be amended, but it was stipulated that the amendments “shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed”, thus preserving the position of facilities that were already in operation or in the course of planning and construction at the time of the review. The material provision is Article 44.3:

\textit{During the year 2010, on sight of the results of the monitoring reports on the degree of fulfilment of the Renewable Energies Plan (PER) 2005-2010, and of the Energy Efficiency and Savings Strategy in Spain (E4), together with such new targets as may be included in the subsequent Renewable Energies Plan 2011-2020, there shall be a review of the tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree with regard to the costs associated with each of these technologies, the degree of participation of the special regime in covering the demand and its impact upon the technical and economic management of the system, and a reasonable rate of profitability shall always be guaranteed with reference to the cost of money in the capital markets. Subsequently a further review shall be performed every four years, maintaining the same criteria as previously.}

\textsuperscript{50} RD 661/2007 (R-086/C-098), Article 44.1.
\textsuperscript{51} RD 661/2007 (R-086/C-098), Articles 28, 29.
\textsuperscript{52} RD 661/2007 (R-086/C-098), Article 36, Table 3. (The relevant lines of the Table, relating to group b.1.1 (PV installations) are available in the Spanish version and in the improved English version of C-098).
\textsuperscript{53} Cinco Dias, Article, \textit{Nieto Says the New Wind Regulation Provides “Full Legal Certainty”} (C-115), quoting the General Secretary of Energy, Mr. Nieto.
The revisions to the regulated tariff and the upper and lower limits indicated in this paragraph shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed.54

130. This attractive new scheme was a limited offer. RD 661/2007 set a target for the production to be derived from each kind of renewable energy facility: the “target reference installed power” for PV installations was 371 MW.55 The Decree provided that once 85% of that target had been reached, a cut-off date should be set after which no more facilities could be registered and entitled to the tariffs set under the Decree. The cut-off date was to be set taking into account information on the fulfilment of the power target for each technology and the estimated period for the fulfilment of the corresponding target, and on “the speed of implementation of new facilities and the average duration of the works for a standard project of any technology”, and the date could not be less than 12 months ahead.56 There was, accordingly, an incentive to establish PV facilities quickly in order to benefit from the scheme, and an obligation to allow a period within which projects already under way might be completed before the scheme was closed.

131. The Spanish Ministry of Industry, Tourism and Commerce issued a press release at the time that RD 661/2007 was adopted, which described the system established by the Decree:

Every 4 years the tariffs will be revised, bearing in mind compliance with the targets set. This will allow an adjustment to the tariffs in line with the new costs and the degree of compliance with the targets. The tariff revisions carried out in the future will not affect those installations already operating. This guarantee affords legal safety to the producer, providing stability to the sector and promoting its development. The new regulations will not be of a retroactive nature. The installations operating before January 1, 2008 may continue to adopt the previous regulations under the fixed tariff option throughout their working life.

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54 RD 661/2007 (R-086/C-098), Article 44.3.
55 RD 661/2007 (R-086/C-098), Article 37.
56 RD 661/2007 (R-086/C-098), Articles 21, 22.
The new text, which replaces Royal Decree 436/2004, fits into the energy policy commitment to drive forward the use of clean, native and efficient energies in Spain. The Government commitment to these energy technologies was the reason why the new regulations sought stability over time, which allows businessmen to carry out medium and long-term scheduling as well as a sufficient, fair return that, combined with stability, makes the investment and dedication to this activity attractive.

The new regulations will not be of a retroactive nature. The installations that are operational by January 1, 2008 may continue to adopt the previous regulations under the fixed tariff option throughout their operating life. When they take part in the market, they may maintain their prior regulation until December 31, 2012. These installations may voluntarily opt to abide by this new Royal Decree as from its publication.

It will be in 2010 that the tariffs and premiums set out in the proposal will be revised in accordance with the targets set in the Renewable Energies Plan 2005-2010 and in the Energy Efficiency and Savings Strategy and in line with the new targets included in the following Renewable Energies Plan for the period 2011-2020.

The revisions carried out in the future of the tariffs will not affect those installations already in operation. This guarantee provides legal safety for the producer, affording stability to the sector and fostering its development.  

132. In his witness statement dated 21 July 2016, Joachim Kruck wrote of his view of the new regime:

The incentives under RD 661/2007 offered investors a fixed long-term tariff at rates equal or even higher – for relatively large facilities – than those offered under RD 436/2004. The full tariff would apply for twenty-five years, after which the facility would receive approximately 80% of the fixed tariff rate for the duration of the life of the facility. Further, the tariff would be adjusted annually under the consumer price index (CPI), which was also a clear indication that Spain would not arbitrarily modify the tariff in future years. Notably, the decree ensured that once a facility had been granted rights under the applicable tariff regime, any future revisions to the tariff

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rates would not impact those facilities. Thus, it was critically important for us to develop and finalize our facilities quickly so that they would receive the RD 661/2007 tariffs.\footnote{Joachim Kruck WS, ¶ 16.}

133. RD 661/2007 proved very successful in attracting investment in PV facilities, and the level of 85% of the 371 MW target was passed by September 2007.\footnote{Resolution of the General Energy Secretariat which sets forth the regulated tariff maintenance period for the photovoltaic technology, pursuant to article 22 of Royal Decree 661/2007, 27 September 2007 (“Resolution of 27 September 2007”) (C-151). It records that the “Board of Directors of the National Energy Commission, in its meeting dated September 27, 2007, conclud[ed] that on August 31, 2007, the percentage reached with regard to the installed power for solar photovoltaic technology is 91 percent, and that 100 percent of the target shall be achieved in the month of October 2007.”} It was announced, in accordance with the terms of RD 661/2007, that no further registrations would be allowed under the scheme after 29 September 2008.\footnote{Resolution of 27 September 2007 (C-151).} Facilities registered after that date would, therefore, not be eligible for the tariffs set in RD 661/2007.

134. In the light of the success of RD 661/2007, further legislation was adopted in 2008. RD 1578/2008, adopted on 26 September 2008,\footnote{Royal Decree 1578/2008 on remuneration for production of electricity using solar photovoltaic technology for facilities after the deadline for maintaining the remuneration of RD 661/2007, 26 September 2008 (“RD 1578/2008”) (R-087/C-046).} established an amended and extended version of the 2007 scheme for PV plants. The purpose of RD 1578/2008 was explained in a Press Release that accompanied its adoption:

The development of this sector in Spain has totally outperformed the forecasts in 2005. To be precise, the target set for 2010 to attain 371 MW of photovoltaic energy was achieved in August 2007 and it is estimated that installed power at year-end 2008 will be fivefold the power target for 2010. Hence, since said goal has been surpassed, it is necessary to determine a new long-term target and a new legal framework which allows the continuity of the success achieved by this sector in Spain at reasonable costs. With this in mind, a Royal Decree has been approved which will allow 3,000 MW to be attained in 2010 and around 10,000 MW in 2020.\footnote{Press Release, The Government Approves the New Economic Regime for Solar Photovoltaic Technology Installations, 26 September 2008 (C-138).}

135. While the financial incentives offered under RD 436/2004 had failed to attract sufficient investment in PV facilities, those offered under RD 661/2007 had shown themselves to be
more generous than was necessary to achieve Spain’s targets. The Preamble to RD 1578/2008 explained the thinking on this matter:

*Just as insufficient compensation would make the investments nonviable, excessive compensation could have significant repercussions on the costs of the electric power system and create disincentives for investing in research and development, thereby reducing the excellent medium-term and long-term perspectives for this technology. Therefore, it is felt that it is necessary to rationalize compensation and, therefore, the royal decree that is approved should modify the economic regime downward, following the expected evolution of the technology, with a long-term perspective.*

136. RD 1578/2008 accordingly set up a new “economic regime for facilities generating electric power with photovoltaic technology, to which the regulated tariff rates provided in Article 36 of Royal Decree 661/2007, of 25 May, on the activity of electricity power generation under the special regime, are not applicable because of their date of final registration.”

These facilities, coming into operation too late to claim the benefit of RD 661/2007 tariffs, were offered markedly lower tariffs; but the tariffs payable to existing registered projects were not affected.

137. Facilities could establish their entitlement to the tariffs under the 2008 regime by a form of ‘pre-assignment registration’ or ‘pre-registration’ at the beginning of the development of a project, which would provide “the necessary legal security to promoters with respect to the return that the facility will earn once it is put into operation.” Pre-registration was conditional upon submission of specified documents, such as permits from the local authorities, permission to access the electricity grid, and a bond guaranteeing the facilities’ ultimate connection to the grid; and registration was effected chronologically, in the order in which completed applications were filed. The tariffs were again offered on a restricted

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63 RD 1578/2008 (R-087), Preamble.
64 RD 1578/2008 (C-046), Article 1.
65 RD 1578/2008 (R-087/C-046), Article 11.
66 RD 1578/2008 (R-087/C-046), Article 4.
67 RD 1578/2008 (R-087), Preamble.
68 RD 1578/2008 (R-087), Appendix II.
basis, limited by annual capacity quotas applied at each round at which electricity capacity was sought.\(^{69}\)

138. RD 1578/2008 contained a number of other significant features. It was stipulated that “the regulated rate that is applicable to a facility under this royal decree shall be maintained for a maximum period of twenty-five years after the date of the last of the following to occur: the start-up date or the date of the registration of the facility in the compensation pre-assignment registry.”\(^{70}\) RD 661/2007, in contrast, had not set a limit on the operational life of a facility during which the specified tariffs could be claimed.

139. Furthermore, RD 1578/2008 provided for an adjustment of the tariffs in 2012 in the light of the operation of the 2008 scheme:

\[\text{Fifth additional provision. Modification of the compensation for generation by photovoltaic technology.}\]

\[\text{During the year 2012, based on the technological evolution of the sector and the market, and the functioning of the compensatory regime, compensation for the generation of electric power by photovoltaic solar technology may be modified.}\]

140. This was the legal position around the time\(^{72}\) that the Claimants made their investments. It is the changes to that regime that form the essential background to the claims in this case.

141. The Claimants point to five regulatory changes after the adoption of RD 1578/2008, which adversely affected their investments.

142. First, on 19 November 2010 RD 1565/2010 was adopted.\(^{73}\) It removed the entitlement to the advertised fixed feed-in tariffs after the 25\(^{th}\) year of operation.

\(^{69}\) RD 1578/2008 (R-087/C-046), Article 5.

\(^{70}\) RD 1578/2008 (R-087), Article 11(5).

\(^{71}\) RD 1578/2008 (R-087).

\(^{72}\) A more precise analysis follows below. See ¶¶ 213-215, infra.

\(^{73}\) Royal Decree 1565/2010 which regulates and modifies certain aspects of the electricity production activities under the Special Regime, 19 November 2010 (“RD 1565/2010”) (C-129), Ten.
Second, on 23 December 2010 RDL 14/2010 “on the establishment of urgent measures for the correction of the tariff deficit in the electricity sector” was enacted. Among other steps, it introduced a cap on the operating hours each year for which a PV facility would be paid the feed-in tariffs set out in RD 661/2007 and RD 1578/2008. It also required distributors to apply an “access fee” on each MWh of electricity released on to their networks.

RDL 14/2010 also addressed another matter. The removal by RD 1565/2010 of the entitlement to the original FIT after 25 years had led to criticism from investors. RDL 14/2010 responded to the criticism by extending the fixed 25-year period to 28 years (and subsequently, in 2011, to 30 years), thus “largely offset[ting] the economic impact of the elimination of the tariff at the 80% level thereafter.

The third measure identified by the Claimants is Law 15/2012, which imposed a 7% ‘energy tax’. This, the Claimants say, “was indistinguishable from a straightforward 7% reduction in the tariff rates guaranteed by RD 661/2007 and RD 1578/2008.”

The Preamble to Law 15/2012 set out the purpose of the Law, as follows:

_The objective of this Act is to harmonize our tax system with a more efficient use which greater respects [sic] the environment and sustainability, values which have inspired this reform of the tax system, and as such in line with the basic principles governing the tax, energy and, of course, environmental policies of the European Union._

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74  Royal Decree-Law 14/2010 on the establishment of urgent measures for the correction of the tariff deficit in the electricity sector, 23 December 2010 (“RDL 14/2010”) (R-073/C-102). A further measure in 2010, RD 1614/2010, modified the regime applicable to solar thermal and wind power plants.

75  RDL 14/2010 (R-073), First Additional Provision, and Second Transitional Provision.

76  RDL 14/2010 (R-073), First Transitional Provision.

77  RDL 14/2010 (R-073), Preamble, ¶ 4 and First Final Provision.


79  Cl. Mem., ¶ 315, fn 622.

80  Law 15/2012 regarding fiscal measures for energy sustainability, 27 December 2012 (“Law 15/2012”) (R-018/C-040).

81  Cl. Mem., ¶ 325.
In today’s society, the increasingly greater effect of energy production and consumption on environmental sustainability requires a legislative and regulatory framework which guarantees for all the agents involved correct operation of the energy model which also contributes to preserving our rich environmental heritage.

The basic foundation of this Act lies in Article 45 of the Constitution, a precept in which the protection of our environment is established as one of [the] guiding principles of social and economic policies. One of the bases of this tax system reform will therefore be the internalization of the environmental costs arising from the production of electrical energy....

For this purpose and also with a view to favouring budgetary balance, Title I of this Act establishes a tax on the value of the production of electrical energy, of a direct and real nature, which is levied on the performance of activities of production and incorporation into the electricity system of electrical energy in the Spanish electricity system. 82

147. Fourth, on 1 February 2013 Spain enacted RDL 2/2013, “on urgent measures in the energy sector and in the financial sector.” 83 That law changed the basis for the calculation of the indexing of the feed-in tariffs, so as to use an “amended” consumer price index. The Claimants say that “the effect of this change was to reduce the inflation adjustment by about three percentage points (from +2.98% to -0.03%).” 84

148. The thinking behind the change was explained in the Preamble to RDL 2/2013:

The data reported by the National Energy Commission in its report 35/2012 of the 20th of December on the order proposal establishing the access tolls are established from the 1st of January 2013 and tariffs and premiums of special regime facilities, has revealed the appearance of new deviations in estimates of costs and revenues caused by various factors, both for the end of 2012 and 2013, that in the current economic context, would render almost unfeasible their coverage with electric tolls and the items prescribed from the State General Budget.

These deviations are due largely to a higher growth in the cost of the special regime, due to an increase in the operation hours exceeding the projected

82 Law 15/2012 (R-018), Preamble.
83 Royal Decree-Law 2/2013 on urgent measures in the energy sector and in the financial sector, 1 February 2013 (“RDL 2/2013”) (R-078/C-083).
84 Cl. Mem., ¶ 333.
and an increase in the compensation values after indexing to the Brent price, and a reduction of toll revenues due to a very sharp drop in demand which is consolidated for this exercise.

The proposed alternative would be a further increase in access tolls paid by electricity consumers. This measure would affect directly household economies and corporal [sic] competitiveness, both in a delicate situation, given the current economic situation.

Given this scenario, in order to alleviate this problem the Government has decided to adopt certain cost-reduction urgent measures to avoid the assumption of a new effort by consumers; helping them, through consumption and investment, to collaborate as well for the economic recovery.

Consequently, with the purpose of using a more stable index which is not affected by the volatility of unprocessed foods nor those from domestic fuels, all those remuneration updating methodologies that are linked to CPI shall substitute it by the Consumption Price Index to constant taxes with no unprocessed food nor energy products.\(^85\)

149. The fifth step was the replacement of the “Special Regime” for renewable energy, which had existed since 1994 and included the tariffs fixed by RD 661/2007 and RD 1578/2008, with a new regime. The Claimants point to a series of measures that had this effect, beginning with RDL 9/2013, establishing “urgent measures to ensure the financial stability of the electricity system”,\(^87\) which was adopted on 12 July 2013. The Respondent, in contrast, emphasizes the continuity of the basic principles on which both the old and the new regimes were based.\(^88\)

150. The lengthy Preamble to RD 9/2013 describes in some detail Spain’s repeated efforts to devise a satisfactory regime for electricity production and the issues faced as a result of unexpected difficulties, including the world economic crisis. These considerations pointed to “the unsustainable nature of the deficit of the electricity sector and the need to adopt

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85 RDL 2/2013 (R-078), Preamble.
86 Cl. Mem. ¶¶ 335.
87 Royal Decree-Law 9/2013 which sets forth urgent measures to ensure the financial stability of the electricity system, 12 July 2013 (“RDL 9/2013”) (R-079/C-091).
urgent measures of an immediate effect that would put an end to this situation." The Preamble outlined the new regime that was to be introduced:

It shall be based on receiving the revenue derived from participation in the market, with an additional return that, if necessary, shall cover those investment costs that an efficient and well-managed company does not recover in the market. In this sense, according to community case law, a company shall be deemed as being efficient and well-managed if it has the necessary means for the development of its field, whose costs are those of an efficient enterprise in that field and considering the corresponding revenue and a reasonable profit for the execution of its functions. The aim is to ensure that the high costs of an inefficient company are not taken as reference.

This framework shall articulate a remuneration that shall allow renewable energy, cogeneration, and waste facilities to cover the costs necessary to compete in the market at an equal level with the rest of technologies and get a reasonable rate of return.

In this way, the Law carries out a balanced allocation of the costs attributable to the electricity system, electrical consumers and taxpayers, to the extent in which part of these costs are financed under the General State Budget.

Furthermore, Law 54/1997, of 27 November, stipulates the regulation on the concept of reasonable rate of return, setting it, in line with the legal principles on the particular case law developed within the last few years, within project profitability that will be focused, prior to taxes, on the average yield in the secondary market of State Obligations within ten years, by applying the appropriate differential.

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89 RDL 9/2013 (R-079), Preamble.
In this way, the aim is to consolidate the continuous adaptation that the regulation has experienced, in order to keep this reasonable rate of return through a predictable system, subject to temporary realisation.\(^{90}\)

151. RDL 9/2013 prescribed a “reasonable rate of return” for PV investments:

For purposes of the provisions of the penultimate paragraph of Article 30.4 of Law 54/1997, of 27 November, for the facilities that as of date of the entry into force of this Royal Decree law have the right to a feed-in tariff scheme, the reasonable rate of return shall focus, before taxes, on the average yield in the secondary market for ten years prior to the entry into force of this Royal Decree-Law of the Obligations of the State within ten years\(^{91}\) increased by 300 basic points, without prejudice to the revision envisaged in the last paragraph of that article.\(^{92}\)

152. While RDL 9/2013 indicated the shape of things to come, it did not itself set out the new regulatory regime (“NRR”) in detail. In the words of the Preamble to RD 413/2014,\(^{93}\) RDL 9/2013 “explicitly outlined the principles upon which the framework to be applied to these facilities is to be based, pursuant to the terms that were later included in Act 24/2013, of 26\(^{th}\) December, on the Electricity Sector, and which are developed herein.” The necessary detail was added by Law 24/2013, RD 413/2014, and Ministerial Order IET/1045/2014, which together constitute the NRR.

153. Law 24/2013, adopted on 26 December 2013,\(^{94}\) once more recalled in its Preamble Spain’s successive attempts since 1997 to establish a stable and sustainable economic and financial

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\(^{90}\) RDL 9/2013 (R-079), Preamble.

\(^{91}\) I.e., 10-year Spanish Treasury bonds.

\(^{92}\) RDL 9/2013 (R-079), Preamble and First Additional Provision. Article 30.4 of Law 54/1997 is quoted supra, at \¶ 121. A later measure defined 300 basis points above the average historic yield (over ten years) on Spanish ten-year treasury bonds as 7.398%: see Ministerial Order IET/1045/2014 adopting the remuneration parameters of standard facilities applicable to certain electrical energy production plants using renewable energy sources, cogeneration and waste, 16 June 2014 (“Ministerial Order IET/1045/2014”) (R-101/C-179), Annex III, Article 1.3. The Brattle Group Regulatory Report, at \¶ 189, states that the ten-year average became a two-year historical average in the periodic reviews provided for in the NRR, with the result (as a consequence of falling interest rates) that the reasonable rate of return falls.

\(^{93}\) Royal Decree 413/2014 regulating the production of electrical energy from renewable energy sources, cogeneration and waste, 6 June 2014 (“RD 413/2014”) (R-095), Preamble.

\(^{94}\) Law 24/2013 regarding the Electrical sector, 26 December 2013 (“Law 24/2013”) (R-062; C-180).
system applicable to energy production. It provided a helpful summary of the position at that time:

Essentially, the continuous normative changes have entailed an important distortion to the normal operation of the electrical system and which needs to be corrected through action by the legislator which lends the regulatory stability that electrical activity requires. This regulatory safety, combined with the need to undertake the reforms needed to ensure the sustainability of system in the long-term and to resolve the existing shortcomings in system operation would recommend the approval of an overall reform of the sector, based on a new income and expenses regime for the electrical system which tries to return to the system the financial sustainability it lost a long time ago and whose eradication has not been achieved to date through the adoption of partial measures.

…

The present Law essentially sets out to establish the regulation for the Electrical Sector, ensuring electrical supply with the necessary quality levels and at the lowest possible cost, to ensure the economic and financial sustainability of the system and allow an effective competition level in the Electrical Sector, all within the environmental protection principles of a modern society.

…

The widespread awareness of the tariff deficit situation and the consequent threat to the very feasibility of the electrical system has led to the need to make major changes to the remuneration regime for regulated activities. In view of the progressive deterioration in the sustainability of the electrical system, the legal entities in the latter could no longer legitimately trust the maintenance of the parameters which had degenerated into the situation described and any diligent operator could anticipate the need for these changes.

For activities with regulated remuneration, the Law reinforces and clarifies the principles and criteria for establishing the remuneration regimes to which end the necessary costs will be considered to carry out activity by an efficient, well-managed company through the application of homogeneous criteria throughout Spain. These economic regimes will allow appropriate returns to be obtained with regard to the activity risk.

…
The technical and economic management of the system essentially maintains the other remuneration criteria, incorporating into the system operator’s remuneration incentives for the reduction of system costs deriving from the operation.

The high penetration of production technologies deriving from renewable energy sources, cogeneration and waste, included in the so-called special regime for electrical energy production, has meant that its unique regulation connected with power and its technology lacks any object. By contrast, it makes it necessary for regulation to consider these installations in a similar way to those of other technologies which will be integrated into the market and, in any case, for them to be considered because of their technology and impacts on the system, rather than because of their power which is why the differentiated concepts of ordinary and special regime are abandoned. This is why unified regulation is being carried out without prejudice to any unique considerations which need to be established.

The remuneration regime for renewable energies, cogeneration and waste will be based on the necessary participation in the market of these installations, complemented by market income with specific regulated remuneration which enables these technologies to compete on an equal footing with the other technologies on the market. This specific complementary remuneration will be sufficient to attain the minimum level required to cover any costs which, by contrast to conventional technologies, they cannot recover on the market and will allow them to obtain a suitable return with reference to the installation type applicable in each case.  

154. Law 24/2013 set out a number of measures intended to address the widening gap between the costs of providing electricity and the revenue derived from it – the “tariff deficit.” It was, however, RD 413/2014, adopted on 6 June 2014, that was the main instrument in the establishment of the NRR.

155. Yet again, the Preamble to RD 413/2014 provided a detailed and frank account of the development of Spanish policy on renewable energy regulation. In relation to the Special Regime for renewable energy as it was provided for by RD 661/2007 it said:

Although, considering the circumstances existing at each moment in time, these provisions permitted the achievement of the purposes for which they

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95 Law 24/2013 (R-062), Preamble.
96 Law 24/2013 (R-062), Preamble.
97 RD 413/2014 (R-095/C-090).
were introduced, it cannot be overlooked that the forecasts prevailing when they were adopted were soon surpassed as a result of the highly favourable support framework. This circumstance, together with the fact that the costs of technology were gradually falling, made it necessary to make a series of amendments to the regulatory framework in order to guarantee both the principle of reasonable return and the financial sustainability of the system itself.

The measures adopted between 2009 and 2011 proved insufficient for fulfilling their intended aims and the regulatory framework was found to be suffering from certain failings—which remained uncorrected despite the huge effort made to adapt the regulation—seriously compromising the system’s financial sustainability. This situation led to the adoption of Royal Decree-Act 1/2012, of 27th January, which suspended the remuneration pre-allocation procedures and withdrew financial incentives for new facilities generating electrical energy through cogeneration or from renewable energy sources or waste, and Royal-Decree Law 2/2013, of 1st February, on urgent measures for the electricity system and the financial sector, which, among other measures, amended Royal Decree 661/2007, of 25th May, eliminating the “market price plus premium” option applicable to certain technologies and establishing tariff-based remuneration for all special regime facilities, while at the same time modifying the criteria for updating the remuneration of regulated activities in the electricity system.

In this context—it having become apparent that the financial sustainability of the electricity system had to be guaranteed, that the successive amendments to the regulation required consolidation (among other reasons, to ensure the stringent and correct application of the principle of reasonable return), and that the regulatory framework needed to be reviewed in order to adapt it to the actual circumstances of the industry—Royal Decree-Act 9/2013, of 12th July, on urgent measures to ensure the financial stability of the electricity system, was passed.  

156. The main features of the NRR were described as follows:

Under this new framework, in addition to the remuneration earned by selling energy at market rates, facilities may also receive specific remuneration throughout their regulatory useful lives. This specific remuneration comprises an amount per unit of installed capacity, intended to cover any investment costs incurred by a standard facility that cannot be recovered through the sale of its energy on the market, known as

98 RD 413/2014 (R-095), Preamble.
“compensation for investments”; and an amount linked to operations, intended to cover any difference between a standard facility’s operating costs and the revenue generated from its participation in the energy production market, known as “compensation for operations”.

The compensation for investments and compensation for operations applicable to a standard facility are to be calculated based on standard revenues from the sale of energy valued at market rates, standard operating costs required to perform the activity and the standard value of the initial investment—all three standard values established on the basis of an efficient, well-managed company. A set of compensation benchmarks will be established for each standard facility by order of the Ministry of Industry, Energy and Tourism …

The compensation for investments—and, where applicable, the compensation for operations—aims to cover the higher costs incurred by facilities that produce electricity from renewable energy, high-efficiency cogeneration and waste, so that they may compete on an equal footing with other technologies and obtain a reasonable return by reference to the standard facility applicable in each case.

Moreover, the concept of “reasonable return” on a project is introduced into the regulatory framework. In line with legal scholarship on this matter in recent years, reasonable return is set as a pre-tax return approximately equal to the average yield on ten-year government bonds in the secondary market for the 24-month period leading up to the month of May of the year prior to the commencement of a given regulatory period, increased by a spread.

…

Regulatory periods are to have a six-year duration. The first regulatory period spans from the date of entry into force of Royal Decree-Act 9/2013, of 12th July, to 31st December 2019. Each regulatory period is divided into two half-periods of three years each; the first half-period runs from the date of entry into force of Royal Decree 9/2013, of 12th July, to 31st December 2016.

The compensation benchmarks may be adjusted as part of a review conducted at the end of each regulatory half-period or period, pursuant to Article 14.1 of Act 24/2013, of 26th December.
All compensation benchmarks may be adjusted in the corresponding review, including the value upon which reasonable return is to be based over the remaining regulatory life of standard facilities.

...

Once a facility’s regulatory useful life\(^99\) has elapsed, it will no longer receive the compensation for investments or compensation for operations. Such facilities may remain in operation, receiving only the remuneration earned on energy sales on the market.\(^{100}\)

157. The NRR thus established a flexible system under which remuneration to an actual PV installation was calculated by considering the position of a hypothetical “standard installation”, and making payments to supplement the market price for electricity.\(^{101}\) There was an “investment incentive” or “compensation for investments (Rinv)” calculated per MW of installed capacity, and an “operating incentive” or “compensation for operations (Ro)” calculated per MWh of electricity production.\(^{102}\) The incentives were explicitly subject to review and to change over time.

158. The details of the “standard installations” were set out in Ministerial Order IET/1045/2014, of 16 June 2014.\(^{103}\) The Order defines 578 “standard installations” in the PV sector, and sets out detailed parameters, including the “regulatory useful life” (30 years for all PV installations),\(^{104}\) the “operation threshold” (below which no incentives (Rinv or Ro) were payable) and the minimum operation hours required (up to which only a proportion of the

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\(^{99}\) The regulatory life of an installation was to be “the useful regulatory life of the associated standard facility—as set forth in a ministerial order to be issued the Ministry of Industry, Energy and Tourism, subject to prior approval by the Government’s Executive Committee for Economic Affairs”: RD 413/2014 (R-095), Article 28(1). It was set at 30 years for all PV installations.

\(^{100}\) RD 413/2014 (R-095), Preamble.

\(^{101}\) RD 413/2014 (R-095/C-090), Article 11.

\(^{102}\) RD 413/2014 (R-095/C-090), Article 11(6)(a) and (b), respectively.

\(^{103}\) Ministerial Order IET/1045/2014 (R-101/C-179).

\(^{104}\) Ministerial Order IET/1045/2014 (R-101/C-179), Article 5.
Rinv and Ro was payable),\textsuperscript{105} and the maximum operating hours for which the Rinv and Ro would be payable.\textsuperscript{106}

159. The Claimants’ case is that the NRR in effect “abolished the incentives regime entirely and replaced it with a completely different regulatory paradigm.”\textsuperscript{107} The Respondent rejects the Claimants’ view and maintains that the NRR was “the foreseeable result of the [Spanish Electricity System], in accordance with its principles and objectives.”\textsuperscript{108}

V. JURISDICTION

160. In the Claimants’ view, the Tribunal has jurisdiction over the dispute on the basis of Article 26 of the ECT and Article 25 of the ICSID Convention,\textsuperscript{109} whose jurisdictional requirements are, they say, all met in this case.\textsuperscript{110}

161. The Respondent raises the following three objections to the jurisdiction of this Tribunal:\textsuperscript{111}

a. The Tribunal lacks jurisdiction because the Claimants are not protected investors under Article 25 of the ICSID Convention. Alternatively, the Tribunal lacks jurisdiction due to the Respondent’s lack of consent to having the multiple Claimants’ claims heard in a single arbitration (the “Multi-Party Objection”);\textsuperscript{112}

b. The Tribunal lacks jurisdiction since the Claimants are not protected investors under the ECT. They are not nationals of another Contracting Party because both Germany and Spain are members of the EU, also a party to the ECT, and the ECT

\textsuperscript{105} Ministerial Order IET/1045/2014 (R-101/C-179), Article 7.

\textsuperscript{106} Ministerial Order IET/1045/2014 (R-101/C-179), Article 8.

\textsuperscript{107} Cl. Mem., chapter IV.H.5.

\textsuperscript{108} Resp. PHB, ¶ 38.

\textsuperscript{109} RfA, ¶¶ 61-62; Cl. Mem., ¶¶ 42-43.


\textsuperscript{111} Respondent originally raised four objections in its Counter-Memorial. However, the Respondent withdrew its third objection, the ‘corporate personality objection’ in its Rejoinder. See Resp. Rej., fn. 1.

\textsuperscript{112} Resp. C-Mem., § III(A); Resp. Rej., § III(A); According to the Respondent, this was originally presented as an admissibility objection but was later transformed into a jurisdictional objection under Article 25 of the ICSID Convention. Resp. Opening Statement, slide 250; Tr. Day 1 [Mr. Elena Abad] 297:12-17.
does not apply to disputes related to Intra-EU investments (the “Intra-EU Objection”);\(^{113}\) and

c. The Tribunal lacks jurisdiction to decide on the alleged breach of Article 10(1) of the ECT arising from the introduction of the TVPEE by Law 15/2012. This is because Article 21 of the ECT enshrines a *carve-out* for taxation measures and the TVPEE is a taxation measure (the “Taxation Measure Objection”).\(^{114}\)

162. Therefore, the Respondent requests that the Tribunal declare that it lacks jurisdiction over the dispute or, if applicable, that the Claimants’ claims are inadmissible.\(^{115}\)

163. The Parties’ respective positions with respect to each of these three objections are summarized below.

164. In the course of its analysis of those objections the Tribunal will also deal with certain other matters that are relevant to the establishment of its jurisdiction and the admissibility of the claims.

165. The Tribunal notes that Germany, Spain and the EU are all Contracting Parties to the ECT. The ECT was ratified by Germany on 14 March 1997 and entered into force on 16 April 1998. For Spain the corresponding dates are 11 December 1997 and 16 April 1998; and for the European Union they are 17 December 1994 and 16 April 1998.\(^{116}\) The ICSID Convention was ratified by Germany on 18 April 1969 and entered into force for Germany on 18 May 1969. For Spain the corresponding dates are 18 August 1994 and 17 September 1994. The EU is not a party to the ICSID Convention, and as that Convention stands is not eligible to be.\(^{117}\)

\(^{113}\) Resp. C-Mem., § III(B); Resp. Rej., § III(B); Resp. Opening Statement, slide 250.

\(^{114}\) Resp. C-Mem., § III(D); Resp. Rej., § III(C); Resp. Opening Statement, slide 250.

\(^{115}\) Resp. C-Mem., § VI, ¶ a).


A. THE MULTI-PARTY OBJECTION

(1) The Parties’ Positions

a. Respondent’s Position

166. The Respondent states that the DSG Deutsche Solargesellschaft (“DSG”) Group and the Tauber Solar Investors (“TS”) Group, on behalf of which it says that the claims were filed, are not nationals of a Contracting Party to the ICSID Convention and, therefore, do not fulfil the requirements of Article 25 of the ICSID Convention.118

167. In the alternative, should the Tribunal decide that the true Claimants are the 116 individuals and companies listed, the Respondent argues that the Tribunal lacks jurisdiction since Spain has not consented to a joint arbitration comprising their accumulated independent and heterogenous claims.119

168. Based on Giovanni Alemanni v. Argentina, the Respondent argues that a multi-party arbitration can only occur under one of three circumstances: (1) “when it is specifically provided for …;” (2) when both parties consent thereto, either expressly or implicitly; and (3) when “the instrument setting up the arbitration or establishing the Respondent’s consent to it can properly be interpreted … as covering the particular multiplicity of claimants within that consent.”120 For the Respondent, none of these circumstances are present in this case.

169. First, neither the ECT nor the ICSID Convention expressly provide for multi-party arbitration.121 Second, the Respondent has not expressly or implicitly consented to any joint actions by the Claimants and, in fact, has expressed its opposition since the submission of the RfA.122 Third, as explained in the following paragraphs, the claims presented by the

118 Resp. C-Mem., ¶ 51; Resp. Rej., ¶ 72.
119 Resp. C-Mem., ¶¶ 5, 52, 85; Resp. Rej., ¶¶ 4, 75, 103. The Respondent does not argue that multi-party proceedings are completely prohibited: Resp. Rej., ¶ 93.
121 Resp. C-Mem., ¶ 68.
122 Resp. C-Mem., ¶ 69.
Claimants are not identical in all essential aspects and “there are irreconcilable and relevant differences between them.”

170. For the Respondent, when Article 25(1) of the ICSID Convention and Article 26(4) of the ECT use the phrases “any legal dispute” and “the dispute”, these provisions presuppose “a substantive unity in the ‘dispute’ submitted to arbitration.” This requires that “… the interest represented on each side of the dispute has to be in all essential respects identical for all of those involved on that side of the dispute.”

171. In the Respondent’s view, the Claimants in this arbitration are unrelated investors with unrelated investments. As such, the inclusion of all the investments submitted in a single procedure would entail an “unparalleled experience” due to the “unprecedented level of subjective and objective heterogeneity in the field of investment arbitration” of all the Claimants.

172. With respect to the alleged “subjective heterogeneity”, the Respondent argues that:

a. DSG Spanien Verwaltungs GmbH, DSG Deutsche Solargesellschaft mbH, Matthias Kruck, Joachim Kruck, Ralf Hofmann, Peter Flachsmann, Frank Schumm and Rolf Schumm have not demonstrated that they are investors in the plants; and

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123 Resp. Rej., ¶ 94. See also Resp. C-Mem., ¶¶ 65, 76, 85; Resp. Rej., ¶¶ 96, 100.
124 Resp. C-Mem., ¶ 74 (emphasis in the original) (citing Giovanni Alemanni (RL-023), ¶ 287); Resp. Opening Statement, slide 251; Tr. Day 1 [Mr. Elena Abad] 298:7-14.
125 Resp. C-Mem., ¶ 75 (emphasis in the original) (citing Giovanni Alemanni (RL-023), ¶ 292); Resp. Rej., ¶ 95.
126 Resp. C-Mem., ¶¶ 76, 79.
127 Resp. C-Mem., ¶ 55; Resp. Rej., p. 28.
b. Two of the Claimants, DSG Spanien Verwaltungs GmbH and Matthias Kruck, do not claim anything. Thus, there is no dispute as required by Article 25 of the ICSID Convention.\textsuperscript{130}

173. With respect to the alleged “objective heterogeneity”, the Respondent argues that there are multiple investors and investments of different natures and structures, including: (a) “Companies holding a stake in the holding companies of photovoltaic plants”; (b) “Companies holding direct ownership of essential elements of PV plants and, at the same time, indirect ownership of non-essential elements of PV plants”; (c) “Subjects holding a stake in companies owning economic rights deriving from leases to the holding companies of PV Plants for the deployment of their facilities”; (d) “Subjects holding a stake in companies owning purchase option rights on the PV plants”; (e) “Subjects holding economic rights deriving from operation and maintenance contracts concluded with the holding companies of the PV plants.”\textsuperscript{131}

174. In this respect, the Respondent submits that it has not given its consent with regard to the claims presented by Deutsche Solar Ibérica Real State, S.L., Solar Andaluz Grundstücks, S.L. and DSG Deutsche Solargesellschaft GmbH. These Claimants do not perform activities related to the production of electricity and/or the guarantees in dispute,\textsuperscript{132} and are claiming damages for breach of the contracts they entered into with the companies holding the Plants which, under no circumstances, can be the Respondent’s responsibility.\textsuperscript{133}

175. In its PHB, the Respondent submitted an additional argument regarding the “lost bonus payments” that DSG Deutsche Solargesellschaft GmbH claims in relation to the O&M (operations and maintenance) Contracts to which it is a party.\textsuperscript{134} For the Respondent, these

\textsuperscript{130} Resp. C-Mem., ¶¶ 59-60, 84; Resp. Rej., ¶ 80; Resp. Opening Statement, slide 251; Tr. Day 1 [Mr. Elena Abad] 299:14 – 300:1, 300:10-13; Resp. PHB, ¶ 9.

\textsuperscript{131} Resp. C-Mem., ¶ 62. See also Resp. C-Mem., ¶ 82; Resp. Rej., ¶¶ 81-82, 90; Resp. Opening Statement, slide 251; Tr. Day 1 [Mr. Elena Abad] 299:6-13; Resp. PHB, ¶ 14.

\textsuperscript{132} Respondent argues that the first two companies are in charge of renting the land where some of the PV plants are located and have certain purchase options on some of the plants. The third one provides services of operation and maintenance, administration and accounting services to some of the companies involved in the Alcolea, Calasparra and Tordesillas projects. Resp. Rej., ¶¶ 77-79, 85-86.

\textsuperscript{133} Resp. Rej., ¶¶ 87-88; Resp. PHB, ¶ 19.

\textsuperscript{134} Resp. PHB, ¶ 10.
contracts do not satisfy the objective criterion of an “investment” under Article 25(1) of the ICSID Convention nor under Articles 1(6) and 26 of the ECT. Thus, the Tribunal should decline its jurisdiction in relation to such contracts, which would have an impact on the total **quantum** of the dispute.\textsuperscript{135}

176. In support of this argument, the Respondent contends that the Tribunal must assess its jurisdiction *ex officio* under Article 41(1) of the ICSID Convention; it is therefore irrelevant that the argument was not presented earlier.\textsuperscript{136} In any event, the Respondent submits, this argument relates to its jurisdictional objection based on the “unprecedented objective heterogeneity” of investors and investments whose confusing nature has prevented the Respondent from articulating a more detailed defence in this case.\textsuperscript{137}

177. Finally, the Respondent states that the heterogeneity among the Claimants is also evident from the fact that the alleged investments were made over a five-year period and that some investors made their investment after some of the challenged measures were enacted.\textsuperscript{138}

### b. Claimants’ Position

178. The Claimants reject the position adopted by the Respondent arguing that it is not supported by the ECT, the ICSID Convention or arbitral case law.\textsuperscript{139} They argue that: (1) the Respondent mischaracterized the Claimants’ identities; (2) Spain’s separate consent to multi-party arbitration is not required; and (3) the Claimants are permitted to pursue arbitration jointly.\textsuperscript{140}

179. *First*, the Claimants argue that the Respondent has mischaracterized the identity of the Claimants by arguing that the Claimants are the DSG Group and the TS Group.\textsuperscript{141} There are 116 different Claimants in these proceedings, something that they have explained in

\textsuperscript{135} Resp. PHB, ¶¶ 11-28.
\textsuperscript{136} Resp. PHB, ¶¶ 11-12.
\textsuperscript{137} Resp. PHB, ¶ 13.
\textsuperscript{138} Resp. Rej., ¶¶ 83, 91.
\textsuperscript{139} Cl. Reply, ¶ 36.
\textsuperscript{140} Cl. Reply, ¶ 38; Cl. Rej., ¶¶ 3, 29-30.
\textsuperscript{141} Cl. Reply, ¶¶ 40-41.
several submissions. The DSG Group and the TS Group are not and have never been the names of any formal legal entity or claimant; they are just the names assigned to two independent groups in which the Claimants have been categorized due to their commonalities.\textsuperscript{142}

180. \textit{Second}, the Claimants argue that they are not required to obtain specific consent to “multi-party” arbitration from Spain.\textsuperscript{143} Such separate consent requirement does not exist under the ECT, the ICSID Convention or ICSID Arbitration Rules, and has been rejected by the Tribunal in \textit{Giovanni Alemanni v. Argentina}.
\textsuperscript{144} On the contrary, for reasons of efficiency, it is in the interest of both parties to hear the Claimants’ claims together.\textsuperscript{145}

181. \textit{Third}, the Claimants argue that several tribunals have recognized that multi-party arbitrations are permissible.\textsuperscript{146} The correct standard for a multi-party arbitration, which has never been contested by the Respondent, is whether there is a common legal dispute, originated from the same facts and measures, and the relief sought is significantly similar.\textsuperscript{147} There is no requirement that several named claimants in a single arbitration must hold “identical” investments.\textsuperscript{148}

182. The Claimants argue they comply with said standard. All 116 Claimants’ investments are related to the PV projects; their claims are related to the alleged harm caused by Spain through the alteration and abrogation of RD 661/2007 and RD 1578/2008 incentives.

\begin{itemize}
\item \textsuperscript{142} Cl. Reply, ¶¶ 39, 42; Cl. Rej., ¶¶ 9-10, 21.
\item \textsuperscript{143} Cl. Reply, ¶ 49.
\item \textsuperscript{144} Cl. Reply, ¶¶ 50-51.
\item \textsuperscript{145} Cl. Reply, ¶¶ 49, 54-55; Cl. Rej., ¶¶ 18-19, 27.
\item \textsuperscript{146} Cl. Reply, ¶¶ 53-55 (citing \textit{Ambiente Ufficio S.p.A. and others v. Argentine Republic} (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013 (CL-002), ¶ 141, 161, 163; \textit{Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia} (PCA Case No. 2011-17), Award, 31 January 2014 (CL-003), ¶ 341; \textit{Abacalat and others v. Argentine Republic} (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011 (RL-021), ¶ 518-519; \textit{Noble Energy, Inc. and MachalaPower Cia. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad} (ICSID Case No. ARB/05/12), Decision on Jurisdiction, 5 March 2008 (“Noble”) (RL-025), ¶ 194).
\item \textsuperscript{147} Cl. Reply, ¶ 52; Cl. Rej., ¶¶ 15-17, 30 (citing \textit{Giovanni Alemanni} (RL-023), ¶¶ 288, 292; \textit{Ambiente Ufficio S.p.A. and others v. Argentine Republic} (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013 (RL-026), ¶ 161; \textit{Noble} (RL-025), ¶ 194).
\item \textsuperscript{148} Cl. Reply, ¶ 45.
\end{itemize}
regime; and they share common issues of international law, including *inter alia*, whether there is a violation of the fair and equitable treatment and expropriation standards under the ECT.\(^{149}\) The Respondent has never rebutted these assertions.\(^{150}\)

183. With respect to the Respondent’s subjective and objective heterogeneity arguments, the Claimants contend that:

   a. They have not concealed any information and have taken great care to transparently describe their investments, their ownership and the damages claimed;\(^{151}\) as such, they have demonstrated their ownership, directly or indirectly, of all the assets related to their facilities;\(^{152}\)

   b. DSG Spanien Verwaltungs GmbH and Mathias Kruck have not claimed any specific compensation to avoid double-counting; this does not affect the Respondent’s consent to arbitrate the dispute since these Claimants fulfil the jurisdictional requisites under the ECT and the ICSID Convention;\(^{153}\)

   c. Deutsche Solar Ibérica Real State, S.L. and Solar Andaluz Grundstücks, S.L. are not Claimants in this proceeding. Some of the DSG Claimants share ownership of these companies and, as such, these two companies are investments in relation to the Projects in Alcolea, Calasparra and Tordesillas;\(^{154}\) and

   d. DSG Deutsche Solargesellschaft GmbH holds contractual rights in relation to the Alcolea, Calasparra, and Tordesillas projects and these rights have been affected

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\(^{149}\) Cl. Reply, ¶¶ 42-44, 47, 50, 52; Cl. Rej., ¶¶ 14, 17, 24, 27.
\(^{150}\) Cl. Reply, ¶¶ 44-45; Cl. Rej., ¶ 17.
\(^{151}\) Cl. Rej., ¶ 25.
\(^{152}\) Cl. Reply, ¶ 47; Cl. Rej., ¶ 26.
\(^{153}\) Cl. Reply, ¶ 48; Cl. Rej., ¶ 24.
\(^{154}\) Cl. Rej., ¶ 22.
by the Respondent’s conduct;\textsuperscript{155} in any event, the Claimants’ experts have ensured there will be no double recovery.\textsuperscript{156}

(2) The Tribunal’s Analysis

a. Can the DSG claims and TS claims be heard as a single case before this Tribunal?

184. Although this objection has frequently been referred to in these proceedings as the multi-party objection, it is clear that it is not suggested that there is any prohibition on multi-party proceedings as such,\textsuperscript{157} and that the difference between the Parties concerns the conditions on which a number of claimants may come together and bring their claims under the ECT against a respondent as a single claim to be heard and determined in a single arbitration.

185. One preliminary question can be answered and put aside swiftly. The Respondent objects to arbitrating a dispute with claimants who claim no compensation.\textsuperscript{158} The Tribunal notes that the Claimants have requested both compensation and declaratory relief,\textsuperscript{159} and that the Respondent has not shown that any rule or principle of international law requires or permits the treatment of claimants differently, for the purposes of establishing a consent to arbitrate, according to the remedy that they seek. The Tribunal does not consider that this objection has any effect upon questions of admissibility or jurisdiction, and accordingly rejects the objection.

186. A second preliminary question can also be put aside swiftly. Though the Request for Arbitration refers to the request being made by the “DSG Group” and the “TS Investors Group”,\textsuperscript{160} it is evident that the Claimants do not put forward either group as a legal person or claimant in its own right.\textsuperscript{161} The DSG Claimants are 65 limited liability partnerships,

\textsuperscript{155} Cl. Reply, fn. 10.
\textsuperscript{156} Cl. Rej., ¶ 28.
\textsuperscript{157} Resp. Rej., ¶ 93.
\textsuperscript{158} Resp. C-Mem., ¶ 60; Resp. Rej., ¶ 103.
\textsuperscript{159} Cl. Mem., ¶ 526.
\textsuperscript{160} RfA, ¶ 1.
\textsuperscript{161} Cl. Mem., ¶¶ 33, 39.
two private companies, and six individuals, all having German nationality: they total 73
Claimants.¹⁶² These claimants are said by the Claimants to be united as investors in the
same set of projects with “common management and organizers.”¹⁶³ The TS Claimants are
similarly a group of corporate and individual investors, 43 in number, distinct from the
DSG Claimants but like them functioning as a group with “common management and
organizers.”¹⁶⁴

187. The composition of the two groups was summarized by the Claimants in a letter to ICSID
dated 8 May 2015, as follows:

As previously explained, the 116 Claimants fall into two distinct (but
informal) groups of investors that own investments related to solar
photovoltaic plants in Spain. Those Claimants are listed and numbered in
our letter of April 17, 2015.

Claimants numbered 1 through 73 in that list hold investments in three
photovoltaic projects in Spain known as the Alcolea, Calasparra, and
Tordesillas project (Request ¶¶ 2, 11-13, 33-39). Specifically, Claimants
Joachim Kruck, Ralf Hofmann, Frank Schumm, Rolf Schumm, and Peter
Flachsmann invested in the Alcolea solar park, which today consists of
twenty 100 kW photovoltaic plants (see Request ¶¶ 12, 33). Those
Claimants incorporated an engineering, procurement, and construction
company in Spain called Solar Andaluz 2006 S.L. (Request ¶ 33), which
constructed and financed the Alcolea project. Additionally, they
incorporated Claimants Solar Andaluz 1-20 GmbH & Co. KGs in Germany,
each of which owns a Spanish special purpose vehicle that in turn owns a
100 kW solar plant comprising the Alcolea project (Request ¶¶ 33, 35).

Claimants Joachim Kruck, Ralf Hofmann, and Peter Flachsmann further
invested in two additional photovoltaic projects in Spain, called Calasparra
and Tordesillas (Request ¶ 36). To manage construction of these projects,
they formed DS Hispano Alemana Fotovoltaica Sociedad Unipersonal S.L.
and incorporated Claimants Solarpark Tordesillas 401-430 GmbH & Co.
KGs and Claimants Solarpark Calasparra 251-265 GmbH & Co. KGs
(Request ¶¶ 36-38). Each of the Claimants Solarpark Tordesillas 401-430
GmbH & Co. KGs and Claimants Solarpark Calasparra 251-265 GmbH &
Co. KGs owns a Spanish special purpose vehicle (“SPV”) that in turn owns

¹⁶² RfA, ¶ 2-5. Cl. Mem., ¶¶ 21–33 and Table.
¹⁶³ Cl. Rep., ¶ 39.
¹⁶⁴ RfA, ¶ 6–8. Cl. Mem., ¶¶ 34–39 and Table.
a 100 kW photovoltaic plant comprising the Calasparra and Tordesillas projects, respectively. The Claimants’ ownership interests in those SPVs and their ownership of the photovoltaic facilities are qualifying “investments.”

Moreover, the investments of Claimant Kruck Beteiligungs GmbH include its contracts with all of the German limited partnerships named above to serve as their general partner (see Request ¶ 39). The investments of Claimants Peter Flachsmann, Joachim Kruck, and DSG Deutsche Solargesellschaft mbH (“DSG”) include contractual rights and rights to money enshrined in operation and management contracts that Claimant DSG entered into with respect to each Spanish SPV (see id.). Further, Claimants Peter Flachsmann, Joachim Kruck, Ralf Hofmann, Frank Schumm, and Rolf Schumm’s investments include contractual rights and rights to money derived from lease agreements that a company they own, Solar Andaluz Grundstücks S.L. (SAG S.L.), entered into with the Alcolea SPVs (id.).

Separate from the investments described above, Claimants numbered 74 through 116 in our letter of April 17, 2015, own investments in and related to ten different solar photovoltaic projects held through a number of different SPVs in Spain. Specifically, Claimants TRC Energy GmbH, Sunburn Verwaltungs GmbH, and TS Villalba GmbH own fifteen 100 kW photovoltaic plants in the Cuenca III project (see Request ¶ 42; see also CEX-13). Claimant Sunburn Verwaltungs GmbH further owns six 100 kW photovoltaic plants comprising the Cabeza Oliva project. Tauber-Solar Sierra GmbH owns two 100 kW mounted photovoltaic plants comprising the Pozoblanco Rooftop project.

Claimants TS Abuzaderas 1-30 GmbHs own thirty 100 kW photovoltaic plants comprising the Abuzaderas project (id.). Claimant TS Avila Eins GmbH owns twenty 100 kW solar plants comprising the Avila project (id.). Claimants Karsten and Jürgen Reiss, as well as Claimants WBG GmbH, TS Cuenca zwei GmbH, TRC Energy GmbH own seven 100 kW photovoltaic plants comprising the Cuenca I project (id.). Claimant ZKS GmbH owns a 415 kW photovoltaic plant called Henibra and Claimant TS Cuenca 20 GmbH owns a 415 kW photovoltaic plant called Boguar (see Request ¶ 43; see also CEX-13). Claimant TS Valtou GmbH owns a 476 kW photovoltaic plant called Valtou, and Claimant TS Cuenca 40 GmbH owns a 340 kW photovoltaic plant called Juan del Valle (id.). The Claimants’ ownership interests in their respective Spanish SPVs and their ownership of the respective photovoltaic facilities are qualifying “investments.”¹⁶⁵

¹⁶⁵ Letter from the Claimants to ICSID, 8 May 2015 (R-012), pp. 1-3 (footnotes omitted).
In the present case, the Claimants have in fact acted as two *de facto* groups at critical stages. For instance, the claims of all of the DSG Claimants were put forward to the Respondent on 16 June 2014 with a view to amicable settlement, and the claims of all the TS Claimants were put forward to the Respondent on 11 August 2014.\(^\text{166}\) While the case for all of the DSG Claimants and all of the TS Claimants has been presented in a single set of written and oral submissions, those submissions frequently refer to “the DSG Claimants” and “the TS Claimants” and describe the pertinent factual differences between them. In their pleadings the Claimants have consistently maintained that it is the individual members of these two groups who are the Claimants in these proceedings.\(^\text{167}\)

The Tribunal’s understanding is that references to the “DSG Claimants” and the “TS Claimants” are not intended to be anything more than convenient labels to describe these informal groupings of similarly-placed claimants. The Tribunal, too, uses the terms in that way, as convenient labels not intended to carry any legal implications.

The issue is whether this Tribunal should proceed to exercise jurisdiction in the proceedings initiated by the Request for Arbitration dated 19 March 2015 to adjudicate upon all of the claims brought by the 73 Claimants comprising the DSG Claimants and all of the 43 Claimants comprising the TS Claimants.

There are two elements to that question: (i) the question whether the Tribunal has jurisdiction in respect of the whole or part of the case set out in the Request for Arbitration, and (ii), the question whether the whole or part of the case set out in the Request for Arbitration is admissible.\(^\text{168}\)

The Tribunal considers that the distinction between those two elements is essentially that jurisdiction is an attribute of a tribunal, which has jurisdiction in respect of a certain limited category of disputes, whereas admissibility is a characteristic of the dispute actually

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\(^{167}\) *See, e.g.*, RfA, ¶¶ 2, 6; Cl. Mem., ¶¶ 21-39; Cl. Reply, ¶¶ 39-42.

\(^{168}\) The Respondent distinguished between its objection to jurisdiction and its objection to the admissibility of the claims. Resp. C-Mem., § VI; Tr. Day 1 [Mr. Elena Abad] 297:11-17
submitted to the tribunal which, even if the dispute falls within the jurisdiction of a tribunal, may be rejected because it is for some reason (such as a failure to exhaust local remedies, in circumstances where exhaustion is required) inadmissible. In fact, however, the two concepts are closely related (and not uncommonly conflated), and in the present case nothing turns upon the distinction between them. The multi-party objection might be characterized as an objection based on the outer limits of the Respondent’s consent to accept the jurisdiction of the Tribunal, and in that sense a jurisdictional objection; alternatively, that objection might be said to relate to whether the manner in which the Claimants have submitted their claims (each of which is, arguendo, individually within the Tribunal’s jurisdiction) renders some or all of those claims inadmissible. That distinction was not the subject of argument before the Tribunal, and as was said above is not material in the present context. Accordingly, the Tribunal is not to be understood as deciding or taking a firm position on this question of the characterization of the multi-party objection as a matter of jurisdiction or of admissibility.

193. Logically the question of jurisdiction should have priority because questions of admissibility cannot arise unless jurisdiction exists; but it is preferable in the present case to consider first the multi-party objection, whether it be a question of jurisdiction or of admissibility, because it is dispositive of a large number of cases. If one or both groups of claims (assuming that all of the Claimants in the group can be considered together, which point is addressed below) are not properly before the Tribunal, that single decision will dispose of all groups in that claim and narrow the scope of the case considerably, whereas jurisdiction must in any event be established in respect of each individual Claimant and will have to be considered in due course in relation to each claim. To put it another way, it is possible that even if there is jurisdiction over the individual claims brought by each one of the 116 Claimants, the submission of all of the claims together in a single case is impermissible. The Tribunal does not doubt that, if it has jurisdiction over each of the individual claims, the Parties could agree to have all of the claims determined together. The question is whether both Parties have in fact agreed and consented to that procedure.

194. It is common ground that the answer to the multi-party objection (whether treated as a question of admissibility or of jurisdiction) turns on the scope of the Respondent’s consent
to the arbitration of ECT claims. It is clear that the Claimants – the DSG Claimants and the TS Claimants – consent to this Tribunal determining all of the claims in the Request for Arbitration: their consent is evident in the Request itself and in their pleadings. Equally, it is evident that the Respondent maintains that it has not consented to the Tribunal hearing and adjudicating upon all of these claims together in a single case. The Respondent is a Contracting State to the ICSID Convention and a Contracting Party to the ECT; and the question therefore depends upon the interpretation of those instruments in order to determine whether by its acceptance of them the Respondent has given the consent necessary to establish the jurisdiction of the Tribunal in this case and the admissibility of all of the claims presented.

195. The relevant provisions are the consents to arbitration in Article 25 of the ICSID Convention and Article 26 of the ECT. ICSID Article 25 provides, in so far as is material, that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.” The effect of ICSID Article 25 is, in the present case, to refer the question of consent to the ECT.

196. The relevant provision of ECT is Article 26, which reads as follows:

**ARTICLE 26**

**SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY**

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the “Additional Facility
Rules”), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an “agreement in writing” for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the “New York Convention”); and

(iii) “the parties to a contract [to] have agreed in writing” for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another
"Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

197. The express terms of ECT Article 26 are clear. It makes provision for the arbitration of “a dispute” or “the dispute” between the parties to it, and thus indicates an assumption that it is what might be called a ‘single’ or a ‘unitary’ dispute that will come before an arbitral tribunal. Article 26(3)(a) refers to “consent to the submission of a dispute to international arbitration”, and in adding qualifications (not relevant here) to that provision, paragraphs (3)(b) and (c) refer respectively to “the dispute” and “a dispute” in the singular. Similarly, Article 26(4) addresses situations in which an Investor chooses to “submit the dispute” for resolution, referring consistently to “the dispute.” Article 26(5), (7), and (8) also refer throughout to “a dispute” or “the dispute”, in the singular.

198. The only elements of the language of Article 26 that might suggest that it is possible to file multiple ‘disputes’ as a single ‘case’ appear in Article 26(1) and (2). Those paragraphs refer to “disputes”, and appear to refer to disputes in the plural. Those paragraphs are, however, setting out general provisions applicable to each and every dispute “between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part II.” Paragraph (1) says that such disputes (i.e., each and every dispute within the definition in paragraph (1)) “shall, if possible, be settled amicably.” Paragraph (2) opens by referring to “such disputes”, i.e., the disputes identified by paragraph (1): it provides (with emphasis added) that “[i]f such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution ….” But its meaning would be more accurately rendered
by stating that the words “if any such dispute” cannot be so settled it may be submitted for resolution. It would be completely and obviously nonsensical to say that all disputes falling with Article 26(1) must remain unsettled before any such dispute may be submitted for resolution.  

199. The Tribunal concludes that on a reading of the text of ECT Article 26 in good faith, giving its terms their ordinary meaning in their context and in the light of the object and purpose of the ECT, it is plain that the unconditional consent of the Respondent is to the submission of “a dispute”, in the singular, to international arbitration.

200. This linguistic point is supported by consideration of the architecture of an investment treaty or an agreement such as the ECT. Such agreements do not create a standing judicial body to decide all disputes arising out of a particular event or period: instead, tribunals are constituted on an *ad hoc* basis as and when disputes arise, in circumstances where there is no continuing oversight by a permanent judicial body and no mechanism for coordinating the work of the individual tribunals, each of which becomes *functus officio* once it has rendered a final award on the particular dispute that has been submitted to it. This, too, points towards the conclusion that in principle, and subject to agreement to the contrary, each tribunal should ordinarily deal with one dispute and not with multiple disputes.

201. The Tribunal thus agrees with the careful analysis of this issue by the *Giovanni Alemanni* tribunal, and its conclusion that the focus both under the ICSID Convention and under the relevant compromissory clause (in the BIT in that case, and ECT Article 26 in the present case) is on the question whether there is ‘a dispute’, in the singular: i.e., whether what is put before a tribunal is or is not a single dispute.

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169 If confirmation of this interpretation were needed it can be found in the French text of ECT Article 26(2), which states that “*Si un différend de ce type n’a pu être réglé conformément aux dispositions du paragraphe 1 dans un délai de trois mois à compter du moment où l’une des parties au différend a sollicité un règlement à l’amiable, l’investisseur partie au différend peut choisir de le soumettre, en vue de son règlement …*” Recourse to other authentic texts (cf., ECT Article 50) is a standard part of well-established principles of treaty interpretation: see Vienna Convention on the Law of Treaties, 23 May 1969 (CL-049), Article 33.

170 *Giovanni Alemanni* (RL-023), ¶ 292.
202. For these reasons, the Tribunal finds that the consent to arbitrate given in ECT Article 26, and specifically in Article 26(3) is a consent to accept the submission of a dispute to a tribunal, and does not amount to consent to submit two or more distinct disputes to a tribunal in a single proceeding. This is not a question of the ECT or the ICSID Convention or Arbitration Rules imposing “a requirement of separate consent to a multi-party arbitration”, as the Claimants put it: 171 it is a question of the precise scope of the Respondent’s actual consent.

203. This leads to what are the critical questions, of how a tribunal is to distinguish between ‘a dispute’ and multiple ‘disputes’, and of the relationship between multiple parties and multiple disputes.

204. ‘Multiple parties’ and ‘multiple disputes’ are distinct concepts. The fact that there are multiple claimants does not mean that there are multiple disputes. In the present case, for instance, 20 separate operators of PV systems were registered in a single solar park – the Alcolea / Solar Andaluz plant – in order that each might benefit from the higher feed-in tariffs made available to small (under 100 kW) facilities. Such a solar park could as well have been operated by one operator, owning all of the facilities into which it was in fact divided among the 20 actual operators. In such a situation, if all 20 of the operators have the same nationality and bring the same claim under the same BIT (or the ECT), and rely on the same facts and legal arguments, there is no good reason for refusing to accept the 20 claims in a single proceeding. Furthermore, if some functions of the operation of the solar park, such as the purchase of the site and its lease to the operators, were consigned to separate companies, there is no practical difficulty that prevents their claims too being pursued in the same proceeding, though the question whether each separate claimant is entitled to compensation is, of course, a separate and subsequent question.

205. This is the approach that was taken in the award in Giovanni Alemanni: “it is perfectly possible … for ‘a dispute’ to have more than one party on the claimant’s side. But the interest represented on each side of the dispute has to be in all essential respects identical

171 Cl. Response to Preliminary Objections, 2 March 2016, p. 9.
for all of those involved on that side of the dispute.”172 The Tribunal considers that to be the correct test, and indeed a test dictated by practical necessity.

206. In circumstances where, as here, a respondent’s alleged liability depends upon commitments said to have been made and representations on which investors are said to have relied, it is obvious that if different commitments or representations were made to different individual claimants, the individual claimants cannot all be grouped together for the purposes of determining liability. This is not simply a matter of quantum, with different individual claimants who all made investments in similar circumstances in a single project, but having different losses that may call for compensation. Nor is it a case where a single group of investors, all receiving and evaluating the same representations, make a series of incremental investments over time. Both of those situations can often be addressed by making a single determination on liability and drawing distinctions between the different claimants or different phases of an investment when quantum and reparation are determined. But if the relevant commitments and representations and the evaluations of those representations differ from claimant to claimant, no single determination of liability is possible. The ‘case’ is in truth a bundle of distinct disputes that may be closely related in terms of their factual underpinning, but which cannot properly be said to constitute one and the same dispute.

207. In a case such as the present, multiple claims can generally be said to constitute a single dispute where, in the case put before the tribunal, all of the claimants (i) have invested in the same project or group of related projects, and (ii) have made their investments on the basis of the same terms and representations, and (iii) advance their claims on the basis of the same legal arguments, and (iv) do so against the same respondent, who maintains the same defences against each claimant. There will usually be a significant connection between the members of the group of claimants at the times when they make their

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respective investments. The Respondent used the concept of ‘homogeneity’ to refer to such multiple claims within a single dispute, and the Tribunal adopts that convenient usage.

208. This approach to the determination of whether there is a single dispute or multiple disputes is essentially a matter of procedural justice. If a member of what purports to be a single group of claimants is in a materially different factual position from the others, or relies upon or is met with materially different legal arguments in their claim or in the defence to their claim, their claim cannot properly be decided by saying that they are in the same position as the other members of the purported group: plainly, they are not.

209. This is, of course, a question of degree. It is possible, and in practice not uncommon, to say that a particular co-claimant or claim must be treated differently from others in a case. Such a decision inevitably requires that separate consideration be given to that co-claimant or claim, distinguishing their position from that of the core of the case. It has not been suggested that a party could say in those circumstances that the separate consideration necessarily demonstrates that there is a separate dispute and that it has not consented to having two different disputes heard and decided together. It might therefore be said that if that can be done for one claimant, there is no good reason why it could not be done for each of the 116 Claimants in the present case. The point is, however, not one of practicality. The question at this stage is not whether it would be feasible for the tribunal to hear and decide all the claims together, but whether all of the claims can properly be regarded as ‘a dispute’ which the Parties have consented to be heard and decided in a single proceeding.

210. Similarly, it does not matter that the tribunal has jurisdiction over both the claims of what might be called the homogenous group and also the claims of the heterogenous individual claimant(s). The question is not whether any or all of the claims considered individually fall within the jurisdiction of the tribunal, but whether all of the claims may be treated collectively as a single dispute. The question is whether, even if the tribunal has jurisdiction
over each and every claim considered in isolation from the others, it is right for the tribunal to exercise its jurisdiction by treating all of the claims together as a single dispute.\textsuperscript{173}

211. More precisely, if the claims in the present case do not constitute a single dispute, the question is whether (a) the Respondent has consented to all of the claims in the case being heard in a single proceeding, as if it were a single dispute, and if not (b) whether the Respondent’s objection precludes the Tribunal proceeding to hear it as a single dispute.

212. The Tribunal considers that the claims of the DSG Claimants and the claims of the TS Claimants in this case are materially different. The Tribunal asked the Claimants “[i]n respect of each Claimant, on what date(s) was the relevant investment(s) made, and on what specific representations made by (a) Respondent and (b) by any other person did each Claimant actually rely?” The Claimants’ response was helpfully set out in their Post-Hearing Brief dated 19 September 2019, at pages 21–30. Because of its importance in these proceedings, the data in that response is reproduced below. The data is reproduced here with the addition in bold of the initials or name of the Claimant who made the investment, and with the entries rearranged into chronological order.

<table>
<thead>
<tr>
<th>Date</th>
<th>Claimant</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>30/05</td>
<td>Joachim Kruck (“JK”)</td>
<td>Purchase of 50% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. (C-203, company renamed at C-209), which owns the land on which Project Alcolea is located (C-202). Ownership interest reduced on 15 Jan. 2008 to 25% (C-204). The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (\textit{Id.}). The company also owns the right to purchase the Project Alcolea plants after twenty-five years of operation (C-246).</td>
</tr>
<tr>
<td>Rolf Schumm (“RS”)</td>
<td>Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. through the company Monte Grace Paradise, S.L. in which he owned a 50% interest (C-206), which owns the land on which Project Alcolea is located (C-202). On 31 Oct. 2007, Monte Grace Paradise, S.L. reduced its ownership share in Solar Andaluz Grundstücks S.L. to 25%, with the result that Rolf Schumm owned a 12.5% interest in the real estate company (C-205). On 1 Aug. 2013, Rolf Schumm sold his interest in Monte Grace Paradise, S.L. and thereby Solar Andaluz Grundstücks S.L. (C-206). The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (C-202).</td>
<td></td>
</tr>
<tr>
<td>Frank Schumm (“FS”)</td>
<td>Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. through the company Monte Grace Paradise, S.L. in which he owned a 50%</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{173} The Tribunal notes the discussion of this point in Luke Peterson, An UNCITRAL Tribunal Declines Jurisdiction over a Joint Treaty Claim Brought Against Turkmenistan by a Series of Unrelated Claimants, IA Reporter, 23 June 2015 (RL-024).
interest (C-206), which owns the land on which Project Alcolea is located (C-202). On 31 Oct. 2007, Monte Grace Paradise, S.L. reduced its ownership share in Solar Andaluz Grundstücks S.L. to 25%, with the result that Frank Schumm owned a 12.5% interest in the real estate company (C-205). On 1 Aug. 2013, Frank Schumm acquired the remaining 50% interest in Monte Grace Paradise, S.L. and thereby Solar Andaluz Grundstücks S.L. (C-206), thereby owning Monte Grace Paradise, S.L.’s full 25% share of Solar Andaluz Grundstücks S.L. The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (Id.). The company also owns the right to purchase the Project Alcolea plants after twenty-five years of operation (C-246).

<table>
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<tr>
<th>2007</th>
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<tr>
<td><strong>JK</strong></td>
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<tr>
<td><strong>Peter Flaschmann (“PF”)</strong></td>
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</table>

| 15/01 PF | Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. (C-204), which owns the land on which Project Alcolea is located (C-202). The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (Id.). The company also owns the right to purchase the Project Alcolea plants after twenty-five years of operation (C-246). |

| 27/02 DSG Deutsche Solargesellschaft mbH | DSG Deutsche Solargesellschaft GmbH owns rights to 50% of excess profit from the sale of electricity produced by the Project Alcolea PV plants (C-199). |

| 28/02 Solar Andaluz 120 GmbH | Purchase by each Claimant company of the assets of one of the Project Alcolea PV plants through the Claimant companies’ wholly-owned Spanish subsidiaries (20 Claimants, 20 SPVs, and 20 plants in all) (C-223). Documents demonstrating Claimants’ purchase of the SPVs: C-221; C-222. |

| 27/03 Ralf Hofmann (“RH”) | Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. (C-205), which owns the land on which Project Alcolea is located (C-202). The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (Id.). The company also owns the right to purchase the Project Alcolea PV plants after twenty-five years of operation (C-246). |

| 10/04 FS | Purchase of 100% of the shares in Claimant Solar Andaluz 4 GmbH & Co. KG, which owns one of the Project Alcolea PV plants (C-192). |

| 11/04 JK | Purchase of 100% of the shares in Claimant Solar Andaluz 3 GmbH & Co. KG, which owns one of the Project Alcolea PV plants (C-339). |

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174 A different figure (10%) is given in the Technical Management Contract dated 27 February 2008 (C-199), Section 4 Variable fee.
<table>
<thead>
<tr>
<th>Date</th>
<th>Claimant/Company</th>
<th>Event Description</th>
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<tbody>
<tr>
<td>17/04</td>
<td>PF</td>
<td>Purchase of 100% of the shares in Claimant Solar Andaluz 2 GmbH &amp; Co. KG, which owns one of the Project Alcolea PV plants (C-193).</td>
</tr>
<tr>
<td>28/04</td>
<td><strong>Karsten Reiss</strong></td>
<td>Purchase of a 50% interest in the Project Cuenca I Bravosonnen plant (C-288).</td>
</tr>
<tr>
<td></td>
<td><strong>Jürgen Reiss</strong></td>
<td>Purchase of a 50% interest in the Project Cuenca I Bravosonnen plant (C-288).</td>
</tr>
<tr>
<td>19/05</td>
<td><strong>JK</strong></td>
<td>Purchase of 33.3% of the shares in real estate lessor Deutsche Solar Ibérica Real Estate S.L. (C- 210), which owns the right to purchase the Project Calasparra and Tordesillas plants after twenty-five years of operation (C-247, C-248).</td>
</tr>
<tr>
<td></td>
<td><strong>PF</strong></td>
<td>Purchase of 33.3% of the shares in real estate lessor Deutsche Solar Ibérica Real Estate S.L. (C-245), which owns the right to purchase the Project Calasparra and Tordesillas PV plants after twenty-five years of operation (C-247, C-248).</td>
</tr>
<tr>
<td>26/06</td>
<td><strong>TS Abuzaderas 1-30 GmbH</strong></td>
<td>Purchase by each Claimant of 100% of the shares in one of the Project Abuzaderas SPVs (for a total of 30 Claimants and 30 SPVs) (C-271). On the same day, each SPV purchased the one of the Project Abuzaderas plants (for a total of 30 plants) (C-272).</td>
</tr>
<tr>
<td>15/07</td>
<td><strong>DSG Deutsche Solargesellschaft mbH</strong></td>
<td>DSG Deutsche Solargesellschaft GmbH owns rights to 50% of excess profit from the sale of electricity produced by the Project Calasparra PV plants (C-200).</td>
</tr>
<tr>
<td>31/07</td>
<td><strong>RH</strong></td>
<td>Purchase of 33.3% of the shares in real estate lessor Deutsche Solar Ibérica Real Estate S.L. (C-249), which owns the right to purchase the Project Calasparra and Tordesillas PV plants after twenty-five years of operation (C-247, C-248).</td>
</tr>
<tr>
<td>05/08</td>
<td><strong>TRC Energy GmbH</strong></td>
<td>Purchase of four of the Project Cuenca III plants(C-297).</td>
</tr>
<tr>
<td>06/08</td>
<td><strong>Sunburn Verwaltungs GmbH</strong></td>
<td>Purchase of ten of the Project Cuenca I plants (C- 304).</td>
</tr>
<tr>
<td>12/08</td>
<td><strong>TS Villalba GmbH</strong></td>
<td>Purchase of one of the Project Cuenca III plants (C-300).</td>
</tr>
<tr>
<td>21/08</td>
<td><strong>Solarpark Calasparra 251-265</strong></td>
<td>Purchase by each Claimant company of 100% of the shares in one of the SPVs that owned one of the Project Calasparra plants (15 Claimants, 15 SPVs, and 15 plants in all) (C-230). Documents demonstrating that the SPVs owned the plants: C-227.</td>
</tr>
<tr>
<td></td>
<td><strong>Solarpark Tordesillas 401-430 GmbH</strong></td>
<td>Purchase by each Claimant company of 100% of the shares in one of the SPVs that owned one of the Project Tordesillas plants (30 Claimants, 30 SPVs, and 30 plants in all) (C-229). Documents demonstrating that the SPVs owned the plants: C-228.</td>
</tr>
<tr>
<td>31/08</td>
<td><strong>TS Cuenca zwei GmbH</strong></td>
<td>Purchase of two of the Project Cuenca I plants (C-282).</td>
</tr>
<tr>
<td>08/10</td>
<td><strong>TS Avila eins GmbH</strong></td>
<td>Purchase by TS Avila 1-20 GmbH each of one of the Project Avila plants (C-280). In August 2009 TS Avila 1-20 GmbH merged into Claimant TS Avila eins GmbH (C-007).</td>
</tr>
<tr>
<td>02/11</td>
<td><strong>DSG Deutsche Solargesellschaft mbH</strong></td>
<td>DSG Deutsche Solargesellschaft GmbH owns rights to 50% of excess profit from the sale of electricity produced by the Project Tordesillas PV plants (C-201).</td>
</tr>
<tr>
<td>20/11</td>
<td><strong>TRC Energy GmbH</strong></td>
<td>Purchase of one of the Project Cuenca I plants (C-293).</td>
</tr>
</tbody>
</table>
213. The Tribunal considers that there are significant differences between the two groups of claimants and their respective claims, which can be summarized as follows. First, there is an evident difference in the timing of the investments made by each group. With one
exception, all of the DSG Claimants’ investments that are the subject of claims in this case were, according to the list in Claimants’ Post-Hearing Brief, made between 28 February 2008 (the date of the purchase of the Alcolea PV plants)\(^{175}\) and 5 May 2009 (the date of the purchase by Joachim Kruck of 43% of Claimant Solarpark Tordesillas 422 GmbH & Co. KG, which owns one of the Project Tordesillas PV plants).\(^{176}\) The one exception\(^{177}\) is the purchase on 30 May 2006 by Messrs. Joachim Kruck, Rolf Schumm and Frank Schumm of Solar Kruck-Schumm S.L.,\(^{178}\) a real estate company that was renamed Solar Andaluz Grundstücks S.L in 2007,\(^{179}\) and the purchase by Mr. Peter Flachsmann of an interest in the same company on 15 January 2008.\(^{180}\)

214. Furthermore, the core DSG Claimants’ investments in the PV plants were completed by the end of August 2008, before the closure of registration under RD 661/2007 and before the enactment of RD 1578/2008, both of which are significant events in this case. The DSG Claimants’ investments in the Claimants’ list with dates after August 2008 are purchases by individual DSG Claimants of shares in various DSG Claimant companies that already held rights in relation to PV plants: they are not transactions concerning investment in new or additional PV plants.

215. The earliest investment by TS Claimants identified in the list in the Claimants’ Post-Hearing Brief is the purchase by Messrs. Karsten Reiss and Jürgen Reiss from Accener

\(^{175}\) Deeds of Incorporation of Iberica Voltaic Energy 1-20 S.L., November 2006 (C-221); Share Purchase Agreements Between Mr. Frank Schumm (Seller) and Solar Andaluz 1-20 GmbH & Co. KG (Buyers) (supplemented), 4 March 2008 (C-222); Asset Purchase Agreements Between Iberica Voltaic Energy 1-20 S.L. and Solar Andaluz 2006 S.L., 28 February 2008 (C-223).

\(^{176}\) Articles of Incorporation of Solarpark Tordesillas 422 GmbH & Co. KG, 5 May 2009 (C-191).

\(^{177}\) RfA, ¶ 12, says that “the DSG Group owns and operates sixty-five photovoltaic power plants in Spain, comprising three major projects, which they acquired and developed beginning in November 2006.” This appears to be a reference to early contacts with Ms. Mafalda Soto, the Spanish attorney fluent in German, who advised Mr. Joachim Kruck and through him the DSG Claimants: see Joachim Kruck WS, ¶ 16.

\(^{178}\) Deed of Incorporation of Solar Kruck-Schumm S.L., 30 May 2006 (C-203); Share Purchase Agreement Between Monte Grace Paradise S.L. (Seller) and Frank Schumm (Buyer) of Solar Andaluz Grundstücks S.L., 1 August 2013 (C-206).

\(^{179}\) Deed of Name Change for Solar Kruck-Schumm S.L., 31 October 2007 (C-209).

\(^{180}\) Share Purchase Agreement Between Joachim Kruck (Seller) and Peter Flachsmann (Buyer) of Solar Andaluz Grundstücks S.L., 15 January 2008 (C-204).
S.L. of the Project Cueca I Bravosonnen plant on 28 April 2008. There were other purchases of Cuenca and Avila plants in June, August, October, and November 2008, and then in July and September 2009 and December 2010, and then in April and June 2012. The latest TS Claimants’ investment in the list is the purchase by Claimant TS Investors Cuenca 40 GmbH from the non-claimant company, Elements Energy S.L, of a PV facility in Juan del Valle, on 10 July 2012. Some of those purchases thus occurred after the significant legislative changes introduced by RD 1578/2008 (September 2008), RD 1565/2010 (23 November 2010) and RD 1614/2010 and RDL 14/2010 (December 2010).

216. Given the distribution of these dates it is not surprising that the claims advanced by the two groups of Claimants have different bases, as is evident from the Notice of Legal Dispute given by each group to the Respondent. The Notice presented by the DSG Claimants states “[s]pecifically, the German Investors developed their plants in reliance on the remunerative regime established in Royal Decree 661/2007 of May 25, 2007, regulating the activity of electrical energy generation by means of renewable facilities.” The Notice presented by the TS Claimants is less simple. It states

*The TS Investors Group made all of the foregoing investments in Spain in reliance on certain incentive regimes that Spain specifically established to attract the type of projects that the TS Investors Group owns and operates. The TS Investors Group developed or acquired six of the projects mentioned above — Cuenca I, Cuenca III, Cabeza Oliva, Pozoblanco Rooftop, Abuzaderas and Gotarrendura — with the expectation that those parks would benefit from the remunerative regime established in Royal Decree 661/2007 of May 25, 2007, regulating the activity of electrical energy generation by means of renewable facilities (“RD 661”). TS Investors Group expected its four additional solar projects — Henibra, Boguar, Valtou and Juan del Valle — to benefit from the remunerative regime established in Royal Decree 1578/2008 of September 26, 2008 (“RD 1578”).

Both RD 661 and RD 1578 contained attractive remuneration schemes that made creating photovoltaic facilities in Spain worthwhile and economically

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181 Works Supply Agreement Between Accener S.L. (Obligor) and Messrs. Karsten Reiss and Jürgen Reiss (Obligees), 28 April 2008 (C-288). The full instrument appears only in the original German version.

182 The two Notices are filed together as C-013. See fn. 166, supra.

viable. The TS Investors Group would not have invested in Spain by acquiring and developing those photovoltaic facilities in the absence of the incentives included in that legislation.  

217. The Tribunal notes, furthermore, that in principle it is possible that the conduct of a party after a certain date may cast important light on its earlier views, held before that date: for example, it might be argued that the Claimants’ attitude towards investments in 2012 casts light on its view of the significance and effect of RD 661/2007 and of the reforms in the electricity regime in 2010. Accordingly, it is not possible simply to group the TS Claimants’ investments made under RD 661/2007 together with the DSG Claimants’ investments made under RD 661/2007 and separately from the TS Claimants’ investments made after the enactment of RD 1578/2008: the two groups of investors may have had different perspectives on the regulatory regime.

218. A second difference concerns the business background of the organizers of the two groups. The investments in the group of DSG Claimants were initiated and organized by Mr. Joachim Kruck and his father Mathias Kruck and long-term acquaintance Mr. Frank Schumm and his father Rolf Schumm, all of whom were involved in the real estate business in Heilbronn, and Mr. Ralf Hofmann, a technical expert with what is now KACO new energy GmbH, who had experience of selling inverters (an essential component of PV facilities) in Spain and of the technology involved in PV project development. They were joined by Peter Flachsmann, a German investor serving as CEO of KACO in North America. The Notice of Legal Dispute sent to the Respondent in respect of the DSG claims says that “the German Investors have invested in land and renewable energy facilities in Spain since 2007.”

219. The TS Claimants had a deeper history of involvement in solar energy. Incorporated by four entrepreneurs, Messrs Klaus-Bruno Fleck, Zeno Fleck, Thomas Schmiedel, and Dr. Leonhard Haaf, in 2001 after initially developing three small rooftop PV projects, Tauber

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185 Cl. Mem. ¶¶ 24-27, 231.
Solar now develops, finances, manages, and operates solar power facilities across Europe. The Memorial asserts that “with the help of over 3,200 partners and investors, they have funded over 500 solar power plants with an aggregate capacity of over 175 MWp.” The Notice of Legal Dispute sent to the Respondent in respect of the TS claims says that “[t]he individuals and companies comprising the TS Investors Group specialize in financing and operating renewable energy facilities in European countries.”

220. The Tribunal emphasizes that to note this difference is not to say that it would have had any decisive impact upon the Tribunal’s analysis or upon the legal positions of the various Claimants. It is, however, an objective difference of a kind that puts in question the propriety of treating all 116 Claimants alike, as a single group.

221. To this must be added four other material facts:

a. the DSG Claimants and the TS Claimants were at no stage prior to these proceedings in contact with one another;

b. there is no evidence that they shared a one and the same approach to their respective investments or common facilities;

c. they did not invest in the same projects; and

d. the two groups took their advice from different sources and in different ways and at different times.

222. The Preliminary Award on Jurisdiction in the *PV Investors* case contains a careful and detailed consideration of the question of multiple claims, reviewing earlier decisions on the

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187 Cl. Mem., ¶ 35.


189 See Cl. Mem. ¶¶ 233-235, 261-266. Cf., Counsel for the Claimants (Ms. Frey), “Although the two Claimant groups were not related prior to the commencement of this arbitration – in fact, I don't think they knew each other prior to having suffered both at the hands of the unlawful measures in Spain -- there are similarities across the Claimant groups.” Tr. Day 1 [Ms. Frey] 68:8-15.

190 *The PV Investors v. Kingdom of Spain* (PCA Case No. 2012-14), Preliminary Award on Jurisdiction, 13 October 2014 (“*PV Investors*”) (CL-226), ¶¶ 93, 102.
topic. The *PV Investors* tribunal distinguished between “aggregate proceedings”, in which multiple, individual claimants bring claims in their own name *ab initio* in one single arbitration, and “consolidation”, in which pending parallel proceedings are joined into a single one, finding that the joinder of claims in consolidation requires specific consent but that aggregate proceedings do not.\(^{191}\) Importantly, however, the *PV Investors* tribunal referred to the need for a “sufficient connection” between the claimants in that case. It said,

… the Tribunal is satisfied that a sufficient connection exists between them to justify hearing the Claimants’ claims in one single arbitration. The Claimants complain of the same measures taken by Spain in relation to the PV sector, which they allege have negatively affected their investments. In addition, they invoke the same Treaty provisions and claim the same type of relief. Thus, the Tribunal does not believe that any diversities in the Claimants’ situations would make the proceedings unmanageable or unworkable.\(^{192}\)

223. That finding of a “sufficient connection” between the individual claimants distinguishes the *PV Investors* case from the present case. The Tribunal considers that in the present case the combined effect of the differences between the claims in the present case leads to the conclusion that the DSG claims and the TS claims must be regarded as two separate disputes. Recalling the indicative criteria listed in paragraph 207, above, the two groups are entirely separate in membership and organization; and they did not invest in the same project or range of projects. There are two distinct disputes within the Request for Arbitration in this case.

224. It is of course true that the DSG claims and the TS claims are all rooted in the Spanish regime applicable to the production and distribution of energy from solar (PV) facilities and the changes in that regime that occurred between 2004 and 2014. It is also true, to make the point again, that both sets of claims *could* be heard and determined in a single proceeding if the Parties so agreed. It is also plain that both sets of Claimants may wish, perhaps for reasons of efficiency and economy, to combine their claims in a single case:

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\(^{191}\) *PV Investors* (CL-226), ¶¶ 98–103.

\(^{192}\) *PV Investors* (CL-226), ¶ 117.
and that they could do, if the Parties, including the Respondent, agreed. The point is, however, that the Parties have not so agreed.

225. It is clear that throughout the entire course of these proceedings the Respondent has maintained its objection to the hearing together of what it describes as multiple disputes. It has not consented to the hearing together of the DSG claims and the TS claims.

226. The application in this case in respect of the two sets of claims, which is according to the Tribunal’s analysis an application in respect of two distinct disputes, accordingly cannot proceed in the form in which it is presented.

227. As was noted above, this might be described as a being the result of a jurisdictional defect, because the Claimants have not accepted the ‘offer’ to arbitrate made by the Respondent in ECT Article 26 but have in effect proposed an alternative mode of arbitration of disputes, permitting the concurrent handling of a number of disparate disputes in a single proceeding, to which the Respondent has not agreed.

228. It may also be described as a defect relating to the admissibility of the application. As was made clear above, the labels “DSG Claimants” and “TS Claimants” are no more than convenient terms to describe two groups of 73 and 43 separate claims. Legally, the application must be regarded as a set of 116 applications by 116 separate Claimants seeking the hearing of their claims in a single proceeding. To say that the Tribunal does not have jurisdiction over the ‘case’ that consists in the claims of those 116 Claimants would be to accept the very characterization of these proceedings as a single dispute that the Tribunal has rejected, as was explained above. The Tribunal might, for instance, have jurisdiction over most, if not all, of these 116 claims, if each of them were considered individually and in isolation from the others.193 The problem at this point in our analysis lies not in the Tribunal’s lack of jurisdiction over any of the individual claims which have been collected together in the application in this case, but rather in the absence of consent on the part of

193 See ¶¶ 239 ff., infra.
the Respondent to the exercise of jurisdiction over all of those claims in a single proceeding. On this view, it is a question of the admissibility of the application.

229. The Tribunal does not consider it necessary to decide whether the question is to be classified as one relating to jurisdiction or to admissibility, because the practical result in the context of this case is the same whichever classification is adopted. The Tribunal is conscious that there may be arguments that the jurisdiction/admissibility distinction has critical significance in some contexts and does not wish to foreclose any such arguments: it therefore makes no decision on this question of classification.194

230. The Tribunal has considered whether it is right to treat all 73 DSG Claimants as one single group, and all 43 TS Claimants as another. While it recognizes that individual Claimants within each group made their investments at different times and in different PV plants, it is evident that each of the two groups was separately organized and that all members of each group were linked together in pursuing a distinct investment project. The companies and PV facilities and organizers of each group can be readily identified. Each group is sufficiently cohesive and homogenous to be treated in the present context as a single applicant. Moreover, the Claimants in each group identified themselves as such and chose to present their claims to the Tribunal as such. The TS Claimants were referred to in the Notice of Legal Dispute dated 11 August 2014 in the singular, as “the TS Investors Group”,195 and the DSG Claimants have also been presented as a single group in these proceedings. As it was put in the Claimant’s Response to Preliminary Objections, “[w]ithin each of those informal ‘groups,’ Claimants are related in that they share common promoters and managers of their investments and often share ownership in the same photovoltaic facilities.”196

231. Conversely, although there is some overlap in the timing of the investments made by each of the two groups in 2008, there are no other material factual overlaps between the two sets

194 See, e.g., Bernhard von Pezold and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15), Award, 28 July 2015, ¶ 346.


196 Claimants’ Response to Preliminary Objections, 2 March 2016, p. 6.
of Claimants, and no facts or legal considerations that would warrant separating out some of the investors from one of the two groups and treating them along with all of the investors in the other group. The Tribunal is accordingly satisfied that it is right to consider the application in this case as an application in respect of two distinct disputes, one consisting of the claims of the 73 DSG Claimants, and the other of the 43 claims of the TS Claimants.

232. The Tribunal must decide how to proceed in these circumstances. Article 44 of the ICSID Convention gives it the power and the duty to do so; and the Tribunal exercises it conscious of its responsibilities for the procedural fairness and efficiency of the arbitration.

233. The Tribunal considers that it has been presented with two separate disputes and that, in the absence of agreement between the Parties, the mandate provided by ECT Article 26 allows the Tribunal to decide only one of them. The question then arises: which dispute, if any, can or should the Tribunal decide? It would be absurd to decline jurisdiction over both disputes simply because the Tribunal’s mandate is limited to the resolution of a single dispute. The Tribunal has the right, and indeed the duty, to proceed to resolve a dispute that has been validly submitted to it. As each dispute could have independently been validly submitted to this Tribunal, it follows that the Tribunal can proceed to determine the merits of one dispute and decline to exercise its jurisdiction over the other. It can do so by exercising its general case management powers.

234. Several features of this case point to permitting the dispute involving the DSG claims to proceed and ruling that the dispute involving TS claims may not proceed. The DSG claims were the first in time in two senses. The DSG Claimants dispute was notified to the Respondent by a letter dated 17 June 2014, referring to the DSG Claimants as the “German Investors.” Notice of the TS Claimants dispute was given to the Respondent by a letter dated 11 August 2014. Apart from the fact that much of the TS Claimants’ Notice was cut-and-pasted, with the necessary changes to the factual details, from the DSG Claimants’ Notice, the TS Claimants’ Notice contains no reference to the DSG Claimants’ Notice and

does not suggest that the TS claims are a continuation or extension of the DSG claims. The TS claims are treated as a separate, and later, dispute.

235. The TS claims are later than the DSG claims also in the sense that, although there is an overlap in 2008, the TS Claimants’ investments were made over a period later than that during which the DSG Claimants’ investments were made.

236. There is, accordingly, an argument of temporal priority in allowing the DSG claims to proceed. The DSG claims were the first to be notified to the Respondent, were presented first in the Claimants’ Memorial, and (though this factor is not decisive) related to the first investments to be made. Had they not been supplemented by the TS claims, these questions of jurisdiction and admissibility would not have arisen.

237. There is also an argument to the same effect based upon the practicalities of the presentation of the case. The Respondent has had to respond to submissions concerning the significance and effect of RD 661/2007 that are common to both the DSG and the TS claims. The matters to be addressed in the TS claims, in contrast, are not confined to RD 661/2007 but are more extended, both legally and factually. Admitting the more limited set of claims is, in the view of the Tribunal, the more prudent and more practical course, and this consideration reinforces, rather than undermines, the Tribunal’s decision based on questions of legal principle.

238. The Tribunal accordingly decides that it will proceed to determine the dispute involving the claims presented by the DSG Claimants, but not the dispute relating to the claims presented by the TS Claimants. As was noted above, there remain questions of jurisdiction to be addressed in respect of each separate DSG Claimant – as, of course, do questions relating to the merits of their claims.

239. For the avoidance of doubt, the Tribunal emphasizes that it makes no findings in respect of the TS claims, and that nothing in this Decision or in the Award to be rendered in respect

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199 See ¶ 193, supra.
of the DSG claims has any determinative or preclusive effect in relation to the TS Claimants or their claims.

240. The Tribunal is aware that if the claims had been separated at the outset of this case the Respondent might have presented its responses to both sets of claims differently from the written and oral submissions that it in fact made in these proceedings. While the same might be said of the claims presented by the two groups of Claimants, their position is different because it was their free choice to present their claims together in a single set of submissions, and they resisted the Respondent’s attempts to prevent that. The Claimants may therefore be regarded as being satisfied that their chosen approach to this litigation allowed a proper opportunity for the presentation of their case.

241. These proceedings could have been bifurcated, so as to resolve questions of admissibility and jurisdiction at the outset. The Respondent explained that it did not submit a bifurcation request because it considered the heterogeneity of the Claimants to be “a matter whose study is inseparable from the merits of the arbitration proceeding”; \(^{200}\) but it maintained that the heterogeneity “has created a misunderstanding in the proper analysis of the case, thus preventing Respondent from articulating a more detailed defence.” \(^{201}\) Indeed, the Tribunal itself has not found it easy to separate out the threads of the individual claims that run through the rather generalized presentation of the Claimants’ cases.

242. In these circumstances the Tribunal has considered what steps, if any, are necessary to ensure that each Party has had a proper opportunity to present its case in respect of the DSG claims. While the Tribunal considers that with diligent analysis, greatly assisted by the Parties’ respective Post-Hearing Briefs, it is possible to obtain a full picture of each Party’s case in respect of the DSG claims, it also considers that it is in the interests of the sound administration of justice that, before it decides upon the merits of the DSG claims, the DSG Claimants be afforded the opportunity to make a short written submission which summarizes the position concerning the DSG claims that they have presented in their previous written and oral submissions. Similarly, the Respondent will be afforded the

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\(^{200}\) C. Mem, ¶ 78.

\(^{201}\) Resp. PHB, ¶ 14.
opportunity to make a short written submission which summarizes the position concerning the DSG claims that it has presented in its previous written and oral submissions. Thus, each Party will have the opportunity to explain briefly how it would have presented differently its case on the merits and quantum if it had been addressing only the DSG claims.

243. The written submissions should be as concise as possible and should focus on explaining clearly any features of the Party’s case that are specific to one or more of the DSG Claimants, and which the Party considers that it did not have an adequate opportunity to emphasize and distinguish from the submissions that it has made in relation to the DSG and TS claims as a whole. The submissions should assume (i) that the Tribunal is familiar with all of the written and oral submissions already made, and (ii) that it is unnecessary to make any further submissions in relation to matters that are not affected by the identities of the Claimants, such as the status and interpretation of Spanish laws and decrees. The DGS Claimants should file their submission by Monday, 31 May 2021, and the Respondent should file its submission by Monday, 12 July 2021.202

244. Existing submissions stand in the record, and these written submissions are intended to serve as aids to understanding them properly in the context of a case confined to the DSG claims. This is not intended to be an opportunity to present a wholly new case, materially different from that already put before the Tribunal. Any request to introduce or respond to any novel arguments or new evidence should be made separately to the Tribunal. The Tribunal will proceed to address the merits of the DSG claims once any submissions have been received.

b. Jurisdiction over the DSG Claimants

245. As was indicated above, the Tribunal will now address the question whether it has jurisdiction ratione personae over each of the DSG Claimants. Jurisdiction ratione personae exists under ECT Article 26(1) if there is a dispute “between a Contracting Party

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202 This filing is subject to the provisions of PO1, including paragraph 11.4 thereof (“Pleadings, expert opinions, witness statements, and any other accompanying documentation shall be submitted in one procedural language, and a translation of such document into the other procedural language shall be filed within 15 business days thereafter.”).
and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III” of the ECT. An “Investor” is defined in ECT Article 1(7). So far as is material it reads as follows:

“Investor” means:

(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party

246. To take the question of nationality and the individual claimants (Claimants 68-73) first, the German nationality of Messrs. Mathias Kruck, Joachim Kruck, Peter Flachsmann, Ralf Hofmann, Rolf Schumm, and Frank Schumm has been established by presentation of their passports or identity cards.203 As nationals of one ECT Contracting Party bringing an ECT claim against another ECT Contracting Party, the Tribunal therefore decides that it has jurisdiction ratione personae over their claims under ECT Article 26.

247. The registration certificates of Claimants 66 and 67,204 the private companies DSG Deutsche Solargesellschaft mbH and Kruck Beteiligungs GmbH (later renamed DSG Spanien Verwaltungs GmbH205), have established their German nationality. So, too, have the registration certificates of Claimants 1–65, the limited liability partnerships Solar Andaluz 1-20 GmbH & Co. KG, Solarpark Calasparra 251-265 GmbH & Co. KG, and

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203  German National Identity Cards/Passports of Messrs. Mathias Kruck, Joachim Kruck, Ralf Hofmann, Peter Flachsmann, Frank Schumm, and Rolf Schumm (C-006).

204  Stuttgart Commercial Register – Registration Certificates for Kruck Beteiligungs GmbH and DSG Deutsche Solargesellschaft mbH, 20-21 November 2014 (C-005).

205  See fn. 1, supra.
Solarpark Tordesillas 401–430 GmbH & Co. KG. Each being a “company or other organization organized in accordance with the law applicable in [Germany]”, these companies and limited partnerships fall within the definition of an investor in ECT Article 1(7)(a)(ii). As nationals of Germany, the Claimants are also “nationals of another Contracting State” within the meaning of Article 25 of the ICSID Convention. The Tribunal therefore decides that it has jurisdiction *ratione personae* over these Claimants under ECT Article 26 and Article 25 of the ICSID Convention.

248. There is no additional criterion for qualification as an “Investor” but in order to fall within ECT Article 26 it is necessary that the dispute relate to an “Investment” of the Investor in “the Area” of another Contracting Party. The DSG Claimants’ purported investments were all in Spain, so the latter part of that requirement is met and the sole remaining question on jurisdiction is whether each of the DSG Claimants did indeed make an “Investment” in Spain.

249. ECT Article 1(6) sets out the definition of an “investment.” Together with its accompanying ‘Understanding’, it reads as follows:

(6) “**Investment**” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

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(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the “Effective Date”) provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

“Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter efficiency projects” and so notified to the Secretariat.

[UNDERSTANDING] With respect to Article 1(6)

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor’s

(a) financial interest, including equity interest, in the Investment;

(b) ability to exercise substantial influence over the management and operation of the Investment; and

(c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.

250. While there are important questions as to the timing and the precise nature of the investments of each of the DSG Claimants, and the relationship between the various DSG
Claimants, to be addressed in due course, their status as “Investors”, and the fact that the dispute relates to their “Investments” is well established.

251. The DSG Claimants’ investments were conveniently summarized in the Claimants’ Memorial in a table reproduced here:

<table>
<thead>
<tr>
<th>No</th>
<th>Claimant</th>
<th>Project(s)</th>
<th>Investment and Ownership Share</th>
<th>Allocation of Compensation Claimed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-20</td>
<td>Solar Andaluz 1-20 GmbH &amp; Co. KG</td>
<td>Alcoles</td>
<td>Each Alcoles Claimant owns 100% of a Spanish SPV and one of the twenty 100 kW PV facilities comprising this Project</td>
<td>Each Alcoles Claimant claims 3% of the harm caused to Project Alcoles for the first 25 years of operation, reflecting its shareholding in Alcoles</td>
</tr>
<tr>
<td>21-35</td>
<td>Solarpark Calasparra 251-365 GmbH &amp; Co. KG (the “Calasparra Claimants”)</td>
<td>Calasparra</td>
<td>Each Calasparra Claimant owns 100% of a Spanish SPV and one 100 kW of the fifteen 100 kW PV facilities comprising this Project</td>
<td>Each Calasparra Claimant claims 6.67% of the harm caused to Project Calasparra for the first 25 years of operation, reflecting its shareholding in Calasparra</td>
</tr>
<tr>
<td>36-65</td>
<td>Solarpark Tordesillas 401-410 GmbH &amp; Co. KG (the “Tordesillas Claimants”)</td>
<td>Tordesillas</td>
<td>Each Tordesillas Claimant owns 100% of a Spanish SPV and one of the three 100 kW PV facilities comprising this Project</td>
<td>Each Tordesillas Claimant claims 3.33% of the harm caused to Project Tordesillas for the first 25 years of operation, reflecting its shareholding in Tordesillas</td>
</tr>
<tr>
<td>66</td>
<td>DSG Deutsche Solargesellschaft mbH (“DSG GmbH”)</td>
<td>Alcoles, Calasparra, and Tordesillas</td>
<td>Claims to bonus payments resulting from higher-than-projected revenue when Projects Alcoles, Calasparra, and Tordesillas surpass projected electricity production</td>
<td>100% of the harm caused to DSG GmbH as a result of lost bonus payments from Alcoles, Calasparra, and Tordesillas</td>
</tr>
<tr>
<td>67</td>
<td>DSG Spanien Verwaltungs GmbH (“DSG Spain”)</td>
<td>Alcoles, Calasparra, and Tordesillas</td>
<td>Indirect Interests in the Alcoles, Calasparra, and Tordesillas Claimants as their General Partner</td>
<td>None – compensation for this claim is covered through the compensation allocated to the Alcoles, Calasparra, and Tordesillas Claimants</td>
</tr>
<tr>
<td>68</td>
<td>Mathias Knecht</td>
<td>Calasparra</td>
<td>50% of Claimant Solarpark Calasparra 233 GmbH &amp; Co. KG</td>
<td>None – compensation for this claim is covered through the compensation allocated to Claimant Solarpark Calasparra 233 GmbH &amp; Co. KG</td>
</tr>
</tbody>
</table>
The fact of these investments was not challenged by the Respondent, although their characterization as “Investments” and the possibility of them serving as the basis of a claim in this case was disputed. Those matters are most easily considered along with other substantive questions, and will therefore be addressed later, along with questions of merits and quantum.
253. The Tribunal determines, with the reservation in the preceding paragraph concerning the status of their “Investments”, that it has jurisdiction *ratione personae* over the DSG Claimants, and can proceed to consider the merits of their claims, subject to the remaining objections to jurisdiction, which are addressed next.

B. **THE INTRA-EU OBJECTION**

(1) **The Parties’ Positions**

   a. **Respondent’s Position**

254. The Respondent argues that the Claimants are not protected investors under Article 26 of the ECT because the ECT does not apply to disputes relating to intra-EU investments.\(^{207}\) According to the Respondent, this continues to be a contentious issue despite the awards that have rejected this objection.\(^{208}\)

255. The Respondent’s position is based on the following arguments: (1) EU law does not permit intra-EU arbitration; (2) EU law is the applicable law to this dispute; (3) the ECT must be interpreted in accordance with EU law; thus, Article 26 of the ECT does not cover intra-EU disputes; (4) even if Article 26 were to cover intra-EU disputes, there is a conflict between EU law and the ECT that should be resolved in favour of EU law;\(^{209}\) (5) this position is supported by scholarly writings;\(^{210}\) (6) the proceeding before the European Commission regarding the evaluation of the measures supporting Renewable Energies and cogeneration in Spain may have an impact on the outcome of this arbitration;\(^{211}\) and (7) there are two pending cases before the CJEU regarding the compatibility of BITs with EU law.\(^{212}\)

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\(^{208}\) Resp. Rej., ¶ 119-120.


\(^{210}\) Resp. C-Mem., ¶¶ 127-129.

\(^{211}\) Resp. C-Mem., ¶ 133.

\(^{212}\) Resp. Rej., ¶ 121.
256. First, the Respondent maintains that EU law does not allow for intra-EU arbitration. The Respondent offers two reasons: (a) Article 344 of the Treaty on the Functioning of the European Union (“TFEU”) precludes EU Member States from submitting disputes to fora other than those of the EU judicial system;\(^\text{213}\) and (b) the Tribunal would have to decide on questions of EU law, which would result in prohibited interference with the exclusive competence of EU Tribunals, as recognized by the CJEU in its Legal Opinion 1/91.\(^\text{214}\)

257. On this point, the Respondent refers to the *Achmea* case, in which the CJEU established a four-step test: (i) whether EU law is applicable to the dispute; (ii) if it is, whether the body applying EU law is within the EU judicial system; (iii) if it is not, whether said body is subject to EU control on the application of EU Law; and (iv) whether the process complies with the principle of autonomy of EU Law.\(^\text{215}\) According to the Respondent, the CJEU’s findings in *Achmea* are confirmed by Opinion 1/2017 on the Comprehensive Economic and Trade Agreement ("CETA") with Canada.\(^\text{216}\)

258. Applying the *Achmea* test to the case at hand, the Respondent argues that (i) EU law is applicable; (ii) the Tribunal is not part of the EU judicial system; (iii) the Tribunal’s award will not be subject to review by a European court; and (iv) the arbitral process does not comply with the principle of autonomy.\(^\text{217}\) The Respondent concludes that this intra-EU arbitration is not compatible with EU law.

259. Second, the Respondent argues that, under Article 26(6) of the ECT, EU Law should be considered as part of the applicable rules and principles of international law.\(^\text{218}\) Since

\(^{213}\) Resp. C-Mem., ¶¶ 92, 114, 131.


Article 26 of the ECT makes no distinction between rules and principles that would apply to jurisdiction or the merits of the dispute, EU Law must be applied to both.219

260. *Third*, the Respondent argues that Article 26 of the ECT, when interpreted in accordance with EU Law, cannot cover arbitrations between an EU investor and another EU Member State.220 The reasons are five-fold: (a) the EU would not have become a party to the ECT if the ECT had not been consistent with EU Law;221 (b) both Germany and Spain were members of the EU when they ratified the ECT; they had transferred their sovereignty to the EU and were unable to enter into obligations between themselves within the framework of the Internal Energy Market harmonised by the EU;222 (c) the ECT and EU law have common objectives; the EU and the Member States would not have promoted the ECT to cover an area “which had been totally covered - and in a far superior manner - for years by EU Law”;223 (d) the ECT recognizes the existence and special nature of Regional Economic Integration Organizations (“REIOs”), like the EU, and the binding nature of EU decisions;224 and (e) there was no need to include a disconnection clause in the ECT because these clauses are used when the EU is not a party itself to the relevant agreement, which is not the case of the ECT.225 The Respondent also submits that the declaration by EU Member States of January 2019, whereby Germany rejected intra-EU arbitrations under Article 26 of the ECT, should be taken as relevant context.226

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222 Resp. C-Mem., ¶¶ 90, 120.
261. *Fourth*, the Respondent argues that if there was a conflict between EU Law and the ECT, EU law should prevail. This conflict rule derives from (a) the primacy principle and (b) Article 16 of the ECT.

262. According to the Respondent, “EU Law is applied to intra-community relations in preference to or prevailing over any other law …”, including the ECT, as required by the principle of primacy recognized in Declaration 17, Article 351 of the TFEU, Article 25 of the ECT and in the judgement *Costa v. ENEL*.

263. On the other hand, Article 16 of the ECT establishes the rules of compatibility between earlier and later treaties. Relying on *Electrabel v Hungary*, the Respondent argues that “Article 16 ECT is not applicable” and that “if the ECT and EU law remained incompatible notwithstanding all efforts at harmonisation, … EU law would prevail over the ECT’s substantive protections and that the ECT could not apply inconsistently with EU law to such a national’s claim against an EU Member State.” In any event, investor and investment protections under EU law are complete and at least as favourable as the protections provided under the ECT.

264. *Fifth*, the Respondent argues that scholarly commentary also supports its position.

265. *Sixth*, the Respondent points to the impact that an existing proceeding before the European Commission may have on the outcome of this arbitration. This existing proceeding relates to the evaluation of the measures supporting renewable energies and cogeneration in

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228 Resp. Rej., ¶ 110.


Spain. Its relevance should be assessed in light of (a) the CJEU’s Order in ELCOGAS, which implies that Member States shall bear in mind the 2014-2020 Guidelines on state aid for environmental protection and energy, and (b) the European Commission’s 26 May 2016 decision in the Micula case, ordering the suspension of the payment of an award for granting an advantage equivalent to state aid.

Finally, the Respondent refers to two pending cases before the CJEU regarding the compatibility of BITs with EU law: (a) the case on the compatibility between the Achmea decision and the 1991 BIT signed between Netherlands and Slovakia; and (b) the request to repeal the decision of the EC regarding the award in the Micula case. Until such issues are decided, and pursuant to the principle of institutional loyalty, the Respondent maintains its objection. The Respondent supplemented its observations on the questions of EU law in its Post-Hearing Brief and its comments on new legal authorities.

b. Claimants’ Position

The Claimants argue that the ECT applies to intra-EU disputes and that they fulfil all the jurisdictional requirements. The Claimants make five main points in support of their position: (1) the terms of the ECT are sufficiently clear and do not contemplate an exception for intra-EU disputes; (2) the relationship between the ECT and EU law does not preclude this arbitration; (3) the CJEU’s decisions do not preclude this arbitration; (4) future contingencies are irrelevant for the purposes of determining the Tribunal’s jurisdiction; and (5) unanimous case law has rejected the Respondent’s argument and the scholarly writings it refers to do not support its position.

236 Resp. Rej., ¶ 121.
237 Resp. Rej., ¶ 122.
238 Cl. Reply, ¶¶ 56, 65; Cl. Rej., ¶ 38.
239 Claimants’ Opening Presentation, slides 177-202; Claimants’ Closing Presentation, slides 51-78.
268. *First*, the Claimants argue that the ECT does not include an exception for intra-EU disputes because: (a) Article 26 provides, without limitations, for the settlement of disputes “between a Contracting Party and an Investor of another Contracting”; since both Germany and Spain are parties to the ECT and all claimants are German nationals, they satisfy the nationality requirement;\(^{240}\) (b) it is irrelevant that the EU is also a Contracting Party to the ECT since the EU is not party to this arbitration;\(^{241}\) (c) the ECT’s recognition of REIOs does not preclude EU investors from commencing arbitration against other EU members; Articles 36(7) and 44 of the ECT show that EU Member States wanted to preserve their autonomy to exercise their individual rights as ECT Contracting Parties, and not to subordinate themselves to the EU;\(^{242}\) and (d) EU Members had the competence to conclude the ECT and create obligations between themselves; if this was not their intention, they would have included an express disconnection clause to that effect, which they did not do.\(^{243}\)

269. *Second*, the Claimants argue that the relationship between the ECT and EU law does not preclude this arbitration because EU law is not international law under which Article 26 of the ECT shall be interpreted.\(^{244}\) In addition, the Respondent has mischaracterized the primacy principle. On the one hand, the *Costa v. ENEL* case dealt with a unilateral and national measure, which the ECT is not.\(^{245}\) On the other hand, the Respondent mischaracterizes Article 25 of the ECT. Indeed, assuming that EU law is an Economic Integration Agreement within the meaning of Article 25, this provision deals with the treatment by Spain of nationals outside the EU (not investors inside the EU) and bears no relevance to the current dispute.\(^{246}\)

\(^{240}\) Cl. Response to the EC *Amicus Curiae*, 29 July 2016, ¶¶ 15-18; Cl. Reply, ¶ 59, 65; Cl. Rej., ¶ 38; Claimants’ Closing Presentation, slide 51; Tr. Day 5 [Ms. Frey] 88:5-17.


\(^{242}\) Cl. Reply., ¶¶ 62-63.

\(^{243}\) Cl. Response to the EC *Amicus Curiae*, 29 July 2016, ¶¶ 4, 19-20, 27-29; Cl. Reply, ¶ 64.

\(^{244}\) Cl. PHB, ¶ 7.

\(^{245}\) Cl. Rej., ¶ 40.

\(^{246}\) Cl. Rej., ¶¶ 41-42.
270. Further, under Article 16 of the ECT, which governs the relationship between co-existing treaties, the treaty that affords a more favourable treatment to investors and investments prevails. Since the right to arbitration is absent from the EU legal framework, and the right to resort to arbitration is more favourable than having recourse to domestic courts before accessing the EU legal system, the ECT is more favourable and, thus, prevails.\(^{247}\)

271. Moreover, the general rule in international law is that when two treaties share the same subject-matter, an earlier-in-time treaty applies unless it is found to be incompatible with the later-in-time treaty.\(^{248}\) For the Claimant, it is unclear whether the ECT and the EU treaties share the same subject-matter and, even if they did, as many tribunals have concluded, there is no incompatibility between them.\(^{249}\)

272. Additionally, Article 344 of the TFEU only prevents the Respondent from submitting a dispute concerning the interpretation or application of the TFEU itself and the Treaty on the European Union to other methods of settlement different than those contemplated therein, neither of which were invoked in this dispute.\(^{250}\) Finally, Legal Opinion 1/91 does not support the Respondent’s position since there is no risk that the Tribunal would need to interpret EU law.\(^{251}\)

273. Third, the Claimants argue that the CJEU case law does not preclude the application of the ECT to intra-EU disputes. In fact, the ECT is part of both EU law and international law, and as such, it is binding on the EU Member States and all EU institutions, including the CJEU.\(^{252}\)

274. In this respect, the Claimants argue that the \textit{Achmea} case does not preclude intra-EU arbitration under the ECT. Different from the case at hand, the \textit{Achmea} case dealt with an

\(^{247}\) Cl. Response to the EC \textit{Amicus Curiae}, 29 July 2016, ¶¶ 47-50; Cl. Reply, ¶¶ 66-70; Cl. Rej., ¶ 44; PHB, ¶ 7.

\(^{248}\) Cl. Response to the EC \textit{Amicus Curiae}, 29 July 2016, ¶ 38; Cl. Reply, ¶ 72.

\(^{249}\) Cl. Response to the EC \textit{Amicus Curiae}, 29 July 2016, ¶ 45; Cl. Reply, ¶¶ 72-73 (citing \textit{Electrabel} (CL-009), ¶¶ 4.189, 4.196-4.197); Cl. Rej., ¶¶ 33, 35-37.

\(^{250}\) Cl. Reply, ¶ 74.

\(^{251}\) Cl. Reply, ¶ 75 (citing \textit{Electrabel} (CL-009), ¶¶ 4.146 – 4.147).

\(^{252}\) Cl. PHB, ¶ 2-5.
investment treaty that was not concluded by the EU, and it must be presumed that when the EU concluded the ECT, it was in accordance with EU law. In addition, the Achmea case dealt with an investment agreement that had a governing law provision under which EU law was to be applied.

Further, in its decision regarding the compatibility of the CETA agreement, the CJEU noted that: (a) the fact that the ISDS mechanism is outside the EU judicial system does not, by itself, mean that this mechanism adversely affects the EU legal order’s autonomy; and (b) the jurisdiction of EU courts and tribunals does not take precedence over international courts or tribunals established by “international agreements entered into by the [European] Union.”

Fourth, the Claimants argue that the Respondent has failed to provide any authority “for the proposition that this Tribunal should be guided – much less bound – by uncertain future contingencies, because there is none.” The Claimants thus deny the relevance of future CJEU decisions, including those in the Achmea and Micula cases, and argue that they have no effect on the jurisdiction of this Tribunal. Additionally, the Claimants reject the arguments related to “state-aid.” According to them, Spain is attempting to conflate potential defences that it might have under EU law on state aid with issues of the applicability and jurisdiction of the ECT. In any event, neither RD 661/2007 nor RD 1578/2008 were “state aid.”

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253 Claimants’ Closing Presentation, slides 60-61 (citing Slovak Republic v. Achmea B.V. (Case No. C-284/16), ECJ Judgement, 6 March 2018 (RL-113), ¶ 57; European Court of Justice, Opinion 1/17, 30 April 2019 (C-500)); Tr. Day 5 [Ms. Frey] 90:24 – 91:2, 92:3-9; Cl. PHB, ¶ 4.
255 Cl. PHB, ¶ 4.
256 Cl. Rej., ¶ 45.
257 Cl. Rej., ¶¶ 46-47.
258 Cl. Response to the EC Amicus Curiae, 29 July 2016, ¶ 12; Cl. Rej., ¶ 48; Cl. PHB, ¶ 2.
259 Claimants’ Opening Presentation, slide 200; Claimants’ Closing Presentation, slide 68; Cl. PHB, ¶ 8.
277. *Fifth*, the Claimants argue that the alleged inapplicability of the ECT in intra-EU disputes has been rejected by more than 30 tribunals and that every ECT tribunal that has considered the issue post-*Achmea* has rejected it. They also argue that the Respondent’s reliance on scholarly writings on this issue is weak and misleading. Like the Respondent, the Claimants supplemented their observations on the questions of EU law in their Post-Hearing Brief and their comments on new legal authorities.

278. **The European Union’s Position**

279. As was noted above, the European Commission sought and was granted permission to intervene as a non-disputing party pursuant to ICSID Arbitration Rule 37(2) (the “European Commission’s Application”), and filed its *amicus curiae* brief on 27 June 2016.

280. The 23 pages of the brief set out the position of the European Commission, according to which the ECT “does not apply at all in the relationship between those EU Member States that were Member States of the European Communities when the ECT was signed and ratified, as is for example also the case for the Agreement on the World Trade Organisation (“WTO agreement”).” While the brief contains much detailed argument, all of which has been considered by the Tribunal, it includes a convenient summary, which can stand as a summary of its contents here:

1.1 *Scope of the amicus curiae brief*

3. As set out in the request for leave to intervene as amicus curiae, the Commission’s request is at this stage limited to the question whether your Arbitral Tribunal has jurisdiction to hear the case. The Commission takes the view that when concluding the ECT, the European Communities (including EURATOM) and their Member States have not created obligations under international law inter se with regard to investment promotion and protection. They have only created

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260 Cl. Response to the EC *Amicus Curiae*, 29 July 2016, ¶ 3; Cl. Reply, ¶¶ 57, 77-80; Cl. Rej., ¶ 32; Claimants’ Opening Presentation, slides 173-175; Claimants’ Closing Presentation, slides 52-53, 62-65; Tr. Day 5 [Ms. Frey] 88:18-21, 92:10-16; 92:17-20; Cl. PHB, ¶¶ 2-3.

261 Cl. Reply, ¶¶ 81-82.

262 *Amicus curiae* brief filed by the European Commission, 27 June 2016 (the “EU Brief”).

263 EU Brief, ¶ 11.
such obligations with regard to third countries, that is countries that are not EU Member States, and investors that are companies or citizens of those third countries. As a consequence, investors that are incorporated under the laws of an EU Member State (“EU investors”) cannot bring an ISDS case against an EU Member State on the basis of Article 26 ECT.

4. The Commission also wishes to inform the Arbitral Tribunal that the Kingdom of Spain has notified the disputed measures, i.e. its national support scheme for electricity production from renewable energy sources (referred to by the Kingdom of Spain as the so-called “special regime”) and the subsequent adoption of various legislative and regulatory measures approved by the Spanish Parliament and the Spanish Government that affect producers of electricity from renewable energy sources, to the Commission on the basis of Article 108(3) of the Treaty on Functioning of European Union (“TFEU”). Should the Arbitral Tribunal take the view that in order to decide the dispute in front of it, it becomes necessary to analyse the compliance of special regime, in so far as it applies to electricity production from renewable energy sources, with State aid rules, for example for assessing whether the investors had legitimate expectations, the Commission invites the Arbitral Tribunal to suspend the dispute until the Commission has taken a view on Spain’s notification.

1.2. Summary of the Commission’s position and precedent

5. In a nutshell, the Commission’s argument can be summarized as follows: Investment protection for investments carried out by an EU investor in another EU Member State is governed by Union law, in particular the rules of free movement of capital and freedom of establishment, the general principles of Union law, the Charter of Fundamental Rights of the European Union (“Charter of Fundamental Rights”), and relevant secondary legislation. Pursuant to Article 3(2) TFEU, EU Member States are prohibited from concluding an agreement between themselves which might affect rules of Union law or alter their scope. It follows that Member States lack the competence to conclude bilateral or multilateral international agreements concerning such protection of investments.

6. That has two consequences:

7. First, the Kingdom of Spain, on the one hand, and the Federal Republic of Germany, on the other hand, when ratifying the ECT, were Member States of the European Communities and did not have the competence to enter into inter se obligations concerning protection of investments.
made by EU investors. That competence lay with the European Communities (and now lies with the Union and EURATOM). A detailed analysis of the ECT also shows that the ECT can be interpreted consistent with those competences, and that the Contracting Parties of the ECT did not have the intention of creating inter se obligations concerning investment protection for EU investors between EU Member States.

8. Second, the appropriate forum for the claimants to bring an action against the Kingdom of Spain is the competent national court or tribunal, which is the juge du droit commun du droit de l'Union (“the ‘ordinary’ courts within the Union legal order”). In that forum, the claimants could have relied on the relevant rules of Union law, and they could have asked the competent judge to decide whether the ECT, which is part of Union law, applies to their case or not, as that question is ultimately a question of Union law. If necessary, those courts and tribunals would have the possibility, and, for the judge in last instance, the obligation, to refer the question of the applicability of the ECT to EU investors when investing in another Member State to the European Court of Justice (“ECJ”).

9. In recent years, the number of cases brought by investors from one EU Member State against another EU Member State under the ECT has significantly increased. The Commission considers that all those proceedings are brought in an incompetent forum, and that investors should bring those cases in the competent national courts and tribunals, which are the ordinary judges of Union law (for the investors).

10. The Commission therefore seeks systematically to intervene in such arbitration proceedings of which it believes that they have been brought in an incompetent forum, as they involve issues of Union law.264

(3) The Tribunal’s Analysis

280. The Tribunal is established under the ICSID Convention, pursuant to the dispute settlement provisions of the ECT and the consent of the parties to this arbitration. It is axiomatic that the competence of the Tribunal is determined by those instruments. Both the ICSID Convention and the ECT have States Parties located in many parts of the world; but the question here concerns the operation of the ICSID Convention and the ECT in the context

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264 EU Brief, ¶¶ 3-10.
of a dispute involving a member State (Spain) of an REIO (the EU) and nationals of another member State of that REIO (Germany).

281. The Respondent’s objection is based upon the proposition that the ECT is not applicable. The Tribunal must approach that question by applying the provisions of the relevant instruments – the ECT and the ICSID Convention – construing them in accordance with the rules of international law as reflected in the familiar terms of Articles 30-32 of the Vienna Convention on the Law of Treaties (“VCLT”).

282. ECT Article 26 sets out the dispute settlement provisions pursuant to which the Claimants’ application in this case has been filed. Because of its importance, it is quoted (in part) again here.

*Article 26*

*Settlement of Disputes between an Investor and a Contracting Party*

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

...
(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention;

....

283. The question whether this is a “dispute” (in the singular) was addressed in the section above on the ‘multi-party objection’. The next question is whether the dispute is, in the words of ECT Article 26(1), a dispute “between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III [of the ECT].” The only question here is whether the Claimants are “Investors” of “another Contracting Party.” If they are, the remaining requirements in Article 26(1) are plainly met.

284. It is argued that the Claimants are all “Investors” of the EU, of which Spain is a Member State, and are therefore not “Investors” of ‘another Contracting Party’ to the ECT. This is the “intra-EU” argument, according to which the ECT does not operate in the context of intra-EU States but only in the context of a dispute involving an EU State and a non-EU State.

285. The Tribunal understands the thinking and the policy behind the intra-EU argument, and the relevant principles of EU law; but it is bound to interpret and apply the instruments to which it owes its existence and its powers and, in the words of ECT Article, to do so “in accordance with [the ECT] and applicable rules and principles of international law.”

286. The starting point is the rule of interpretation set out in VCLT Article 31(1): “1. 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.”
287. Both Spain and Germany are ECT Contracting Parties. On the face of it, and giving the terms of ECT Article 26(1) their ordinary meaning, this is plainly a dispute “between a Contracting Party and an Investor of another Contracting Party.” The question is whether this conclusion is vitiated by the fact that the EU\textsuperscript{265} is also a Contracting Party to the ECT.

288. Clearly, it is not the simple fact that the EU is an ECT Contracting Party that is relevant: it is the relationship between the EU and the two States involved in this case. But nothing in the wording of ECT Article 26 points to the conclusion that because the EU is itself a Contracting Party, Germany and Spain cease to be distinct Contracting Parties vis-à-vis one another. Provision could have been made to that effect in ECT Article 26; or an additional “Understanding” of the kind attached to many ECT Articles (including Article 26 itself)\textsuperscript{266} could have been adopted in relation to Article 26; or some other provision in the ECT could have made plain the relationship between EU Law and the ECT; or an instrument of the EU could have made explicit to EU States how they and their nationals were to act in relation to disputes covered by the substantive provisions of the ECT, and perhaps have invited other ECT Contracting Parties to agree to what would have been a regional derogation from the terms of the Treaty.

289. No such step was taken. The argument that the ECT cannot apply rests on the interpretation of general provisions of EU Law, notably Article 3(2) of the TFEU, which stipulates that the Union has “exclusive competence for the conclusion of an international agreement when its conclusion … may affect common rules or alter their scope.”\textsuperscript{267} But nothing in the TFEU addresses the question of the continuing validity of the ECT when investment was brought under Union competence, in 2007, after the ECT had been ratified and entered into force for the EU, Germany and Spain.

\textsuperscript{265} As the EU Brief notes, it was the European Communities that concluded the ECT, and one of them (the European Economic Community) is the legal predecessor of the EU (see EU Brief, ¶ 3). The change of personality is not material in the present context, and for the sake of clarity, reference is made here to the “EU” throughout.

\textsuperscript{266} The (sole) Understanding attached to Article 26 reads as follows: “[UNDERSTANDING] With respect to Articles 26 and 27 The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organizations, even if they are legally binding, or treaties which entered into force before 1 January 1970.”

\textsuperscript{267} EU Brief, ¶ 45.
290. The principles of the supremacy of EU Law and of Union competence are well understood to be principles of fundamental importance within the EU; but it is far from being ‘manifest’ that a treaty concluded by the EU itself, alongside its Member States, without any reservation or any declaration of how the express provisions of that treaty were to be interpreted and applied, should be regarded as incompatible with EU law. Indeed, the legal test of incompatibility appears to be one whose application will in many cases be unclear until the Union’s Court has made a determination: as the EU Brief put it, “it is also important to recall that the ECJ considers that international investment treaties breach Union law already when they present the risk of conflict with potential Union measures, without it being necessary to demonstrate actual conflict.”\textsuperscript{268}

291. The ‘incompatibility’ of the ECT and the TFEU may have been the result of an oversight at the time that the ECT was adopted or at the time that the TFEU was adopted. But if a treaty does not say what one or more of the parties wished (or has come to wish) it to mean, the remedy cannot be for one or some of the parties to impose a different meaning upon the treaty by a unilateral declaration of its position.

292. There is a further point of great importance. The ECT itself does make provision for circumstances where two treaties appear to be in conflict. ECT Article 16, together with the Decision relating to its application, reads as follows:

\begin{quote}
\textit{Article 16
Relation to Other Agreements

[DECISION] With respect to the Treaty as a whole

\textit{In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply.}\
\end{quote}

\footnotesize{\textsuperscript{268} EU Brief, ¶ 45.}
Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,

where any such provision is more favourable to the Investor or Investment.


293. The ordinary meaning of these words is plain. Applied in this context they mean that nothing in the ECT derogates from any provision of any of the EU treaties in relation to investment promotion and protection (ECT Part III) or from any right to dispute resolution; and nothing in the EU treaties derogates from any provision of any of the ECT in relation to investment promotion and protection (ECT Part III) or from any right to dispute resolution. The explicit reference to the Svalbard Treaty highlights the silence of Article 16 in relation to the EU treaties. It is difficult to see that any reader of the ECT and of Article 16 in particular could fail to draw from it an understanding that the ECT and the EU treaties were intended by ECT Contracting Parties (including the EU) to co-exist, with investors entitled to take the benefit of the more favourable treaty provision in any particular case.

294. The Tribunal was referred by the Parties and by the European Commission as amicus curiae to the awards of other tribunals on this point and to the relevant decisions of the Court of Justice of the European Union, and it has considered them carefully. The Tribunal understands that the EU, as an REIO, will decide for itself on the relationship between its legal order and international law, as must any system of municipal law. But just as the Union Court may consider itself bound to uphold the supremacy of EU law, this Tribunal
must apply the rules and principles of international law, in accordance with ECT Article 26(6). EU law, like municipal laws, has a very important role in the development and the application of international law; but it cannot prevail over it.

295. The Tribunal accordingly finds that its jurisdiction under the ECT and the ICSID Convention is not precluded or excluded by provisions of EU law, and dismisses this objection.

C. **THE TAXATION MEASURE OBJECTION**

(1) **The Parties’ Positions**

   a. **Respondent’s Position**

296. The Respondent argues that, as recognized by previous tribunals, this Tribunal lacks jurisdiction to decide over the alleged violations of Article 10(1) of the ECT that would arise out of the enactment of the TVPEE. According to the Respondent, under Article 21(1) of the ECT, the TVPEE qualifies as a taxation measure and Article 10(1) of the ECT does not generate any obligations in relation to taxation measures. Thus, under Article 26 of the ECT, the Respondent has not consented to arbitrating alleged violations of Article 10(1) allegedly arising out of the enactment of the TVPEE, since this measure does not create any obligations for the Respondent.

297. ECT Article 21(1) reads as follows:

   **Article 21**
   **Taxation**

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

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298. The Respondent denies that for a measure to be covered by the carve-out of Article 21(1) of the ECT, such measure must not only fall within the definition of a Taxation Measure in ECT Article 21(7)(a)(i) but must also (as the Claimants contend) be shown to be *bona-fide*. However, should the Tribunal accept that this is the case, the Respondent submits that the TVPEE is in fact a *bona-fide* taxation measure.  


272 Resp. C-Mem., ¶¶ 212-213.


275 Resp. C-Mem., ¶¶ 229-231; Resp. Rej., ¶ 134.


277 Resp. Rej., ¶¶ 140-142.

299. Article 21(7)(a)(i) of the ECT defines the term "Taxation Measure", *inter alia*, as "any provision relating to taxes of the domestic law of the Contracting Party." For the Respondent, the TVPEE falls under such definition because (1) it is a Spanish domestic measure; and (2) it relates to taxes.

300. *First*, Law 15/2012, through which the TVPEE was enacted, is part of the domestic law of the Respondent, which was passed by its Parliament in accordance with the corresponding ordinary legislative procedure provided for in the Spanish Constitution and the rest of the Spanish legal system.

301. *Second*, the TVPEE is a provision "relating to taxes”, both under (a) Spanish domestic law, and (b) under international law.

302. The Respondent argues that the measure is a tax under domestic law and that this characterization under domestic law is useful to determine the nature of the measure. In particular, the Respondent argues that: (i) Article 1 of Law 15/2012 classifies the TVPEE...
as a taxation measure;\(^{278}\) (ii) the TVPEE falls under the definition of “taxes” enshrined in Article 2 of Act 58/2003, which defines the concept of taxes and its different types;\(^{279}\) (iii) the taxation nature is confirmed by the fact that the self-assessment and payment of the TVPEE is made through Form 583 “Tax on the value of the production of electrical energy. Self-assessment and instalment payments”;\(^{280}\) (iv) entities like the Spanish General Directorate of Taxation and the Institute of Accounting and Auditing have recognized the TVPEE as a taxation measure;\(^{281}\) and (v) the Spanish Constitutional Court has ratified that the TVPEE is a taxation measure in conformity with the Spanish Constitution.\(^{282}\)

303. Under international law, a measure is a tax if: (i) it is established by the law; (ii) it imposes an obligation on a class of people; and (iii) such obligation implies paying money to the State for public purposes.\(^{283}\)

304. For the Respondent, the TVPEE fulfils all these elements and, thus, is a taxation measure under international law.\(^{284}\) The TVPEE: (i) was established by Law 15/2012, a law enacted

\(^{278}\) Resp. C-Mem., ¶ 235. According to the Respondent, under this article, “the TVPEE is a direct tax on the performance of the activities of production and incorporation into the electrical system of electrical energy in the Spanish electrical system.”

\(^{279}\) Resp. C-Mem., ¶¶ 236-237.

\(^{280}\) Resp. C-Mem., ¶¶ 238-239; Resp. Rej., ¶ 138. According to the Respondent, this form was approved by Ministerial Order HAP/703/2019 (Website of the State Tax Administration Agency providing information about Form 583 (R-022); Ministerial Order HAP/703/2013 approving Form 583 and establishes the form and procedure for its submission, 29 April 2013 (R-023)), which has been declared in conformity with the law by the Spanish National Court (Judgment from the Spanish High Court dismissing administrative appeal 297/2013, 2 June 2014 (R-024); Judgment from the Spanish High Court dismissing administrative appeal 298/2013, 2 June 2014 (R-025)).

\(^{281}\) Resp. C-Mem., ¶¶ 240-243; Resp. Rej., ¶ 139.

\(^{282}\) Resp. C-Mem., ¶¶ 234, 244-246; Resp. Rej., ¶ 137; Resp. Opening Statement, slide 149. According to the Respondent, the Spanish Constitutional Court, by Judgement of 6 November 2014 (Judgment 183/2014 issued by the Constitutional Court Plenary, 6 November 2014 (R-033)), dismissed an unconstitutional appeal in relation to the TVPEE and ruled that the regulation is valid and in accordance with the Spanish Constitution.


\(^{284}\) Resp. C-Mem., ¶ 272.
by the Spanish Parliament;\(^{285}\) (ii) imposes the obligation to pay the tax to “anyone that performs the activities of production and incorporation of electrical energy into the Spanish electricity system”;\(^{286}\) and (iii) such tax becomes part of the public revenue included in the Spanish General Budget and is used to finance public expenditures (e.g. the costs of the electricity sector).\(^{287}\) Further, the Respondent argues that the EC has ratified the fiscal nature of the TVPEE and that such tax is in conformity with EU Law.\(^{288}\)

305. Third, the Respondent rejects the Claimants’ assertion that a further step is required and that the measure must be a *bona fide* taxation measure.\(^{289}\) However, the Respondent argues that it is for the Claimants to prove that the TVPEE is not a *bona fide* taxation measure. In the Respondent’s view, the Claimants have not fulfilled their burden of proof.\(^{309}\)

306. In any event, the Respondent argues that the TVPEE is a *bona fide* taxation measure\(^{291}\) for the following three reasons: (i) it is a tax of general application that treats all energy producers, both renewable and conventional, in the same manner;\(^{292}\) (ii) it does not discriminate against renewable producers from a legal or economic perspective; they receive the same treatment as conventional producers and the effect of the TVPEE is neutralized since “[t]he TVPEE is one of the costs that are remunerated to the renewable producers to whom the regulated regime applies”;\(^{293}\) and (iii) the objective of the TVPEE


\(^{288}\) Resp. C-Mem., ¶¶ 249, 273-282; Resp. Rej., ¶ 147; Resp. Opening Statement, slide 291. The Respondent argues this happened when the European Commission decided there were no grounds for considering that the TVPEE infringed EU Law and decided to close the EU Pilot procedure 5526/13/TAXU on 8 September 2014 (R-040).


\(^{291}\) Resp. Rej., ¶ 158.


\(^{293}\) Resp. Rej., ¶ 181.
is to raise revenue for the Spanish State for public purposes,\textsuperscript{294} a position also shared by the tribunal in \textit{Isolux v. Spain}.\textsuperscript{295}

\textbf{b. Claimants’ Position}

307. The Claimants argue that for a measure to fall under the carve-out of Article 21(1) of the ECT, it must be a \textit{bona fide} taxation measure. Since the TVPEE is not a \textit{bona fide} taxation measure, the Tribunal has jurisdiction to decide over the alleged violations of Article 10(1) of the ECT through the enactment of the TVPEE.\textsuperscript{296}

308. According to the Claimants, a non-\textit{bona fide} tax measure is one that is dressed up as a tax but is designed to revoke the incentives previously guaranteed to investors and to circumvent the State’s obligations with respect to such foreign investors.\textsuperscript{297} As such, although the domestic characterization of a measure may be useful, it is not determinative, and the Tribunal should look “behind the label.”\textsuperscript{298} The Claimants’ argument is that, although characterized as a tax, the real purpose of Law 15/2012 was to reduce the tariff incentives paid to renewable plants and guaranteed to the Claimants’ plants under RD 661/2007 and RD 1578/2008.\textsuperscript{299}

309. The Claimants argue that under case law, for a measure to be considered a \textit{bona fide} tax measure, it must: (1) be imposed by law; (2) be imposed on a broad class of persons; and (3) raise money for the State’s treasury to be used for public purposes. They concede that the TVPEE was imposed by law but state that it does not fulfil requisites (2) and (3).\textsuperscript{300}

\textsuperscript{294} Resp. Rej., ¶¶ 187-191.

\textsuperscript{295} Resp. Rej., ¶¶ 193-197 (citing \textit{Isolux Infrastructure Netherlands, B.V. v. the Kingdom of Spain} (SCC Case No. V2013/153), Award, 12 July 2016 (RL-101), ¶¶ 717-741).

\textsuperscript{296} Cl. Reply, ¶¶ 118, 125; Cl. Opening Statement, slide 125; Tr. Day 1 [Ms. Frey] 121:11-20.

\textsuperscript{297} Cl. Reply, ¶¶ 118, 124 (citing \textit{Yukos Universal Ltd. v. Russian Federation} (PCA Case No. AA 227), Final Award, 18 July 2014 (CL-111), ¶ 1407.

\textsuperscript{298} Cl. Reply, ¶¶ 120-124, 134; Cl. Rej., ¶¶ 56, 65, 73; Cl. Opening Statement, slide 123; Tr. Day 1 [Ms. Frey] 120:6-15. The Claimants argue that the declarations by the \textit{Audiencia Nacional} and the confirmation by Spanish fiscal authorities are irrelevant. Cl. Rej., ¶ 55.

\textsuperscript{299} Cl. Reply, ¶¶ 119, 129, 134; Cl. Rej., ¶¶ 52, 57, 66, 76; Cl. Opening Statement, slides 119-121; Tr. Day 1 [Ms. Frey] 119:14-23.

\textsuperscript{300} Cl. Reply, ¶ 126; Cl. Rej., ¶ 58 (citing \textit{EnCana Corporation v. Republic of Ecuador} (LCIA Case No. UN3481), Award, 3 February 2006 (CL-096), ¶ 142; Duke (RL-059), ¶ 174; Burlington (RL-062), ¶¶ 164-165.)
310. *First*, the TVPEE is not imposed on a broad class of persons since, according to the Claimants, the TVPEE only affects renewable producers and not conventional producers.

311. On the one hand, conventional producers receive essentially all their revenue from the sale of electricity at the market price and they do not receive the incentive tariff on top of their market revenues. Since the 7% tax is applied to all the revenue that was received from the generation of electricity regardless of the source or purpose of such revenue and not to the profits or the wholesale value of electricity generation, renewable plants paid the tax on a much higher base than conventional plants. Therefore, the tax affected the incentive revenues that only the renewable electricity producers receive and allows Spain to “claw back” the incentives it had guaranteed to renewable producers.  

312. On the other hand, because conventional energy producers receive their remuneration based on market prices, they can pass on to the consumers their costs derived from the TVPEE, whereas renewable energy producers could not raise the prices to recover the tax because their tariffs were fixed by law.

313. Further, the Claimants state that there is not enough data to determine whether the effects of the tax have been fully neutralized, as argued by the Respondent. In any case, Law 15/2012, as originally enacted and as applied to renewable energy producers until July 2013, served as a direct reduction of the remuneration Spain had promised.

314. *Second*, the money raised by the State through the TVPEE is not used for public purposes. The revenue obtained is funnelled into the electricity system to benefit the electricity consumers, whose costs are reduced. According to the Claimants, this operates solely as a reallocation of funds within the electricity system, away from the renewable producers towards the consumers.

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302 Cl. Reply, ¶ 133; Cl. Rej., ¶¶ 60, 71, 74.
303 Cl. Rej., ¶ 72.
304 Cl. Reply, ¶¶ 127, 134; Cl. Rej., ¶¶ 59, 64, 67, 75; Cl. Opening Statement, slides 121, 124; Tr. Day 1 [Ms. Frey] 120:16 – 121:9.
315. In addition to this, the Claimants argue that Law 15/2012 does not advance its stated purpose of “harmoniz[ing Spain’s] tax system with more efficient, respectful, and sustainable use of the environment” inasmuch as renewable energy producers are affected by the measure by receiving a reduced remuneration.305

316. Finally, the Claimants also state that Law 15/2012, through which the TVPEE was implemented, is suspect even under Spanish Law. In support of this position, they argue that: (a) the Spanish Supreme Court has raised doubts regarding the constitutionality of the measure under Spanish law;306 and (b) the Constitutional Court has deferred addressing that question until after the Supreme Court requests a ruling from the CJEU on whether the measure has complied with EU laws because there is serious reason to believe it does not.307

(2) The Tribunal’s Analysis

317. The question whether the TVPEE is a tax arises under ECT Article 21(1), and is thus a question of treaty interpretation. The classification of the TVPEE in domestic law, while plainly a matter to be taken into account, is not determinative.

318. Both the Respondent and the Claimants have referred to the test adopted in the EnCana case to determine if a measure is a tax,308 and the Tribunal is accordingly content to accept that test for present purposes. That test requires that the measure: (1) be imposed by law, (2) be imposed on a broad class of persons; and (3) raise money for the State’s treasury to be used for public purposes. It is accepted that the TVPEE was imposed by Spanish law. The Claimants argue, however, that parts (2) and (3) of that test are not satisfied in this case. The Tribunal disagrees.

319. The TVPEE was imposed, on renewable- and non-renewable energy producers alike, in order to internalize environmental and other costs of electricity production and produce a

305 Cl. Reply, ¶ 130 (citing Law 15/2012 (C-040), Preamble); Cl. Rej., ¶ 63.
306 Cl. Rej., ¶ 54 (citing Auto TS 2955/2014, 14 June 2016 (C-494); Auto TS 2554/2014, 14 June 2016 (C-495)).
307 Cl. Rej., ¶ 54 (citing Auto 202/2016, 13 December 2016 (C-496); Auto 204/2016, 13 December 2016 (C-497)).
308 See ¶ 303, 309, supra.
favourable budget balance. The purpose was described in the Preamble to Law (Act) 15/2012:

*Title I of this Act establishes a tax on the value of the production of electrical energy, of a direct and real nature, which is levied on the performance of activities of production and incorporation into the electricity system of electrical energy in the Spanish electricity system. This tax will be levied on the economic capacity of electrical energy producers whose installations give rise to significant investments in the electrical energy transport and distribution networks in order to be able to evacuate the energy loaded thereto, and entail, by themselves or as results of the existence and development of the said networks, unquestionable environmental effects, as well as the generation of highly significant costs necessary for maintaining the guarantee of supply. The tax will be applied to the production of all generation installations.*

320. The Tribunal has seen no evidence that casts any doubt upon this account of the purpose of the TVPEE. It is evident that the TVPEE was imposed on a broad class of persons, in order to raise money for the State’s treasury to be used for public purposes, and in particular with a view to purposes connected with the electricity system, and was imposed upon anyone performing the activities of production and incorporation of electricity into the Spanish electricity system.

321. The Claimants’ argument that the tax was imposed in bad faith is not made out. The Claimants point to the fact that its effect was to reduce the payments to electricity producers; but that is in no way inconsistent with the characterisation of the TVPEE as a measure imposed on a broad class of persons to raise money for the State’s treasury for public purposes. Similarly, the fact that the Claimants are able to argue that the TVPEE was not best designed to achieve its stated aims of internalizing costs and promoting environmental objectives does not mean that it was not a tax. It means only that the Claimants consider they could have devised a more satisfactory tax. The Tribunal finds here no evidence to support the allegation of bad faith.

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309 Law 15/2012 (R-018), Preamble.
322. The Tribunal accordingly decides that the TVPEE was a tax, and that it engages the operation of ECT Article 21(1). Claims brought under ECT Article 10 based on the effect of the TVPEE are therefore outside the jurisdiction of the Tribunal.

323. It is to be noted that, as the Respondent has pointed out, the tax carve-out under ECT Article 21(1) does not affect claims of violations of ECT Article 13 (Expropriation). As the Respondent has also pointed out, ECT Article 21(5) requires an Investor alleging expropriation to “refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority.” ECT Article 21(5) reads as follows:

\begin{quote}
\textit{Article 21}
\textit{Taxation}

(5) (a) Article 13 shall apply to taxes.

(b) Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:

(i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;

(ii) The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where non-discrimination issues are concerned, the Competent Tax Authorities shall apply the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the tax or no such tax convention is in force between the Contracting Parties concerned, they shall apply the non-discrimination principles under the Model Tax
\end{quote}

\footnotesize{\begin{itemize}
\item[310] Resp. C-Mem., ¶¶ 212-213.
\item[311] ECT (C-001), Article 21(5).
\end{itemize}}
Convention on Income and Capital of the Organisation for Economic Co-operation and Development;

(iii) Bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation. Such bodies shall take into account any conclusions arrived at within the six-month period prescribed in subparagraph (b)(ii) by the Competent Tax Authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the Competent Tax Authorities after the expiry of the six-month period;

(iv) Under no circumstances shall involvement of the Competent Tax Authorities, beyond the end of the six-month period referred to in subparagraph (b)(ii), lead to a delay of proceedings under Articles 26 and 27.

324. The Respondent indicated in its Counter-Memorial dated 31 October 2016 that “the Claimants have sent a letter to the Minister of Finance and Public Administrations of Spain referring the issue of whether or not the TVPEE is expropriatory.” 312 No statement of conclusions arrived at by the Competent Tax Authorities was filed in these proceedings. Nonetheless, it is evident that such conclusions are not a precondition for consideration of this aspect of the claim by the present Tribunal, and that the absence of such conclusions are not an obstacle to such consideration. The Tribunal will therefore address this aspect of the claim along with other questions pertaining to the merits of the Claimants’ case.

VI. COSTS

325. The Tribunal reserves the question of costs for decision in the context of its Award in this case.

312 Resp. C-Mem., ¶ 214.
VII. DECISION

326. For the reasons set forth above, the Tribunal decides as follows:

(1) The jurisdictional objection based upon the relationship between the ECT and EU law is rejected; [paragraph 295, above]

(2) The jurisdictional objection based upon the tax carve-out in ECT Article 21 is upheld, and claims brought under ECT Article 10 based on the effect of the TVPEE are outside the jurisdiction of the Tribunal; [paragraph 322, above]

(3) The objection referred to as the multi-party objection is upheld in part, and the Tribunal decides that it will not proceed to determine the merits of the claims of the TS Claimants because they are not part of ‘the dispute’ that the Respondent agreed to arbitrate; [paragraphs 238-239, above]

(4) The Tribunal will proceed to determine the merits of the claims of the DSG Claimants; [paragraphs 244, 253 above]

(5) A written submission may be made by (i) the group of DSG Claimants and (ii) the Respondent, in accordance with paragraphs 242-243 above, each explaining the position specifically in relation to the claims of DSG Claimants; [paragraph 243, above]

(6) The Tribunal will take the necessary steps to proceed with the determination of the remaining questions, including questions bearing upon jurisdiction, relating to the DSG claims; [paragraphs 252-253, above] and

(7) The question of costs is reserved for decision in the context of its Award. [paragraph 325, above]
Dr. Michael Pryles AO, PBM
Arbitrator

Professor Zachary Douglas, QC
Arbitrator

Professor Vaughan Lowe, QC
President of the Tribunal