

ISOLUX INFRASTRUCTURE NETHERLANDS B.V. V. SPAIN
(Unofficial Translation of Award Extracts and Dissenting Opinion)

VII. DISCUSSION

A. JURISDICTION

As already indicated, the Kingdom of Spain bases the lack of jurisdiction of the Arbitral
621. Tribunal on six main jurisdictional objections listed from letter A to letter E.

**1. Jurisdictional Objection A: The ECT does not apply to disputes concerning
intra-EU investments**

According to the Kingdom of Spain, the arbitration mechanism for dispute resolution provided for
622. in Article 26 of the ECT is not applicable to intra-European Union disputes

869 Counter-Response, ¶ 1000.

(“EU”), such as this one, due to being incompatible with EU law, which must prevail in the case of conflict with the ECT. The Kingdom of Spain is supported by, among other elements of analysis, the *amicus curiae* observation presented by the European Commission on 20 February 2015.

623. The European Commission invites the Arbitral Tribunal to decline its jurisdiction. It considers that the ECT forms part of Union law and that the courts of the Member States and the CJEU are, therefore, the competent jurisdictional bodies for its interpretation and application. It notes that the ECT does not create obligations between Member States, but that obligations are only generated between the European Union and its Member States, on the one hand, and third-party contracting parties, on the other. The ECT would thus contain an implicit disconnection clause for EU Member States. If the ECT had created the possibility of intra-European arbitration, such a dispute would be contrary to EU Treaties.
624. The European Commission explains that the ECT forms part of the EU’s external energy policy without it having an impact on internal policy. Investors from an EU Member State requesting the resolution of a dispute against another Member State cannot be considered investors of “*another Contracting Party*”, in the sense of Article 26 (1) of the ECT. The EU is the “*Contracting Party*”. The ECT considers the EU to be a sole actor. The Union Treaties contain a full set of standards, including the rules relating to the judicial protection of investments of nationals of a Member State investing in another Member State. The EU’s institutional and judicial framework provides the appropriate legal remedies when the rules protecting investors are infringed.
625. Consequently, the right to resort to the dispute resolution mechanism between investors and States by an EU investor against another EU Member State would violate the EU Treaties. The European Commission refers in particular to Article 344 of the TFEU: “*The Member States undertake not to submit disputes concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.*”, interpreted in light of the Court of Justice’s ruling in the Commission/Ireland case (*MOX*)⁸⁷⁰.
626. The European Commission recalls that the Kingdom of Spain notified the measures subject to dispute, that is, the national incentive regime for the production of electricity from renewable sources of energy and the amendments to this regime, to the Commission by virtue of Article 108 section 3 of the TFEU, given that the Spanish authorities consider that the national incentive regime constitutes State aid in the sense of Article 107, section 1 of the TFEU. The European Commission indicates that, if the Arbitral Tribunal

⁸⁷⁰ CJEU, ruling on the *Commission/Ireland* case, C-459/03, EU:C:2006:345, section 123.

considered that, in order to decide on the dispute, it would be necessary to establish, first of all, if the national measures actually constitute State aid, the Commission would invite it to suspend the procedure until the Commission pronounced on the notification submitted by the Kingdom of Spain.

627. These observations of the European Commission are of the utmost importance to the Arbitral Tribunal, which considered them with the greatest attention in order to rule on the arguments of the Parties. These are the only arguments it must consider in order to make a decision regarding its jurisdiction.

628. The arguments of the Kingdom of Spain to maintain that the arbitration mechanism for dispute resolution envisaged in Article 26 of the ECT is not applicable to intra-EU disputes are basically the following:

- The Kingdom of Spain and the Netherlands belong to the same Regional Economic Integration Organisation (“**REIO**”) which implies that the present dispute did not occur between “a Contracting Party” and an “investor of another Contracting Party” (a);
- EU law, which is the applicable international law, prohibits the submission of the present dispute to jurisdictions other than the jurisdictions provided for in the European Treaties (b).

None of those arguments convinces the Arbitral Tribunal.

629. The fact that the Kingdom of Spain and the Netherlands belong to the same REIO does not imply that the present dispute cannot be between an
a. investor of one Contracting Party and an investor of another Contracting Party

630. The Respondent explains clearly that “*the Arbitral Tribunal lacks the jurisdiction to rule on this case given that, as it will be the object of development, Isolux INBV is not an investor of a Contracting Party other than the Respondent Contracting Party nor, therefore, an investor protected by the ECT*⁸⁷¹.” Article 26.1 of the ECT requires that the dispute occur between “a Contracting Party” and an “investor of another Contracting Party”, which inevitably implies the exclusion from the scope of said Article of the cases in which an investor of an EU State has a dispute with an EU State, regarding an investment in said State⁸⁷². This position is also developed by the European Commission in its *Amicus Curiae* observation.

⁸⁷¹ Response, ¶ 261, p. 73.

⁸⁷² Counter-Response, ¶45, p. 25.

631. Article 26.1 of the ECT states that “*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 of the latter shall, if possible, be settled amicably.*” The sections following Article 26 state that, if such disputes cannot be resolved in accordance with section 1, they will be resolved by arbitration.
632. The Kingdom of Spain, the Netherlands and the EU are Contracting Parties to the ECT. The Claimant claims to be an investor from the Netherlands. By provisionally accepting the veracity of said claim, which is denied by the Respondent, the Arbitral Tribunal must determine whether the membership of the Netherlands and Spain of the EU means that ISOLUX can be considered as an EU investor that made a supposed investment in the EU. If this were the case, the condition of territorial diversity that is addressed by Article 26.1 would not be fulfilled.
633. Article 1.10 of the ECT relating to the definition of the concept of territory, indicates: “*With respect to a Regional Economic Integration Organisation which is a Contracting Party, Territory means the Territories of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation.*” As a result, both the territory of the Netherlands and the territory of the Kingdom of Spain are parts of the territory of the EU as a REIO. However, the same Article states that with respect to a State that is a Contracting Party the “*Territory*” is “*the territory under its sovereignty.*” There is no doubt that the Netherlands and the Kingdom of Spain exercise sovereignty over their respective national territories.
634. Thus, the fact that the “*territory*” of the EU, according to Article 1.10 of the ECT, covers the territories of the Netherlands and the Kingdom of Spain does not prevent each of them also maintaining a “*territory*” in the sense of the ECT. Only an interpretation of Article 26.1 of the ECT would allow the determination of which “*territory*” must be referred to in order to verify that the requirement of territorial diversity is met.
635. According to Article 31 of the VCLT “*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*” To solve the problem raised, the concept of territory as defined in Article 1.10 of the ECT must be interpreted in the context of the subject of Article 26.1 of the ECT itself.
636. Article 26.1 refers to disputes between “*one Contracting Party and an Investor of another Contracting Party... relating to an investment of the latter in the territory of the former*”. This clearly implies that the territory in question is the territory of the Contracting Party against which the investor is acting⁸⁷³. In the present dispute,

⁸⁷³ In this sense, Counter-Argument, ¶ 89, p. 19.

the alleged investment was made in Spain by an investor who claims to be Dutch and who is acting on the basis of the ECT against the Kingdom of Spain, not against the EU. Leaving aside for further developments the debates on the nationality of the investor and the reality of the investment, the dispute submitted to the Arbitral Tribunal is presented as a dispute between a Contracting Party (Spain) and an investor of another Contracting Party (the Netherlands), relating to an investment of the latter in the former. In this sense, the territorial diversity requirements of Article 26.1 of the ECT are respected.

637. The previous conclusion would be erroneous if an implicit disconnection clause existed in the ECT. In its *Amicus Curiae* observation, the European Commission is of the opinion that the ECT contains an implicit disconnection clause for EU Member States. The Respondent shares said opinion⁸⁷⁴. It is not disputed between the Parties that a disconnection clause is a clause inserted into a multilateral convention that allows the signatories of another treaty or members of a regional organisation to not apply or only partially apply the multilateral convention in their mutual relations.
638. However, neither the European Commission nor the Respondent presents arguments based on the text of the ECT that lead to the conclusion that the ECT contains an implicit disconnection clause for EU Member States.
639. The Respondent appears to rely on Article 25 of the ECT⁸⁷⁵, which indicates in section 1 that “*the provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as “EIA”), to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of being parties thereto.*” But as the Claimant rightly observes, this Article “*is limited to circumscribing the extension of the effect of the most favoured nation treatment between Contracting Parties that are party to “Economic Integration Agreements” and those that are not*”⁸⁷⁶.” It cannot be interpreted as a disconnection clause of general scope.
640. Accordingly, the Tribunal concludes that the fact that the Kingdom of Spain and the Netherlands belong to the same REIO does not mean that the present dispute cannot be between an investor of one Contracting Party and another investor of a Contracting Party.

⁸⁷⁴ Response, ¶ 286 and note No. 133, p. 79; ¶ 288, p80.

⁸⁷⁵ Response, ¶278, p. 77 and, although indirectly, note No. 133 p. 79; Counter-Response, ¶ 60, p. 28.

⁸⁷⁶ Counter-Argument, ¶ 57, p.11.

b. European Union law does not prohibit the submission of this dispute to arbitration

641. The Respondent believes that the application of the ECT to intra-EU disputes is contrary to the context, object and purpose of the ECT itself and to EU law. The European Commission holds the same position. This would be especially justified, in the understanding of the Respondent, because both the Netherlands and the Kingdom of Spain are States that were already members of the EU at the time of the negotiation, ratification and entry into force of the ECT⁸⁷⁷. They were not able to sign International Investment Treaties that provided for autonomous mechanisms of investor-State dispute resolution in relation to intra-EU investments⁸⁷⁸.
642. This conclusion is motivated by an alleged inconsistency between the ECT and EU law⁸⁷⁹. According to the Respondent, such incompatibility results from the existence of the freedoms of the Internal Market of the EU and the rights that these freedoms recognise with regard to an intra-EU investment⁸⁸⁰. The Internal Market is a comprehensive system for the promotion and protection of intra-EU investments, vastly superior to that of the ECT⁸⁸¹. Allowing arbitration to settle disputes that affect the freedom of establishment and free movement of capital of a Community investor in the territory of the EU in the field of renewable energies would be contrary to EU law⁸⁸².
643. The Respondent explains that *“to understand that intra-EU disputes are included in the scope of protection of the ECT would mean dispensing with the context, objective and purpose of the ECT and the EU. In particular, it would mean assuming that the EU and its Member States promoted, as determining actors, the creation and conclusion of the ECT in order to cover a sphere, that of intra-EU investments, which had been covered for years, exhaustively, and in a far superior way, by EU law. Furthermore, this interpretation would contravene both the rules of the Internal Market and the principles of autonomy of EU law and the monopoly of its ultimate interpretation by the jurisdictional system of the EU, which prevent a dispute resolution system such as that in Article 26(1) of the ECT.”*⁸⁸³. This is confirmed by Article 344 of the TFEU, which provides that:

*“The Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”*⁸⁸⁴

⁸⁷⁷ Response, ¶ 266, p. 74.

⁸⁷⁸ Idem, ¶ 267.

⁸⁷⁹ Idem, ¶ 270.

⁸⁸⁰ Idem, ¶ 275.

⁸⁸¹ Idem, ¶ 278.

⁸⁸² Counter-Response, ¶ 92, p. 34. ⁸⁸³ Idem, ¶ 285.

⁸⁸⁴ **Annex RLA-1:** Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, published in the Official Journal of the European Union of 26 October 2012 (C 326), Article 344.

644. The Arbitral Tribunal considers that a potential incompatibility between the ECT and European law does not necessarily affect its jurisdiction in this arbitration. This cannot be the case if the alleged incompatibility concerns the investor's substantive rights. In such a hypothesis, the problem raised is that of the choice of the applicable norm. The resolution of a conflict of this nature does not have to do with a conflict of jurisdiction. The Arbitral Tribunal would have the jurisdiction to resolve it.
645. *Ex abundanti cautela*, the Arbitral Tribunal notes that such an inconsistency is unlikely because it shares the observation of the tribunal in the award on Electrabel v. Hungary, to which both parties refer, and which indicates that: "the ECT's genesis generates a presumption *that no contradiction exists between the ECT and EU law*⁸⁸⁵." The award correctly adds that "*the ECT was negotiated and ratified after the coming into existence of the Rome Treaty, by its Member States. The interpretation of the ECT's text should therefore take into account such circumstances, in accordance with Article 32 of the Vienna Convention* (which provides that, in order to interpret a treaty "(r)ecourse may be had to *supplementary means of interpretation, including ... the circumstances of its conclusion*"). This means, in the Tribunal's view, that the ECT's conclusion by the *European Union and its Member States at that time ... should be presumed, in the absence of clear language or cogent evidence otherwise, to have been made in conformity with EU law.*⁸⁸⁶
646. However, this observation would lose its relevance if there were a disconnection clause in the ECT for EU Member States. However, neither the Respondent nor the European Commission have indicated an explicit disconnection clause, nor did they establish the existence of an implicit clause⁸⁸⁷.
647. Both the Respondent and the European Commission invoke Article 344 of the TFEU in order to conclude that the monopoly on the interpretation of European law by the jurisdictional system of the EU is incompatible with Article 26(1) of the ECT that constitutes the basis of the jurisdiction of the Arbitral Tribunal to resolve the present dispute. If this were so, a real conflict of jurisdiction would arise.
648. According to the Claimant, Article 344 of the TFEU is irrelevant for the purposes of the present arbitration to the extent that it only applies to disputes between States and not to investor-State disputes, and only concerns the interpretation of Treaties of *the EU*, and not of other treaties of international law, such as the ECT⁸⁸⁸.

⁸⁸⁵ **Annex RLA-3: *Electrabel v. the Republic of Hungary***, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ("*Electrabel v. Hungary*"), ¶ 4.134,

⁸⁸⁶ *Idem*.

⁸⁸⁷ See *supra*, ¶¶ 116-181

⁸⁸⁸ Counter-Response on the jurisdictional objections, ¶ 61, p. 14

649. Article 344 of the TFEU provides the following:

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

650. The Respondent, in light of the *Amicus Curiae* observation of the European Commission, affirms that the application of this provision prevents Spain from submitting to arbitration issues relating to the internal electricity market⁸⁸⁹. The Tribunal is not convinced by this general assertion, which does not seem to apply to the present dispute.

651. On the one hand, there is no doubt that, as the Claimant stresses, the Treaties referred to in Article 344 of the TFEU are the EU Treaties, to the exclusion of the other international instruments such as the ECT. The claims submitted to the Arbitral Tribunal are related to alleged violations of the ECT and not to violations of the EU Treaties.

652. On the other hand, the reading of the Article proposed by the Respondent would imply that, by the interpretation or the application of a norm of a European Treaty, one could only resort to a procedure provided for in the Treaty itself. This interpretation is incompatible with the reality of jurisdictional practice.

653. As was clearly noted by the tribunal in the case of Electrabel v. Hungary “The ECJ’s monopoly is said to derive from Article 292 EC (now Article 344 TFEU) which grants to the ECJ exclusive jurisdiction to decide disputes amongst EU Member States on the application of EU law……. However, as is well known and recognised by the ECJ, such an exclusive jurisdiction does not prevent numerous other courts and arbitral tribunals from applying EU law, both within and without the European Union. Given the widespread relevance and importance of EU law to international trade, it could not be otherwise.”⁸⁹⁰

654. In addition, it is today generally accepted that arbitral tribunals not only have the power but also the duty to apply European law⁸⁹¹.

655. Accordingly, the Arbitral Tribunal concludes that EU law does not prohibit the submission of the present dispute to arbitration.

656. The Respondent’s Jurisdictional Objection A that the Arbitral Tribunal has no jurisdiction because the ECT does not apply to disputes concerning intra-EU investments is rejected.

⁸⁸⁹ Counter-Response, ¶ 63, p. 28

⁸⁹⁰ **Annex RLA-3:** *Electrabel v. the Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, (“*Electrabel v. Hungary*”), ¶ 4.147;

⁸⁹¹ CJEC, C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, 1 June 1999, Rec 1-3055.

657. The European Commission recalls that the Kingdom of Spain notified the measures subject to the dispute, by virtue of Article 108 (3) of the TFEU. If the Arbitral Tribunal considered that, in order to decide on the dispute, it would be necessary to establish, first of all, if the national measures actually constituted State aid, the Commission would invite it “in the alternative” to suspend the procedure until the Commission ruled on the notification submitted by the Kingdom of Spain.
658. The Claimant states that the invitation made by the European Commission to suspend the procedure until the Commission rules on the notification submitted by the Kingdom of Spain is lacking in substance, since no issue of Community law is involved in the present arbitration⁸⁹². It adds that the European Commission is not a party to this arbitration and therefore has no procedural rights⁸⁹³. The Claimant asks that the request for suspension be dismissed or rejected⁸⁹⁴.
659. The Respondent does not make the request for the suspension of the procedure presented by the European Commission. However, it notes that if the European Commission decided that the measures discussed in this arbitration constitute State aid, its result would be affected.
660. The Tribunal does not understand the European Commission’s “in the alternative” invitation as a petition in the procedural sense but as an alternative recommendation to that of declining its jurisdiction. This type of recommendation is covered by the *Amicus Curiae* role and the European Commission did not overstep the mark in any way when it was formulated. However, the Tribunal cannot suspend the arbitral procedure without any of the Parties having requested it. The Respondent does not request the suspension of the procedure and the Claimant would oppose such a request if it were made by the Respondent. In such circumstances, the Tribunal does not have to rule on the matter.

2. Jurisdictional Objection B: the claim has been formulated, materially, by a Spanish investor—Isolux—and by a Canadian investor—PSP Investments

661. The Kingdom of Spain argues that behind the legal personality of IIN, there actually lies a Spanish company, Isolux Corsan S.A., and a Canadian company, PSP Investments, which exercise full and effective control over the Claimant. With regards to Isolux Corsan S.A., it claims that the jurisdictional requirement of diversity of nationalities between Investor-Claimant and Contracting Party-Respondent required by Article 26(1) of the ECT has not been met. With regards to the Canadian company—PSP Investments—, it must be

⁸⁹² Counter-Argument, ¶79, p. 16.

⁸⁹³ Counter-Response on the jurisdictional objections, ¶ 80 p. 19.

⁸⁹⁴ Idem.

taken into account that Canada is not a Contracting Party to the ECT and, therefore, Canadian investors are not protected by the ECT⁸⁹⁵.

662. The Kingdom of Spain emphasises that all business decisions of IIN are adopted by its Spanish and Canadian shareholders and that IIN is a mere shell company, without any business activity, nor workers, in the Netherlands. The above justifies the removal of the corporate veil, the consequence of which would be that IIN could not be considered as a “*company or organisation*”⁸⁹⁶. The ECT demands “*the existence of a ‘company or other organisation’ as an organised set of material and human resources aimed at an economic end*” and not only the incorporation of a company in a Contracting State⁸⁹⁷.
663. The conclusion reached by the Respondent is that IIN would not be an investor and could not invoke the ECT dispute settlement mechanism.
664. The Kingdom of Spain refers mainly to the dissenting opinion of Chairman Prosper Weil in the case Tokios Tokelés v. Ukraine⁸⁹⁸ and the case Venoklim Holding B.V. v. the Bolivarian Republic of Venezuela⁸⁹⁹.
665. According to the Claimant, the only criterion of nationality to be considered is that of Article 1(7) (a) (ii) of the ECT, which defines the investor as a “*company or other organisation organised in accordance with the law applicable in that Contracting Party*”. As IIN is a legally constituted company in the Netherlands, the nationality diversity requirement would be satisfied⁹⁰⁰. It considers that the Respondent intends to add to Article 1(7) of the ECT requirements that do not exist and that it relies on jurisprudence that does not have relevance⁹⁰¹.
666. The Tribunal notes that the Claimant is a legal entity incorporated in the Netherlands and that the Netherlands is a Contracting Party to the ECT. That IIN is not a validly incorporated company under the legislation of the Netherlands has not been questioned. What the Respondent argues is that IIN cannot be considered as a “*company*” or an “*organisation*” in the sense of Article 1(7) of the ECT due to a lack of economic and human resources in the Netherlands.

⁸⁹⁵ Counter-Response ¶ 114, p. 38

⁸⁹⁶ Counter-Response, ¶ 148- 155, p. 45.

⁸⁹⁷ Counter-Response ¶ 114, p. 38

⁸⁹⁸ **Annex RLA-14:** *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18. Dissenting opinion of 29 April 2004.

⁸⁹⁹ **Annex RLA-90:** *Venoklim Holding B.V. versus the Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, 3 April 2015.

⁹⁰⁰ Counter-Argument, ¶ 96, p. 20.

⁹⁰¹ Counter-Response on jurisdictional objections, ¶ 87 -114, p. 21-26.

667. However, the Tribunal does not share the Respondent’s interpretation of this Article. It could be discussed indefinitely whether IIN is or is not a company from the economic point of view, but the discussion would be of no interest to the interpretation of Article 1 (7) of the ECT. The ECT does not require that the protected investor be a company from the economic point of view. Such an interpretation would exclude individuals, who are protected just as legal entities are. With regards to them, the criterion is solely a legal one: the constitution according to the legislation in the Contracting Party, states that it must be a “*company*” or “*other organisation*”. If IIN were not a *company*, it would be “*another organisation*”, but it turns out that it is organised as a company according to the law of the Netherlands.
668. The conclusion is that the formal requirements of Article 1(7) of the ECT are met in order for the Claimant to be considered as an investor of a Contracting Party.
669. However, the Kingdom of Spain does not consider that to be sufficient. It understands that the Tribunal would have to lift the corporate veil and, going beyond the nationality of the company, base its decision as to its jurisdiction on the nationality of the shareholders of the Claimant.
670. Before any other consideration, the Arbitral Tribunal notes that the ECT text does not contain, as some Treaties do, an exception clause that excludes the application of the criterion of the constitution under the laws of another Contracting Party when a legal entity is controlled by nationals of the other Contracting State. However, it would proceed to lift the corporate veil in case of fraud to the jurisdiction. Fraud was not established, as indicated below (¶¶ 695-715).
671. The arbitral jurisprudence invoked by the Respondent does not allow deviation from the clear text of Article 1(7) of the ECT. The dissenting opinion of Chairman Weil in Tokios Tokelés v. Ukraine is a minority vote. The majority decision rejected the lifting of the corporate veil⁹⁰².
672. The Venoklim Holding B.V. v. the Bolivarian Republic of Venezuela case had the peculiarity that the investor could only benefit from the Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Venezuela and the Kingdom of the Netherlands through the filter of Venezuela’s Law on Promotion and Protection of Investments. Article 3(2) of this law defines international investment as “*Investment that is owned by, or that is effectively controlled by, foreign individuals or legal entities.*” Article 3(4) defines an international investor as “*The owner of an international investment, or whoever actually controls*

⁹⁰² Tokios Tokelés v. Ukraine, ICSID Case, No. ARB/02/18, Decision on Jurisdiction, of 29 April 2004.

⁹⁰³ **Annex RLA-90:** Venoklim Holding B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/22, of 3 April 2013, ¶ 141.

it⁹⁰³.” Unlike the ECT, the applicable text obliged the court to lift the corporate veil and to verify that the foreign company was not under the control of companies or individuals of the State receiving the investment.

673. In addition, it was an ICSID arbitration, which raises issues of interpretation that do not exist within the framework of the ECT.

674. Based on the foregoing, the Arbitral Tribunal rejects Jurisdictional Objection B of the Respondent, according to which the jurisdictional requirement of diversity of nationalities between the Investor-Claimant and the Contracting Party-Respondent required by Article 26(1) of the ECT, would not be met.

3. Jurisdictional Objection C: due to Isolux IIN not having made an investment in the Kingdom of Spain, in accordance with the definition of an investment contained in Article 1(6) of the ECT

675. It is not disputed that the company IIN has a shareholding of 88.3413% in the capital of T-Solar, a company with economic involvement in the energy sector in Spain and from which IIN indirectly obtains income.⁹⁰⁴

676. The Kingdom of Spain maintains that IIN has not made an investment in Spain since it has not made an investment in the objective or ordinary sense of the concept of investment, given that it has not made any contribution of economic resources nor has it assumed any risk linked to the assets that are the subject of this arbitration procedure⁹⁰⁵. To justify its demand for an investment in an objective or ordinary sense, it refers mainly to a book by Dr Crina Baltag⁹⁰⁶ and several arbitral awards⁹⁰⁷.

677. The Kingdom of Spain explains that in the execution of the Investment Agreement signed by the Spanish business group ISOLUX and the Canadian entity PSP Investments on 29 June 2012⁹⁰⁸, ISOLUX made a divestment of certain assets and PSP Investments made an investment in those same assets⁹⁰⁹. IIN is simply the company that receives ISOLUX’s assets and the cash from PSP Investments⁹¹⁰. This last company is the only one that made an investment with a contribution of funds, with the purpose of obtaining returns and a risk linked to said contribution of funds⁹¹¹.

⁹⁰⁴ Claim, ¶ 45 p.12; Response, ¶ 336, p. 91.

⁹⁰⁵ Response, ¶¶ 333-338, p. 91-92.

⁹⁰⁶ **Annex RLA-15:** *The Energy Charter Treaty. The Notion of Investor*. Crina Baltag, Kluwer Law International BV, 2012, The Netherlands.

⁹⁰⁷ Response, ¶ 352-358, p.94-96.

⁹⁰⁸ **Annex R-9:** File C/0452/12 brought before the National Competition Commission at the request of Grupo Isolux Corsán S.A. and Infra-PSP Canada Inc (non-confidential version).

⁹⁰⁹ Response, ¶ 362, p.97.

⁹¹⁰ Response, ¶ 363, p.97

⁹¹¹ Idem.

678. The Kingdom of Spain also claims that the returns indirectly obtained by IIN cannot be qualified as an investment because the concept of indirect possession “*refers to the last holder of the*” corporate chain.⁹¹². Said interpretation would be wholly consistent with the denial of benefits clause of Article 17(1) of the ECT⁹¹³.
679. According to the Claimant, the ECT defines the concept of “investment” in a precise manner making unnecessary the search for “objective definitions” not provided in the text⁹¹⁴. The ECT’s definition of the concept of investment is self-sufficient⁹¹⁵. It emphasises that the additional requirements mentioned by the Kingdom of Spain are developed in the framework of the ICSID arbitration and consequently do not apply to the ECT⁹¹⁶. The Claimant adds that in any case the participation of IIN complies with the inappropriate definition of the Kingdom of Spain’s concept of investment⁹¹⁷.
680. Regarding the returns obtained indirectly by IIN, the Claimant considers that the Respondent’s analysis lacks any foundation and that the Kingdom of Spain seems to confuse the notion of investment with criteria more specific to the denial of benefits⁹¹⁸.
681. Article 1(6) of the ECT establishes the following:
- “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 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;*
- 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*

⁹¹² Counter-Response, ¶¶ 244-246, p.63.

⁹¹³ Response, ¶ 410, p. 106.

⁹¹⁴ Counter-Argument, ¶ 138, p. 29

⁹¹⁵ Counter-Argument, ¶ 146, p. 31

⁹¹⁶ Counter-Argument, ¶ 141, p. 30

⁹¹⁷ Counter-Argument, ¶ 163, p. 34

⁹¹⁸ Counter-Argument, ¶ 190, p. 39

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."

682. Firstly, the Tribunal notes that the Respondent does not deny that the investment that the Claimant intends to possess is related to an Economic Activity in the Energy Sector, as required by Article 1(6) of the ECT. According to Article 1(5) of the ECT: *"Economic Activity in the Energy Sector" means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products, except those included in Annex NI, or concerning the distribution of heat to multiple premises."*

683. The Arbitral Tribunal does not share the Claimant's position that the definition of the concept of investment in the ECT is self-sufficient. The list of assets in Article 1(6) of the ECT provides examples of investment, but does not define the concept. In a circular manner, it is indicated that an investment means *"every kind of asset, owned or controlled directly or indirectly by an Investor"*. That is, to be qualified as an investment, the asset has to be owned or controlled by an investor. However, the definition of an investor in Article 1(7) of the ECT is only interested in their nationality or residence if it is an individual, and in the laws that govern its constitution if it is a legal entity. No element in Article 1(7) of the ECT allows the investor to be distinguished from any other individual or legal entity. What does distinguish an investor is its possession or control of an investment, which confirms the circular nature of the reasoning and makes a further definition of the concept of investment necessary.

684. The Arbitral Tribunal shares the position of the Kingdom of Spain when it argues that this additional definition must be objective, in the absence of a subjective definition in the ECT. It is not convinced by the Claimant's argument that the objective definition developed by many other courts faced with the absence of a definition in other bilateral or multilateral treaties, in particular, but not exclusively, as part of ICSID arbitration, would be inapplicable. More than the content of each treaty, what matters is the silence of each of them regarding the definition of the concept of investment. That is the common feature of these treaties, which justifies a definition of the concept of investment.

685. As the Claimant notes⁹¹⁹, the source of this definition is the 2001 award in the Salini Construttori Spa and Italstrade Spa v. the Kingdom of Morocco case⁹²⁰ in which the court considered that an investment “*implies contributions, a certain duration of execution of the market and a participation in the risks of the operation*” (free translation). It added the condition of “*contribution to the economic development of the State receiving the investment*” (free translation). With the evolution of arbitral jurisprudence⁹²¹, the objective definition of the notion of investment now only includes: (i) a contribution, (ii) the receipt of returns and (iii) the assumption of risks⁹²².
686. The Arbitral Tribunal considers that this definition of the concept of investment, in the absence of another definition in the ECT, is applicable in this procedure, since it corresponds to the precepts of interpretation of Article 31(1) of the Vienna Convention on the Law of Treaties (“Vienna Convention”) which establishes that “*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.*” In addition, in order to comply with the requirements of Article 1(6) of the ECT, the investment must relate to an Economic Activity in the Energy Sector. The parties have not disputed this last point.

919 Counter-Argument, ¶ 132, p. 28

920 Salini Construttori Spa and Italstrade Spa v. the Kingdom of Morocco, Decision on jurisdiction of 23 of July 2001, ICSID Case No. ARB/00/4, 42 ILM 609 (2003), available on page:
<http://www.italaw.com/sites/default/files/case-documents/ita0738.pdf>

921 See *inter alia* on this theme: Romak S.A. v. the Republic of Uzbekistan, PCA Case No. AA280, award of 26 November 2009, ¶ 207. See also the decisions of other courts resorting to the objective notion of investment, following or modifying in turn the solution adopted by the Salini case: CSOB v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on jurisdiction, 24 May 1999, ¶ 64; MCI Power Group, LC and New Turbine, Inc v. Ecuador, ICSID Case No. ARB/03/6, award of 31 July 2007, ¶ 165; CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment, 25 September 2007, ¶ 71; Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, ICSID Case No. ARB/05/22, award of 24 July 2008, ¶ 312-317; Malaysian Historical Salvors SDN v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision of the ad hoc Committee on the Application for Annulment, 16 April 2009, ¶ 78-79 (aforementioned Biwater v. Tanzania); Phoenix Action, Ltd v. the Czech Republic, ICSID Case No. ARB/06/5, award of 15 April 2008, ¶ 81; Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, award of 8 May 2008, ¶ 232; Consortium Groupement LESI-Dipenta v. People’s Democratic Republic of Algeria, ICSID Case No. ARB/03/8, award of 10 January 2005, ¶ 13(iv); LESI, SpA and Astaldi, SpA v People’s Democratic Republic of Algeria, Decision on jurisdiction of 12 July 2006, ICSID Case No. ARB/05/3, ¶ 72(iv); Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on jurisdiction of 14 November 2005, ¶ 130; Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on jurisdiction of 16 June 2006, ¶ 91; Saipem SpA v. People’s Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on jurisdiction and recommendation for provisional measures, 21 March 2007, ¶ 99; Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on jurisdiction of 6 July 2007, ¶ 116.

922 Response, ¶¶ 352-353, p. 94-95; Counter-Argument, ¶ 133, p. 28.

687. However, the agreement of the Arbitral Tribunal with the position of the Kingdom of Spain ends here. Contrary to what is claimed by the Kingdom of Spain, IIN has an investment in accordance with the objective definition of the concept of investment.
688. There is no doubt that the business assets that IIN controls are an investment that would not exist without initial contributions, which correspond to a long-term activity and which, like all business activities, carry a risk. The Respondent does not deny the existence of an initial investment today controlled by IIN. What it maintains is that the Investment Agreement signed by the ISOLUX business group and the Canadian entity PSP, on 29 June 2012, did not transform this initial investment into new investment. Thus, the Respondent indicates in its Response that “*However, the investment of Infra-PSP Canada Inc. cannot have the effect of transforming a simple repositioning of shares into a new investment. The investment made by the Canadian entity cannot artificially transform a pre-existing investment into a new and different investment from that which existed when the T-Solar shares were held by Grupo Isolux Concesiones S.L or when the group unilaterally decided to reposition said shares in Isolux INBV*⁹²³.”
689. The fact that the investment remains the same as the initial investment does not prevent it from being an investment in the objective sense, protected by the applicable international rules of law. The making of a new investment by the person who acquires the possession or the control of the existing investment is not necessary. Likewise, the investment does not cease to be an investment owing to the change of person who owns or controls it. The Claimant notes that in the case of OI European Group B.V. v. Bolivarian Republic of Venezuela⁹²⁴, when the objective concept of the investment is referred to, the court took into account, in order to verify the existence of an investment, the monetary contributions made by companies of the Claimant’s group prior to the date on which the Claimant assumed ownership of shares in local companies⁹²⁵.
690. The solution is even clearer with regards to ECT Article 1(8), which precisely defines “*Make Investments*” or “*Making of Investments*”, as “*establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.*” (Underlining added). The mode of acquisition of an existing investment, as long as it is in compliance with the law, is not relevant. In addition, the fact that the acquirer of the investment does not make any financing contribution in order to acquire the investment is also irrelevant. The investment is that which is protected, not the price of its acquisition.

⁹²³ Response, ¶ 396, p. 104.

⁹²⁴ **Annex CLA-90:** OI European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25, Award, 10 March 2015.

⁹²⁵ Counter-Argument, ¶ 170, p.36

691. Also, it is not true that IIN did not make a contribution. The Kingdom of Spain recognises that PSP made a contribution with the consequence of consolidating indirect control of the existing investment in Spain. Also, as noted by the Claimant⁹²⁶, the involvement of IIN in its capacity as an instrument to control the investment in Spain constitutes a contribution to industry that cannot be ignored.
692. Nor can the Arbitral Tribunal accept that the returns, indirectly obtained by IIN, cannot be classified as from an investment because the concept of indirect possession “*refers to the last holder of the corporate chain*” according to the argument of the Respondent⁹²⁷. Such an analysis results in the denial of the legal entity, since the last holders of the chain are the last shareholders. That cannot be the criterion of the ECT which, in Article 1(6), distinguishes individuals and legal entities without establishing differences between the rights of the former and the latter.
693. Based on the foregoing, the Arbitral Tribunal rejects jurisdictional objection C of the Respondent regarding the absence of the making of an investment by Isolux INBV in the Kingdom of Spain in accordance with the definition of an investment contained in Article 1(6) of the ECT.

4. Jurisdictional Objection D: the Arbitral Tribunal’s lack of jurisdiction owing to the existence of abuse of process

694. According to the Respondent, IIN was established in the Netherlands for the purpose of fraudulently accessing the ECT investment arbitration, since a Spanish investor and a Canadian investor cannot avail themselves of said dispute resolution mechanism⁹²⁸. The Respondent also explains that the repositioning of shares in T-Solar was carried out when the conflict was foreseeable⁹²⁹. Both ISOLUX and PSP wanted to avoid the well-known jurisprudence of the Spanish Supreme Court, which was not favourable. It would be a prohibited case of *forum shopping*⁹³⁰, which implies that the Court lacks jurisdiction in the light of arbitration jurisprudence and best doctrine.
695. The Claimant maintains that the actions of IIN cannot be qualified as a mere artifice or fraud in order to internationalise the dispute with the Kingdom of Spain⁹³¹. It emphasises that the claim initiated by IIN was carried out in accordance with the law and that the

⁹²⁶ Counter-Argument, ¶ 170, p.37

⁹²⁷ Counter-Response, ¶¶ 244-246, p.63.

⁹²⁸ Counter-Response, p. 66

⁹²⁹ Counter-Response, p. 77-78

⁹³⁰ Counter-Response, p. 66.

⁹³¹ Counter-Argument, ¶ 196, p. 41.

investment operation carried out by the Claimant took place before the Kingdom of Spain adopted the measures that gave rise to the present dispute⁹³².

696. The Arbitral Tribunal does not doubt that the fact of organising an investment with the sole purpose of benefiting from the protection of an international treaty to which it had no right, in order to protect itself from an existing or foreseeable dispute, is an unacceptable act of *forum shopping* that justifies the jurisdiction being denied. This is accepted by both Parties⁹³³. The Claimant admits that *forum shopping* can be verified in the context of the ECT⁹³⁴.

697. In fact, as the court indicates in the case of Mobil Corporation and others v. Venezuela⁹³⁵:

“...in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law. Reference may be made in this respect to “good faith” (“bonne foi”), “détournement de pouvoir” (misuse of power) or “abus de droit” (abuse of right).”

698. However, this same award invoked by the Kingdom of Spain, stresses that, in international law, in order to determine the existence of abuse of process, it is necessary to take into account all the circumstances of a case⁹³⁶. This is what is done by the Arbitral Tribunal in this arbitration, without considering the factual elements of the various awards mentioned by the parties, which hardly apply to the circumstances of this case.

699. IIN’s first investment was on 29 October 2012 when it acquired 65,434,220 nominative shares (equivalent to 58.8632% of the share capital) of T-Solar.⁹³⁷ However, the decision of IIN’s shareholders to place their investment in a company in the Netherlands took place earlier. This is found in the Investment Agreement of 29 June 2012⁹³⁸.

⁹³² Counter-Argument, ¶ 197, p. 41.

⁹³³ Counter-Response, p. 66; Counter-Response on jurisdictional objections ¶ 181, p. 40.

⁹³⁴ Counter-Response on jurisdictional objections, ¶ 188, p. 41.

⁹³⁵ **Annex RLA-110:** *Mobil Corporation, Venezuela Holdings, b.v., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. (claimants) v the Bolivarian Republic of Venezuela, Jurisdictional Decision, 10 June 2010 (English version)*, ¶ 169 p. 46;

⁹³⁶ *Idem*, ¶ 177, p. 48.

⁹³⁷ See **Annex C-42:** Certificate issued by the Secretary of the Board of Directors of T-Solar Global, S.A., 22 November 2013; **Annex C-40:** Copy of the Book-register of Nominative Shares of T-Solar, page 35.

⁹³⁸ **Annex C-172:** Investment Agreement signed on 29 June 2012 by IIN and its shareholders.

700. At that time, the measures that originated the present arbitration had not been adopted by the Kingdom of Spain, since the first one took place on 27 December 2012⁹³⁹. However, a reform of the energy sector in Spain had already been announced, as indicated by the Kingdom of Spain⁹⁴⁰.
701. In these circumstances, it does not seem strange to the Arbitral Tribunal that foreign investors, such as PSP, thought to intervene in the Spanish energy market by means of a Dutch structure in order to protect themselves from possible harmful measures of the Spanish government and to be able to avail themselves of the ECT, although the Respondent has not provided proof that this was the case. That would be nothing more than a case of “*legitimate corporate planning*”⁹⁴¹. On the contrary, it is very doubtful that PSP would have participated in the investment without a structure outside Spain.
702. In addition, the restructuring was not conducted in a secret manner, as illustrated by the Notification to the National Competition Commission of 9 July 2012⁹⁴².
703. Such a usual restructuring of the international economic relations does not equate to a fraud whose only purpose would be a manipulation of the ordinary rules of competition. The Arbitral Tribunal’s conclusion would have been different if, at the time of the restructuring, the conflict had already arisen. Although applicable in the case of an ICSID arbitration, the distinction made in the award of the case of Mobil Corporation and others v. Venezuela⁹⁴³, seems very appropriate to the Arbitral Tribunal, establishing that:
- “As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.*
- With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal,*

⁹³⁹ **Annex C-30:** Act 15/2012, of 27 December, on fiscal measures for sustainable energy, **Annex R-83:** Act 15/2012, of 27 December, on fiscal measures for sustainable energy, published in the Official State Gazette of 28 December 2012.

⁹⁴⁰ Counter-Response, ¶ 305, p. 73.

⁹⁴¹ See, **Annex RLA-110:** *Mobil Corporation, Venezuela Holdings, b.v., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, inc. (claimants) v the Bolivarian Republic of Venezuela, Jurisdictional Decision, 10 June 2010 (English version)*, ¶ 191, p. 52.

⁹⁴² **Annex R-9:** File C/0452/12 brought before the National Competition Commission at the request of Grupo Isolux Corsán S.A. and Infra-PSP Canada Inc. (non-confidential version).

⁹⁴³ **Annex RLA-110:** *Mobil Corporation, Venezuela Holdings, b.v., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, inc. (claimants) v. the Bolivarian Republic of Venezuela, Jurisdictional Decision, 10 June 2010 (English version)*.

“an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.”

704. In this arbitration, the origin of the conflict is found in the laws of 27 December 2012 and the Royal Decree-Law of 1 February 2013⁹⁴⁴ which, according to the Arbitration Claim, violated Articles 10 and 13 of the ECT. The “trigger letter” sent by the Kingdom of Spain dates from 13 March 2013⁹⁴⁵. It is clear that the conflict occurred after the aforementioned restructuring and the placement of the investment in a Dutch company.

705. In view of the above, the Arbitral Tribunal rejects the Respondent’s jurisdictional objection D based on the lack of jurisdiction of the Arbitral Tribunal due to the existence of abuse of process.

5. Jurisdictional objection E: the lack of jurisdiction “*ratione voluntatis*” of the Arbitral Tribunal due to having denied IIN the application of Part III of the ECT owing to the circumstances of Article 17 of the ECT having been met

706. As an alternative to jurisdictional objections C and D, the Respondent invoked the lack of jurisdiction *ratione voluntatis* of the Arbitral Tribunal in its Response⁹⁴⁶. It argues that if the Tribunal considers that Isolux INBV made an investment in an objective sense and that it has not committed abuse of process, it would have to deny the Claimant the application of Part III of the ECT, owing to the circumstances of Article 17 of the ECT having been met.

707. According to the Respondent, the denial of benefits contemplated in Article 17 of the ECT prevents the application of Part III of the ECT, with the consequence that the Tribunal lacks jurisdiction *ratione voluntatis* to consider compliance with the obligations set forth in this Part III⁹⁴⁷.

708. Before examining whether the conditions of Article 17 of the ECT are met, the Tribunal has to resolve two preliminary issues.

709. The first, concerning the nature of the objection: is it an exception of jurisdiction, as the Respondent contends, or rather an exception of inadmissibility, as the Claimant claims?⁹⁴⁸ If it were an exception of admissibility and not of jurisdiction, it would have to be examined at the beginning of the examination of the merits of the dispute, since the Tribunal does not decline its jurisdiction for other reasons.

⁹⁴⁴ Royal Decree-Law 2/2013, of 1 February, on urgent measures in the electricity system and in the financial sector, **Annex C-31; Annex R-85**.

⁹⁴⁵ **Annex R-188**: Letter of friendly composition (Trigger Letter) of 13 March 2013.

⁹⁴⁶ Response, ¶ 595, p. 144.

⁹⁴⁷ Response, ¶ 615, p. 148

⁹⁴⁸ Counter-Response on jurisdictional objections, ¶¶ 217-219.

710. The second issue relates to the effects on this arbitral procedure of a denial of benefits according to Article 17 of the ECT raised in the Response. This relates to the retroactive or proactive nature of the denial.
711. Regarding the first issue, the Arbitral Tribunal does not doubt that the denial of benefits of Article 17 of the ECT raises a question of admissibility.
712. The first paragraph of Article 17 of the ECT indicates that a Contracting Party may deny the benefits of Part III of the ECT to “*a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised*”. The consequence is that legal entities with those characteristics are entitled to benefit from the ECT, except for application of the denial provided for in Article 17, and that those characteristics are not sufficient for a tribunal constituted under Article 26 of the ECT to lack jurisdiction. Article 26 of the ECT does not belong to Part III of the ECT. Based on Article 26, this Arbitral Tribunal has the jurisdiction to rule on the exercise and effects of the denial of benefits. The opposite solution would deprive the investor of any forum necessary to decide on this question. The exercise of the denial of benefits of Article 17 of the ECT may deprive the investor of the right to demand compliance with the obligations of Part III of the ECT, it does not deprive it of doing so before any jurisdiction.
713. As noted by the Claimant, two arbitral tribunals also confirmed that the denial of benefits never affects the jurisdiction of an Arbitral Tribunal, but rather that it relates to a question of admissibility or merits⁹⁴⁹. The Arbitral Tribunal shares the analysis they made.
714. In view of the above, the Arbitral Tribunal rejects the Respondent’s jurisdictional objection D based on the Arbitral Tribunal’s lack of jurisdiction “*ratione voluntatis*” due to the application of Part III of the ECT having been denied to IIN owing to the circumstances of Article 17 of the ECT having been met.
715. The Arbitral Tribunal may examine the second preliminary question, if and when it proceeds to examine the merits of this case. However, the solution is so obvious that it seems simpler to decide immediately. The Arbitral Tribunal shares the position of the Claimant, according to which the activation of the denial-of-benefit clause may never operate retroactively⁹⁵⁰. As the Arbitral Tribunal stressed in the case *Ascom v. Kazakhstan*, in order to activate the denial of benefits of Article 17 of the ECT, the notification

949 *Yukos Universal Limited v. the Russian Federation*, PCA Case No. AA/227, Partial Award on Jurisdiction and Admissibility, 30 November 2009, ¶ 443; **Annex RLA-28**: *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. the Republic of Kazakhstan*, SCC Case No. 116/2010, Award, 19 December 2013, ¶ 745.

950 Counter-Response on jurisdictional objections, ¶ 226.

of said denial must be prior to the start of the dispute.⁹⁵¹ In the present case, there is no argument that the Kingdom of Spain did not activate the denial-of-benefits clause before its Response, in the course of the arbitration.

716. Accordingly, the Tribunal will reject the Respondent's jurisdictional objection E after reclassifying it as an objection of admissibility.

6. Jurisdictional objection F: the Arbitral Tribunal's lack of jurisdiction to rule on an alleged breach by the Kingdom of Spain of obligations derived from Article 10(1) of the ECT by means of the introduction of the IVPEE through Act 15/2012

717. By means of Act 15/2012 of 27 December, the Kingdom of Spain regulated a new tax on the value of electricity production (IVPEE). The Claimant considers that this tax constitutes the first of the measures that gave rise to the present arbitration.
718. In light of Article 21(1) of the ECT, which is a “*carve out*” clause which excludes the tax measures from the scope of the Treaty, the Respondent concludes that the Tribunal lacks the jurisdiction to hear the claims of the Claimant based on the alleged violation of Article 10(1) through the adoption of Act 15/2012.
719. The Claimant maintains that the IVPEE is not a tax promulgated in good faith and that, therefore, it could not be subject to the “*carve-out*” provided for by Article 21(1) of the ECT⁹⁵².
720. Article 21 (1) of the ECT establishes:
- “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.”*
721. Consequently, by fitting into the “*carve-out*” provided for in Article 21(1) of the ECT, the IVPEE would remain outside the jurisdiction *ratione materiae* of the Tribunal whose competence is limited to disputes concerning rights and obligations derived from the ECT.
722. The Claimant does not question the nature of taxation of the IVPEE which, consequently, is not subject to debate between the Parties in this arbitration⁹⁵³. The Arbitral Tribunal also has no doubts about it and, given the circumstances, it does not need to enter this debate.

951 Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan, SCC Case No. 116/2010, Award, 19 December 2013, ¶ 745, Annex RLA-28.

952 Counter-Argument, ¶ 347, p. 65.

953 Claimant's Post-Hearing Memorial, ¶ 4, p.1.

723. In its Post-Hearing Memorial, the Claimant explained that:

*“As it did in its Response and Counter-Response, during the Hearing, the Kingdom of Spain tried to demonstrate the conformity of the Tax by resorting to definitions of tax measures under Spanish law and International Law. However, for purposes of this arbitration, it is only relevant to verify that the Tax qualifies as a Tax Measure in good faith under the ECT.”*⁹⁵⁴

724. As the Claimant accepts that the promulgation of the IVPEE is a tax measure under Spanish law and under international law, the presumption that it contemplated with the “*carve out*” provided for in Article 21(1) of the ECT is established.

725. The argument based on good faith used by the Claimant to dismiss this presumption supposes that it first be verified that only tax measures carried out in good faith can be considered within the “*carve out*”. If this were so, the Arbitral Tribunal would have to decide whether the IVPEE constitutes a tax measure that was not promulgated in good faith, as argued by the Claimant.

726. The Claimant refers to the arbitral jurisprudence to justify that the tax measures promulgated in good faith are the only ones that can be contemplated within the “*carve out*”⁹⁵⁵. It stresses that, under this jurisprudence, the criterion of *bona fide* requires that the intention of the tax measure be analysed, and in particular that it be verified that it is aimed at the collection of general revenue of the State.⁹⁵⁶

727. The definition of tax measures proposed by the Kingdom of Spain also requires verification of the collection of general income of the State⁹⁵⁷. According to the Claimant, this last criterion would be identical to the requirement of good faith. Consequently, the Claimant considers that the necessity of good faith for the activation of the “*carve-out*” is not in dispute between the Parties⁹⁵⁸.

728. The Arbitral Tribunal doubts that this is the case. It is true that the Respondent considers that only the measures ordering a payment of money for the State destined for public purposes can be considered within the “*carve-out*”⁹⁵⁹. The Respondent takes into consideration the effect of the measures: the collection of general revenue from the State. It is not interested, contrary to the assertion of the Claimant, in the purpose of the measures and in the

954 Post-Hearing Memorial, ¶ 12, p. 2-3.

955 Counter-Response on jurisdictional objections, ¶ 282, p. 60.

956 The Claimant cites in particular Annex CLA-88: Yukos Universal Limited (Isle of Man) v. the Russian Federation, CPA Case No. AA/227, Award, 18 July 2014, ¶ 1407.

957 Counter-Response, ¶ 443, p.99.

958 Counter-Response on jurisdictional objections, ¶ 288, p. 61.

959 Counter-Response, ¶ 443, p. 99.

intention of the State when promulgating them. This difference is fundamental, since it is the intention of the State that can reveal, as the case may be, good faith or bad faith. The Respondent does not accept that the analysis of the purpose of the measure is necessary. The Kingdom of Spain argues that in order to apply Article 21(1) of the ECT, it is necessary to exclusively examine the legal operational of the measure. Therefore, it would not be appropriate to carry out an analysis of the IVPEE such as that raised by the Claimant, in particular because it includes an economic analysis of the measure⁹⁶⁰.

729. The Arbitral Tribunal considers that in deciding whether a tax measure can be considered as part of the “*carve out*” of Article 21(1) of the ECT, it is necessary to determine if its purpose really has to do with tax, that is, if it was promulgated in good faith. Article 21(1) of the ECT is a tax exclusion clause similar to numerous other clauses included in Investment Treaties. It excludes from international supervision the powers of the Contracting States to legislate on taxes. This exclusion is no longer justified if States use their prerogatives in the tax framework to achieve other types of ends. In this case the tax measures are not promulgated in good faith and cannot activate the “*carve-out*”.

730. As the Tribunal emphasised in the RosInvestCo case⁹⁶¹:

“...it is generally accepted that the mere fact that measures by a host state *are taken in the form of application and enforcement of its tax law, does not prevent a tribunal from examining whether this conduct of the host state must be considered, under the applicable BIT or other international treaties on investment protection, as an abuse of tax law ...*”

731. Without such investigation, as indicated by the Arbitral Tribunal in the Renta4 case⁹⁶²:

“... investment protection through international law *would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures, perhaps expropriation first of all, as taxation.*”

732. In the Yukos case the Tribunal clearly stated that⁹⁶³:

“...in any event, the *carve-out of Article 21(1) can apply only to bona fide taxation actions, i.e., actions that are motivated by the purpose of raising general revenue for the State. By contrast, actions that are taken only under the guise of taxation, but in reality aim to achieve an entirely unrelated*

960 Counter-Response, ¶ 475, p. 106.

961 RosinvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Award, 12 September 2010, ¶

962 Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. the Russian Federation, SCC Case No. 24/2007, Award, 20 July 2012, ¶ 179.

963 Yukos Universal Limited (Isle of Man) v. the Russian Federation, CPA Case No. AA/227, Award, 18 July 2014, ¶ 1407.

purpose (such as the destruction of a company or the elimination of a political opponent) cannot qualify for exemption from the protection standards of the ETC under the taxation carve- out of Article 21(1)".

733. The Arbitral Tribunal shares the analysis of these tribunals and concludes that the presumption that the IVPEE can be contemplated as part of the “*carve out*” provided for by Article 21(1) of the ECT would be dismissed if the tax measure were not promulgated in good faith.
734. However, the Arbitral Tribunal agrees with the tribunal in the Renta4 case⁹⁶⁴ that “*The presumption must be that the measures are bona fide...*”. That is, that the Claimant has the burden of convincing the Tribunal that the IVPEE was not promulgated for the purpose of raising revenue for the State, but for a different purpose.
735. The Claimant has not convinced the Arbitral Tribunal that the IVPEE is not a good faith tax measure. Its arguments are that there is a serious contradiction between the alleged object of Act 15/2012 and its effects, and that it affects the regulated photovoltaic sector in a discriminatory manner⁹⁶⁵.
736. The Claimant maintains that even though the preamble of Act 15/2012 insists that its objective is “*to harmonise our tax system with a more efficient and respectful use with regards the environment and sustainability*”, none of its provisions pursues this goal⁹⁶⁶. Three characteristics of the IVPEE would justify this conclusion.
737. Contrary to the principle that “*whoever pollutes, pays*”, the IVPEE would apply identically to all types of pollution levels and contrary to any “*green tax*”, it would apply equally to fossil fuels and renewable energy. Secondly, the IVPEE would apply to all electrical power producers, without taking into account the differences in depreciation levels between traditional technologies and more recent technologies. Finally, the IVPEE would also not distinguish between the form of remuneration of the energy produced: market price or regulated tariff, a difference that would be crucial, since the electricity producers that receive a regulated tariff cannot pass on additional costs on the price of energy⁹⁶⁷.
738. Although the official object of the tax is the protection of the environment, its true purpose would be to diminish the tariff deficit. The Claimant’s position is summarised in the Counter-Argument:

964 Annex CLA-82: Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. the Russian Federation, SCC Case No. 24/2007, Award, 20 July 2012, ¶ 181.

965 Claimant’s Post-Award Memorial, ¶ 19, p.4. 966 Claimant’s Post-Award Memorial, ¶ 20, p.4

967 Claimant’s Post-Award Memorial, ¶ ¶ 21-22-23, p.4.

968 Claimant’s Post-Award Memorial, ¶ 26, p.5.

“The (IVPEE) is a tax of a purely revenue-collecting nature that, despite being formulated as an environmental tax, (i) violates the basic principles that should guide this type of tax; (ii) it hinders the development of the internal market; and (iii) it retroactively affects the remuneration of certain technologies, generating discrimination between technologies⁹⁶⁹.”

739. It is not easy to dismiss the presumption that the tax measures promulgated by a State are *bona fide*. As the Tribunal stressed in the RosInvestCo case⁹⁷⁰, “States have a wide latitude in imposing and enforcing taxation law, even if resulting in substantial deprivation without compensation”. The Yukos and RosInvestCo cases contrast bona fide measures with measures taken to dismiss a party or a political adversary⁹⁷¹. The criticisms of the IVPEE made by the Claimant do not reveal such an extreme purpose. The economic impact or the effects of the IVPEE can be obscure and debatable, but that is not a sufficient argument to conclude that the IVPEE is a tax measure that was enacted in bad faith.
740. It is probable that this tax measure does not have the alleged effect in favour of the environment and that its promulgation had no other purpose than to diminish the tariff deficit, as claimed by the Claimant. However, the Arbitral Tribunal does not need to rule on the matter, since, if the true purpose of the measure were merely to collect tax, according to the arguments developed by the Claimant, it would coincide with the legitimate purpose of all taxes, without being able to characterise the bad faith of this tax measure. If it were true that the State submitted a measure which was merely for tax collection as a measure favourable to the environment, the conclusion would be the same. It is the real purpose of the measure that has to be evaluated by the Tribunal, not its cosmetic presentation, which may be explained by political motives that do not fall within the scope of analysis of the Arbitral Tribunal.
741. Consequently, the Arbitral Tribunal has no jurisdiction to rule on the dispute over the alleged violation by the Kingdom of Spain of obligations arising from section (1) of Article 10 of the ECT by means of the introduction of the IVPEE by Act 15/2012.

969 Counter-Argument, ¶ 512, p. 119.

970 **Annex CLA-79:** RosinvestCo UK Ltd. v. the Russian Federation, SCC Case No. V079/2005, Award, 12 September 2010, ¶ 580.

971 **Annex CLA-88:** Yukos Universal Limited (Isle of Man) v. the Russian Federation, CPA Case No. AA/227, Award, 18 July 2014, ¶ 1407; **Annex CLA-79:** RosinvestCo UK Ltd. v. the Russian Federation, SCC Case No. V079/2005, Award, 12 September 2010, *passim*.

7. Jurisdictional objection G: the inadmissibility of the claim due to an alleged breach by the Respondent of its obligations derived from Article 13 of the ECT by the introduction of the IVPEE by Act 15/2012, owing to the lack of submission of the matter to the competent national tax authorities as required by Article 21(5)(b) of the ECT

742. The Claimant considers that if the IVPEE had been excluded by the “*carve-out*” of Article 21(1) of the ECT, the jurisdictional objection of the Kingdom of Spain could not be upheld with regards the IIN’s argument, according to which, the Tax had an expropriatory effect. This is in virtue of the mechanism of the (“*Claw-back*”) exception of Article 21(5) of the ECT, which establishes the following:

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 issues of non-discrimination 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 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.”

743. According to the Respondent, this Article means that the investor, which considers that a tax has an expropriatory effect, has the obligation to submit the matter to the competent tax authorities⁹⁷². If it does not do so, a claim relating to the expropriation of taxes could not be examined by an Arbitral Tribunal before it has submitted the matter to the competent tax authorities.
744. Noting that the Claimant had not submitted the matter to the competent tax authorities, the Respondent requested in its Response to the Arbitral Tribunal that it declare inadmissible the Claimant’s claim regarding an alleged expropriation effect of the IVPEE and that it proceeded to submit this issue to the competent national tax authorities so that they may rule on the matter in a maximum period of six months⁹⁷³. The same request appears in its Counter-Response⁹⁷⁴.
745. The Claimant accepts that the purpose of the ECT is to favour the possibility of going to the Competent Tax Authorities to determine if a tax measure has an expropriatory effect, but it denies that such recourse is obligatory and constitutes a requirement for the start of an arbitration⁹⁷⁵. The ECT would not sanction the lack of appeal with the inadmissibility of the claim since it provides that the tribunal can appeal to the Competent Tax Authorities and that, if they do not rule in a period of six months, the arbitration could not be delayed⁹⁷⁶.
746. In any case, this debate would be of no practical interest according to the Claimant, because no recourse mechanism before the Competent Tax Authorities exists in Spanish law, in accordance with Article 21(5) (b) of the ECT. As a consequence this ECT Article could not be activated⁹⁷⁷, which the Respondent denies⁹⁷⁸.
747. This discussion is now solved by the fact that, on 3 February 2016, IIN requested in writing from the General Directorate of Taxes (DGT), Sub Directorate of Special Taxes of the Ministry of Taxation and Public Administration of the Kingdom of Spain, confirmation of the expropriatory and discriminatory nature of the IVPPE. Although by letter of 16 March 2016 to the Arbitral Tribunal the Claimant confirmed that in its opinion the DGT had no jurisdiction

972 Response, ¶ 731, p. 170.

973 Response, ¶ 740, pp. 172-173.

974 Counter-Response, ¶ 530, p.120.

975 Counter-Response on jurisdictional objections, ¶ 307, p. 64

976 Counter-Response on jurisdictional objections, ¶¶ 315/316, p. 66.

977 Counter-Argument, ¶¶ 309-315, pp. 65-66.

978 Counter-Response, ¶ 537, p.120.

to rule on the expropriatory nature of the IVPEE. Its letter to the DGT expressly noted that its request was for the purpose of complying with Article 21(5) (b) of the ECT.

748. By letter of 22 March 2016 to the Arbitral Tribunal, the Respondent stated that it considered that the submission on 3 February 2016 by the Claimant of a letter to the DGT implied “*an acknowledgement by the Claimant itself of the need to submit to the competent tax authorities the issue regarding the alleged expropriatory effect of a tax—in this case the IVPEE—when an investor alleges that a tax constitutes an expropriation, in accordance with Article 21(5)(b) of the ECT.*”
749. The Respondent’s letter denounced the dilatory nature of the behaviour of the Claimant “*in the absence of reasons that justify the Claimant waiting until the award of this arbitration was pending award to refer the matter to the competent tax authorities.*” The Respondent requested that this behaviour be sanctioned by the Arbitral Tribunal in its decision on costs.
750. The letter of 22 March 2016 from the Respondent was accompanied by a certificate from the DGT of the same date confirming that “*A document is currently being processed relating to the procedure provided for in Article 21.5.b) of the Energy Charter Treaty presented by Isolux Infrastructure Netherlands B.V. with entry date of 3 February 2016...*”
751. On 4 April 2016, the DGT replied to IIN stating that the competent tax authority of the Kingdom of Spain had already issued the report under Article 21(5) (b) of the ECT, which it had transferred to the Respondent’s representation in the arbitration.
752. By letter of 20 April 2016, the Claimant noted that it had not received said report, the transmission of which to the Arbitral Tribunal was the responsibility of the Respondent. The Claimant also stressed that, “*even if in the present case it were obligatory, necessary or possible to activate (quod non) the procedure foreseen by Article 21(5) (b) of the ECT, this has been exhausted with the issue of the aforementioned report.*”
753. The DGT’s report, dated 29 March 2016, was received by the Claimant and sent to the Arbitral Tribunal on 21 April 2016.
754. In these circumstances, the Respondent’s objection regarding the inadmissibility of the Claimant’s claim regarding the alleged breach by the Respondent of its obligations under Article 13 of the ECT by means of the introduction of the IVPEE owing to the failure to submit the matter to the competent national tax authorities, has lost its factual grounds. Whether or not it is necessary, the procedure provided for by Article 21(5) (b) of the ECT has been exhausted.

755. Consequently, the only thing that the Arbitral Tribunal will have to decide in this respect is the impact on its decision as to the cost of the Claimant's behaviour in that, after maintaining throughout the proceedings that the procedure of Article 21(5) (b) of the ECT was not obligatory and that no recourse mechanism before the Competent Tax Authorities existed in Spanish law that allowed its activation, it finally resolved to do so. This impact will be assessed later in this award. However, the Arbitral Tribunal must first rule on the obligatory nature of the procedure of Article 21(5) (b) of the ECT, in order to determine whether a claim relating to the violation of Article 13 of the ECT through tax measures is admissible or not. That it is possible to activate the procedure in Spanish law is established.
756. The Arbitral Tribunal considers the wording of Article 21(5) (b) (i) of the ECT to be absolutely clear:

“i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax constitutes 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 Authority.” (Emphasis added)

757. Article 31 of the VCLT establishes that “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 light of its object and purpose”. In accordance with an interpretation of the ordinary meaning, the use of the future tense (“shall refer”) reflects an obligatory procedure both for the investor and for the tribunal, which confirms the use of “shall” in the English-language version of the Treaty. It is also confirmed by the text of Article 21(5) (b) (iii) of the ECT when it states that “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” and that 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.” When the use of the future tense does not indicate an obligation, the introduction of the word “may”, is necessary.
758. The Arbitral Tribunal shares the Claimant's analysis when it argues that the ECT does not sanction the absence of the procedure with the inadmissibility of the claim. However, even if the claim is admissible, a tribunal cannot examine it without having given the

Competent Tax Authorities the opportunity to rule on it within a period of six months.

759. These observations will be taken into consideration by the Arbitral Tribunal at the time of deciding on the impact of the Claimant's behaviour regarding the application of Article 21(5) (b) (i) of the ECT in its decision on costs.

B. ANALYSIS OF THE MERITS OF THE DISPUTE

760. According to the Claimant, the Kingdom of Spain would have violated its obligations under Article 10(1)(a) and Article 13(b) of the ECT. Those two allegations will be examined in turn. The Tribunal will then rule on the costs (c).

1. The alleged violation of Article 10 of the ECT

761. The Claimant explains that under Article 10 (1) of the ECT, the Respondent has the following obligations: to create stable and transparent conditions for the making of investments in its territory (1), to grant at all times to the Claimant's investments a fair and equitable treatment (2), to ensure full protection and security of the Claimant's investment (3), to not harm in any way, through exorbitant or discriminatory measures, the management, maintenance, use, enjoyment or liquidation of the Claimant's investment in Spain (4), and to comply with the obligations that it has entered into with the Claimant or its investment in Spain (5)⁹⁷⁹.

762. The Claimant maintains that the Kingdom of Spain has violated each of these obligations.

763. Article 10 (1) of the ECT provides as follows:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by

979 Counter-Argument, ¶ 521, p.122.

international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”

764. However, contrary to what the Claimant intended⁹⁸⁰, the Arbitral Tribunal does not find in this Article an autonomous obligation for the Contracting Parties to encourage and create stable and transparent conditions for the making of investments in their territory, the violation of which, *per se*, would generate rights in favour of investors of another Contracting Party. It would be absurd, for example, for an investor to sue a State for compensation for failing to promote stable and transparent conditions for investments in its territory if said failure were not the cause of the breach of another obligation to the investor, such as to grant the investment fair and equitable treatment, protection and security, etc.

765. The Claimant explains that “*this standard prohibits a Contracting Party from establishing a regulatory framework designed to attract investment - as the Respondent has done - only to later radically abolish it.*”⁹⁸¹ But that is merely an illustration of the obligation to respect the legitimate expectations of the investor. In fact, the Claimant does not offer any convincing jurisprudential or doctrinal support for its approach, on the contrary, the court in the Plama⁹⁸² case adopted a position similar to the one at hand when it stated that “*stable and equitable conditions are clearly part of the fair and equitable standard under the ECT*”. In fact, the Claimant implicitly recognises this by stating that under such a standard the reasonableness and proportionality of the measures must be considered in light of the investor’s legitimate expectations, which protect the ECJ standard⁹⁸³.

766. Consequently, the Arbitral Tribunal will not examine separately the alleged violation by the Kingdom of Spain of an obligation to create stable and transparent conditions for the making of investments in its territory.

767. Nor does the Arbitral Tribunal consider it appropriate to carry out a separate analysis of the alleged violation by the Kingdom of Spain of the alleged fifth obligation of Article 10(1) of the ECT mentioned by the Claimant, since the Claimant’s approach is based on an interpretation of the last sentence of Article 10(1) ECT that the Arbitral Tribunal does not share.

980 Counter-Argument, ¶ 524, p.123.

981 Counter-Argument, ¶ 530, p.124.

982 *Plama Consortium Limited v. the Republic of Bulgaria*, Award, ICSID Case No. ARB/03/24, 27 August 2008, ¶173.

983 Counter-Argument, ¶ 619.

768. According to the Claimant, clause 10(1) of the ECT constitutes an umbrella clause that should be interpreted broadly: it would include not only contractual commitments, but also legal obligations assumed under the legislative framework of the host State. The Claimant emphasises that the term “*any obligation*” contained in the English language version of Article 10(1) of the ECT must be interpreted broadly⁹⁸⁴. It refers to decisions of other tribunals⁹⁸⁵ and doctrinal writings⁹⁸⁶ in order to conclude that those obligations derived from administrative or legislative acts of the States are also contemplated by this Article. The Kingdom of Spain would then have been bound to IIN, in accordance with the umbrella clause of Article 10(1) of the ECT, by acquiring very specific commitments to TSolar, the Plants and ultimately IIN⁹⁸⁷.

769. The Arbitral Tribunal does not accept this reading of the last sentence of Article 10(1) of the ECT, which provides: “*Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*” The reference to the English version of the text “*any obligation*” that the Claimant makes, instead of referring to the Spanish version of the ECT, does not lead to a different conclusion. Whether in English or Spanish, the last sentence of Article 10(1) of the ECT contemplates obligations that a Contracting Party “*entered into*” (“*entered into*” in the English version) with the investors or the investments of the investors of another Contracting Party. What matters is the existence of an obligation towards investors or investments of investors of another Contracting Party.

770. The Arbitral Tribunal generally shares the analysis of the Noble Ventures, Inc v. Romania⁹⁸⁷ award, that on interpreting Article II (c) of the Bilateral Treaty between the United States and Romania of 28 May 1992, which is very similar to the last sentence of Article 10 (1) of the ECT, it explained that:

“[...] considering the wording of Art. II (2)(c) which speaks of “any obligation [a party] may have entered into with regard to investments”, it is difficult not to regard *this as a clear reference to investment contracts. In fact, one may ask what other obligations can the parties have had in mind as having been “entered into” by a host State with regard to an investment. The employment of the notion “entered into” indicates that specific commitments are referred to and not general*

984 Counter-Argument, ¶648.

985 Liman Caspian Oil BV and NCL Dutch Investment BV v. Kazakhstan, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, ¶ 448; Eureko B.V. v. the Republic of Poland, Ad Hoc Investment Treaty case, Partial Award, 19 August 2005, ¶ 246, Annex RLA-64.

986 R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), pages 81-82.

987 Counter-Argument, ¶ 656-658.

988 Noble Ventures, Inc v. Romania, ICSID Case No. ARB/01/11, Award of 12 October 2005, paragraph RLA-62

commitments, for example by way of legislative acts. This is also the reason why Art. II (2)(c) would be very much an empty base unless understood as referring to contracts.[...]”.

771. The Arbitral Tribunal accepts that, in special cases, laws or administrative acts may contain commitments, in particular when they are specifically directed at foreign investors, as indicated by the award in the Liman Caspian Oil BV and NCL Dutch Investment BV v. Kazakhstan case⁹⁸⁹. The obligation to submit to arbitration found in several investment codes is a typical example. However, a rule aimed at both domestic investors and foreign investors cannot, because of its general nature, generate obligations only to the former, even when they are investors of a Contracting Party.

772. Contrary to what the Claimant indicates⁹⁹⁰, Royal Decrees 661/2007 and 1578/2008 were not expressly designed “[to] seek [] foreign investment”. In fact, the original investment in the plants before the creation of IIN was Spanish. The commitments that the Kingdom of Spain would have acquired towards T-Solar, the Plants and, ultimately, IIN were commitments that were not specifically entered into with investors or investments of investors of a Contracting Party. Consequently, the Arbitral Tribunal concludes that in the absence of the Kingdom of Spain entering into specific obligations with the Claimant or its investment in Spain, it would be pointless to examine whether it failed to comply with such obligations.

a) The alleged violation by the Respondent of the obligation to grant fair and equitable treatment (FET) to the Claimant’s investments

773. The Claimant maintains that the Respondent’s conduct generated legitimate expectations derived from the regulatory framework. The Respondent would have violated these expectations by introducing the IVPEE, by modifying, ad hoc, by means of RDL 2/2013, the update regime of the FIT by means of an NPI, only applicable to the updates of the Special Regime incentives and finally and with RDL 9/2013, by abolishing the Special Regime and replacing it with the Specific Compensation Regime, with retroactive effects.

774. The Respondent emphasises that *“there is a consolidated jurisprudential current that does not allow the creation of legitimate expectations by the investor regarding the immutability of the legal framework, except when the host State has made a specific commitment in favour*

989 Liman Caspian Oil BV and NCL Dutch Investment BV v. Kazakhstan, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, ¶ 448, “Applying this reasoning to ECT Article 10(1), it could be argued that an abstract unilateral promise by the state in its national legislation and particularly in its laws directed to foreign investors is encompassed by the “umbrella clause”.

990 Counter-Argument, ¶558, p.130.

of the investor”.⁹⁹¹ However, this debate is not relevant since the Claimant indicates that at no time did it claim that there was an expectation of “*immutability of the legal framework*” or of its “*petrification*”, and that it had the legitimate expectation that the Kingdom of Spain would respect its commitment of a fixed long-term FIT in a stable and predictable framework⁹⁹².

775. The Arbitral Tribunal has already decided that the Kingdom of Spain had not made any commitments to investors because of the general nature of the rules applicable to investments. However, the Arbitral Tribunal shares the analysis of UNCTAD, which has presented the concept of legitimate expectations as follows:⁹⁹³

“Arbitral decisions suggest [...] that an investor may derive legitimate expectations either from (a) specific commitments addressed to it personally, for example, in the form of a stabilization clause, or (b) rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment.”

776. In addition, the Arbitral Tribunal notes that both parties refer to the award rendered in the Total v. Argentina case, in order to illustrate the concept of legitimate expectations.⁹⁹⁴ This award explains that legitimate expectations will be generated in accordance with the ECJ standard when;⁹⁹⁵

[...] public authorities of the host country have made the private investor believe that such an obligation existed through conduct or by a declaration. Authorities may also have announced officially their intent to pursue a certain conduct in the future, on which, in turn, the investor relied in making investments or incurring costs. As stated within the NAFTA framework “the concept of “legitimate expectations” relates [...] to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor (or investment) to suffer damages.”

777. The Arbitral Tribunal also shares the observation of the Perenco v. Ecuador award, which emphasises that “*a central aspect of the analysis of an alleged violation of the standard of*

991 Response, ¶ 757.

992 Counter-Argument, ¶ 536, p. 125.

993 Annex RLA-53: United Nations Conference on Trade and Development, Fair and Equitable Treatment, 2012, page 69.

994 Response, footnotes of page no. 373. Counter-Response, ¶744, p. 166 where the Respondent states “This party shares the invocation of the Cases Perenco v. Ecuador and Total v. Argentina that the Claimant makes...”, Counter-Argument, ¶541, p. 126.

995 Annex RLA-57: Total S.A. v. the Republic of Argentina, ICSID Case No. ARB/04/1, Decision on Responsibility of 27 December 2010.

*fair and equitable treatment are the reasonable expectations of the investor regarding the future treatment of its investment by the host State”, which requires “an objective determination of said expectations, considering all the relevant circumstances”.*⁹⁹⁶

778. One of the relevant circumstances is the information that the investor had or should have had at the time of investing, reasoning analysed in the Electrabel v. Hungary case, the award of which states:

*“Fairness and consistency must be assessed against the amount of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host State”.*⁹⁹⁷

779. The Respondent refers to the tribunal’s statement in the Parkerings v. Lithuania case:

*“The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment”*⁹⁹⁸.

780. The Respondent notes that the Claimant did not carry out legal due diligence and relied solely on the technical *due diligence* of the 2008 and 2010 projects⁹⁹⁹. The Claimant acknowledges that it should have “*had a general knowledge of the regulatory environment in which it operates*¹⁰⁰⁰,” but answers that there does not exist “*in international law an obligation for the investor to carry out an exhaustive legal investigation, much less a jurisprudential investigation, before making its investment*¹⁰⁰¹.”

781. The Arbitral Tribunal accepts that an investor cannot be required to conduct an extensive legal investigation. The important aspects for determining whether the expectations alleged by the investor are reasonable is that which every prudent investor must know about the regulatory framework before investing and the investor’s effective information that invokes specific expectations. In particular, an investor cannot have legitimate expectations generated by the regulatory framework

996 Perenco Ecuador Limited v. the Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on the pending issues relating to jurisdiction and on responsibility of 12 September 2014, ¶560, Annex CLA-89; See Counter-Argument, ¶539; Counter-Response, ¶ 745.

997 Electrabel v. the Republic of Hungary ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.78.

998 Parkerings-Compagniet AS v. the Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶332.

999 Counter-Response, ¶¶750-751.

1000 Claimant’s Post-Hearing Memorial, ¶77, p.18.

1001 Counter-Argument, ¶ 437, p. 99.

when its personal information allowed it to foresee and anticipate the unfavourable development of this regulatory framework before investing. In order to violate the legitimate expectations of the investor, new regulatory measures must not have been foreseeable, whether on the part of a prudent investor, or on behalf of an investor which, because of its personal situation, disposed of specific elements to foresee them.

782. The parties object to the date to be considered in assessing the Claimant's ability to foresee the development of the regulatory framework that, according to it, violated its legitimate expectations. According to the Claimant, it is the date of the decision to invest, 29 June 2012, that matters¹⁰⁰². On the contrary, the Respondent refers to 29 October 2012, the date of the Claimant's acquisition of 65,434,220 registered shares (equivalent to 58.8632% of the share capital) from T-Solar¹⁰⁰³.

783. The Arbitral Tribunal considers that it is the last of these two dates that should be the reference date. Although it is true that the decision to invest was already made at the end of June 2012, IIN was able to renounce the investment until 29 October 2012, in particular if the knowledge it had of the circumstances related to the reform of the Spanish electrical system allowed it to anticipate an unfavourable development. In addition, clause 5.6.2 of the Investment Agreement, of 29 June 2012, provided for its termination without the right to compensation if, between the date of the Agreement and the fulfilment of its last suspensive condition, events occurred that could negatively affect the value of the group.

784. In light of these observations, the Arbitral Tribunal must determine whether, at the time of the investment, that is, on 29 October 2012, the existing regulatory framework could have generated a legitimate expectation for the Claimant that it would not be modified, as it was, by the norms that were adopted in 2012 (Law 15/2012) and in 2013 (RDL 2/2013 and, above all RDL 9/2013).

785. The Arbitral Tribunal concludes that the answer to that question must be negative.

786. The Claimant explains that in order to ensure investment in the renewable energy sector and comply with the obligation to guarantee a stable and predictable economic framework for the Plants under the so-called Special Regime, the main tool of the Kingdom of Spain was the FIT system under which it granted the right to obtain a long-term FIT enshrined in Royal Decrees 661/2007 and 1565/2008¹⁰⁰⁴. The Claimant maintains that the Kingdom of Spain violated its legitimate expectation by modifying the applicable regulations by means of, first, the imposition of a tax on the value of electricity production (Law 5/2012) and, second, the modification of the mechanism of updating the FIT applicable to the Plants (RDL 2/2013) in order to, finally, completely abolish

1002 Claimant's Post-Hearing Memorial, ¶78.

1003 Counter-Response, ¶ 678.

1004 Claimant's Post-Hearing Memorial, ¶166.

the Special Regime and replace it with the Specific Remuneration Regime by means of RDL 9/2013¹⁰⁰⁵.

787. However, on 29 June 2012, when the Claimant decided to invest in Spain, the regulatory framework for renewable energies had already been modified and was the subject of several studies that made its revision inevitable. Consequently, no reasonable investor could have the expectation that this framework would not be modified in the future and would remain unchanged. The Claimant accepts this but maintains that “*No investor making its investment in October 2012 would have concluded that its only basic expectation would be to obtain a reasonable return*”¹⁰⁰⁶. The Arbitral Tribunal does not share this observation and, moreover, it considers that the Claimant had special knowledge that did not allow it to have the legitimate expectation that the long-term FIT system enshrined in Royal Decrees 661/2007 and 1565/2008 would last throughout the life of the plants. The only legitimate expectation of the Claimant was a reasonable return on its investment.

788. Firstly, as already mentioned, the regulatory framework had already been amended several times. Royal Decrees 661/2007 and 1565/2008 were no more than modifications to RD436/2004. Afterwards, RD1565/2010 and RDL14/2010 modified the economic regime established in RD661/2007 for the photovoltaic sector. All those regulations pronounced in the development of Law 54/1997, of 27 November 1997, on the Electricity Sector Law (ESL), demonstrate the unstable nature of a regulatory framework that the government has the power and duty to adapt to the economic and technical needs of the moment, within the framework of the ESL.

789. Secondly, the legality of these successive amendments had been verified by several rulings of the Spanish Supreme Court, which highlighted in 2005 that “*No legal obstacle exists for the Government, in the exercise of the regulatory power and the broad authorisations that apply in a highly regulated area such as electricity, in modifying a specific system of remuneration, [...]*”¹⁰⁰⁷.

790. Even more significant is another ruling of 25 October 2006, which states:

“(...)the owners of the facilities of electrical energy production in the special regime do not have an “unmodifiable right” to maintain the economic regime that regulates the collection of premiums unchanged. Said regime exists, in effect, to encourage the use of renewable energies through an incentive mechanism that, like all of this kind, is not

1005 Claimant’s Post-Hearing Memorial, ¶166

1006 Counter-Argument, ¶ 598.

1007 Annex R-30: Sentence of the Third Chamber of the Supreme Court of 15 December 2005.

assured to remain without modifications in the future.”¹⁰⁰⁸. (Emphasis added).

791. Another ruling of the Supreme Court from the same day is even clearer:

*“In the same way that, depending on very diverse factors of economic policy (relating to the promotion of renewable energies but also to the planning of the electricity sector networks, in addition to other considerations of energy saving and efficiency) **the premiums and incentives for the production of electrical power in the special regime can increase from one year to another, they can also decrease when those same considerations so require.** We insist that whenever the variations within the legal limits that discipline this mode of promotion are maintained, the mere fact that the update or the economic significance of the premium goes up or down does not constitute a reason for nullity nor does it affect the legitimate expectation of its recipients.”*¹⁰⁰⁹

792. As indicated by the Supreme Court, in a ruling of 9 December 2009, the only limit to the Government’s power to modify the regulatory framework is the guarantee that the ESL gives a reasonable return on investments:

*“[...] [the Claimant] does not pay sufficient attention to the jurisprudence of this Chamber specifically in relation to the principles of legitimate expectation and non-retroactivity applied to the successive incentive regimes to the generation of electricity. These are the considerations expressed in our judgment of 25 October 2006 and reiterated in that of 20 March 2007, among others, on the legal status of the owners of the production facilities of electrical energy under the special regime, for whom **it is not possible to recognise pro futuro an “unmodifiable right” that the remuneration framework approved by the head of the regulatory authority is maintained unaltered, provided that the requirements of the Energy Sector Law are complied with, with regards the reasonable return on investments.**”*¹⁰¹⁰ (Emphasis added)

793. The Arbitral Tribunal shares the Claimant’s position, according to which the rulings of the Spanish Supreme Court do not bind this Arbitral Tribunal, which must adjudicate the dispute based on the ECT and international law only¹⁰¹¹. However, this observation is relevant when assessing the existence of the alleged legitimate expectations of the Claimant. It is precisely to adjudicate this dispute, based on

1008 Annex R-31: Sentence of the Third Chamber of the Supreme Court of 25 October 2006.

1009 Annex R-31: Sentence of the Third Chamber of the Supreme Court of 25 October 2006, RCA 12/2005, El Derecho EDJ (Case Law Database) reference 2006/282164. Legal Basis Three.

1010 Annex R-39: Ruling of the Third Chamber of the Supreme Court of 9 December 2009.

1011 Claimant’s Post-Hearing Memorial, ¶73.

the ECT and international law, that the Arbitral Tribunal has to determine whether the Claimant was aware that there were no obstacles in Spanish law for the regulatory framework to be modified, including in terms of the remuneration modalities of the investor. The existence or not of such obstacles in Spanish law is a fact, and the rulings of the Supreme Court are part of this fact.

794. Without demanding of a reasonable investor an extensive legal investigation at the time of investing, a knowledge of important decisions of the highest judicial authority on the regulatory framework of the investment can be presumed.

795. Thirdly, and above all, such a presumption is not necessary in this case, since it is established that the Claimant was perfectly aware of the jurisprudence of the Supreme Court that has just been mentioned.

796. Isolux Corsan, S.A., the parent company of the Isolux Group, one of the signatories of the investment agreement of 29 June 2012, brought a contentious-administrative appeal against RD1565/2010 before the Spanish Supreme Court¹⁰¹². The Isolux Corsan lawsuit of 27 May 2011¹⁰¹³ filed before the Supreme Court makes specific references to the jurisprudence mentioned in paragraph 792 above¹⁰¹⁴. As a result, when the decision to invest was made, the Claimant was perfectly aware of the jurisprudence of the Supreme Court that allowed the government to modify the regulatory framework, guaranteeing the investor a reasonable return on investment.

797. On 27 September 2012, Isolux Corsan S.A. was notified of the Supreme Court ruling of 24 September 2012, which clearly stated that:

“The reasonable remuneration of the investments that Act 54/1997 provides for does not have to imply, we repeat, that the remuneration has to be precisely by means of a regulated tariff [...]

The private agents or operators that “renounce” the market, even if they are more or less “induced” by a generous remuneration offered by the regulatory framework, without the counterpart of the assumption of significant risks, knew or should have known that said public regulatory framework, approved at a certain moment in time, was consistent with the conditions of the economic scenario then in force and with the electricity demand forecasts then carried out, and they could not subsequently be ignorant of the relevant modifications of the basic economic data, before which the reaction of the public authorities to match it to the new circumstances is logical.

1012 Annex R-137: Written appeal of 21 January 2011.

1013 Annex R-214: Claim of Isolux Corsán, S.A. 27 May 2011 filed before the Supreme Court against Royal Decree 1565/2010, contentious administrative appeal 60/2011.

1014 In particular the rulings of 9 December 2009, p. 37, of 25 October 2006 (R-214, p. 38).

The administratively fixed economic regime [...] is based on a series of implicit budgets that any diligent market operator—or one who had received prior quality advice—could not fail to know of.”¹⁰¹⁵ (Emphasis added).

798. When Isolux Corsan S.A. learned of this decision on 27 September 2012, and in light of the previous jurisprudence of the Supreme Court, in particular the ruling of 9 December 2009 mentioned in ¶ 792, it had more than enough knowledge to know that the method of remuneration of its investment could be drastically modified, including even the elimination of the regulated tariff. The confirmation and extension of its previous knowledge did not allow the Claimant to have legitimate contrary expectations. There was still time for IIN to renounce the investment if it did not want to assume the advertised risk.

799. The Claimant objects that no reasonable investor could anticipate the abolition of the Special Regime nor foresee that a maximum limit would be imposed on the return on its investment¹⁰¹⁶. It adds that the retroactive nature of the reform was not foreseeable either¹⁰¹⁷.

800. The Arbitral Tribunal is not convinced by these arguments. Firstly, the Claimant was not an ordinary reasonable investor, but a particularly well-informed investor. Secondly, the Claimant’s objections are not convincing *per se*.

801. According to the Claimant, the imposition of a tax on the value of electricity production (IVPEE) was the first of the measures that depleted the Special Regime of its content¹⁰¹⁸. The Arbitral Tribunal has already decided that it has no jurisdiction to hear the dispute over the alleged violation by the Kingdom of Spain of obligations derived from Article 10(1) of the ECT through the introduction of the IVPEE by means of Law 15/2012¹⁰¹⁹.

802. However, it is not necessary to enter into a special discussion on the effects of the IVPEE to conclude that with its successive subsequent reforms, by means of which the Kingdom of Spain has finally abolished the Special Regime completely, replacing it with a new regime named the Specific Remuneration Regime, which is “*radically different from the Special Regime and much less advantageous for the holders of photovoltaic installations*”

1015 Annex R-139: Supreme Court Ruling of 24 September 2012; Annex R- 141: Supreme Court Ruling of 15 October 2012 issued in the T-Solar and 117 SPVs versus RD 1565/2010 dispute, rec. 64/2011.

1016 Counter-Argument, ¶394.

1017 Counter-Argument, ¶465.

1018 Claim, ¶ 143.

1019 See supra ¶ 741.

*under Royal Decrees 661/2007 and 1578/2008*¹⁰²⁰.” Finally, the concept of FIT was itself eliminated.

803. The reality of these facts does not result in the breach of the legitimate expectations of the Claimant. The existence of a Special Regime throughout the life of the Plants could not be an expectation *per se*, regardless of its content. In October 2012, all investors knew or should have known that the system was going to be modified. For example, the National Energy Commission, in its report of 7 March 2012¹⁰²¹ stated that:

“Due to the high cost of the remuneration of the equivalent premium of the special regime, the difficulty of its financing by means of the access tariff (taking into account the current economic imbalance of the electricity system), as well as the necessary revision of the efficiency incentives of the current regulation, it is necessary to review the existing regulation, in order to achieve the objectives in the recently approved Renewable Energy Plan, minimising the associated costs. Likewise, it is possible to contemplate other new sources of financing of the equivalent premium in addition to the current one (based exclusively on the access electricity tariffs).”

804. In October 2012, any investor could anticipate not only a fundamental modification of the content of the Special Regime, but also the elimination of the regime, provided that the principle of reasonable profitability of the investment guaranteed by the ESL were respected, which the National Energy Commission itself also points out¹⁰²². With its special knowledge of the Supreme Court ruling of 23 September 2012, the Claimant should have considered the abolition of the Special Regime as a realistic possibility when it made its investment.

805. The Claimant maintains that it could not foresee that a maximum limit would be imposed on the return on its investment because the principle of profitability of the investment according to the ESL contemplated a “*base*” of profitability and not a “*ceiling*” in its promotion of renewable facilities¹⁰²³. According to the Claimant, the only objective interpretation of Article 30.4 of the ESL is that it marks a minimum or “*base*” for the remuneration of photovoltaic installations, contrary to RDL 9/2013, which imposes a ceiling on this reasonable profitability¹⁰²⁴ in such a way that, if the Claimant had made its investment after the approval of RDL 9/2013, it would have been advised of a maximum limit on the return on its investment¹⁰²⁵.

1020 Claim, ¶ 163.

1021 Annex R-69: CNE [National Energy Commission] report on the Spanish energy sector of 7 March 2012, p. 75

1022 Annex R-69: CNE [National Energy Commission] report on the Spanish energy sector of 7 March 2012, p.23

1023 Claim, ¶¶ 173-178.

1024 Response, ¶ 388, 390.

1025 Response, ¶ 394.

806. Article 30.4 of the ESL provides:

“4. In addition, the production of electricity through non-hydraulic renewable energies, biomass, and hydroelectric power plants equal to or less than 10 MW will receive a premium to be set by the Government so that the price of the electricity sold by these facilities is between 80 and 90 percent of the average price of electricity, which will be calculated by dividing the revenues derived from billing for electricity supply by the energy supplied. The concepts used to calculate the aforementioned average price will be determined excluding the Value Added Tax and any other tax added to the consumption of electricity.

The determination of the premiums will take into account the voltage level of energy on delivery to the network, the effective contribution to environmental improvement, the saving of primary energy and energy efficiency, the generation of economically justifiable useful heat and the investment costs incurred, so as to achieve reasonable profitability rates with reference to the cost of money in capital markets [...].”

807. This text does not include the concepts of “base” or “ceiling”. The only guarantee that it contains for the investor is that it will obtain, in relation to some parameters, a rate of reasonable profitability with reference to the cost of money in the capital market. That is, that the regulator guarantees a minimum profitability but does not guarantee that the investor can achieve a return higher than the guaranteed one.

808. The Respondent notes that before this arbitration, the Claimant shared this analysis. In fact, in its Claim before the Supreme Court of 27 May 2011¹⁰²⁶, Isolux Corsan maintained that the ESL “*intended to create a legal framework stable enough to encourage investors to develop this type of project. Hence, the Law ensures them a reasonable remuneration for their costs, investments and risks incurred. It is necessary that they [the investors] receive a model that allows companies to trust that they can recover their costs and obtain a reasonable return on their investments.*”

809. The Parties do not dispute that the profitability guaranteed by RD-1 9/2013 is 7.398%¹⁰²⁷ before taxes. A report prepared by Deloitte in May 2011 and

1026 Annex R-214: Claim of Isolux Corsán, S.A. of 27 May 2011 filed before the Supreme Court versus Royal Decree 1565/2010, administrative contentious appeal 60/2011., p. 49.

1027 Counter-Argument, ¶ 791 “The Claimant’s losses expert, Deloitte, considers that, having been freely invested in the market, the amounts corresponding to the losses suffered would have obtained a profit of 7.398%. This is precisely the “reasonable profitability” that the Kingdom of Spain guarantees, in accordance with the new regime enshrined in RDL 9/2013, to investors in the photovoltaic sector.” Counter-Response, ¶ 699, M. Conclusions, d) “The measures adopted in 2013 by the Kingdom of Spain are reasonable and guarantee the return to the investors of the costs of the investment, the operation and the sale of electricity, granting a reasonable profitability of 7.398% IRR.”

presented by both Corsan Isolux and the merchants of the T-Global Solar Group before the Spanish Supreme Court in their appeals against RD1565/2010 indicates that the forecast of profitability of the photovoltaic plants after Law 2/2011 was of 6.19%¹⁰²⁸. The same report indicates that within the regulatory framework of RD661/2007 “*the profitability expected by T-Solar when making its investment was of 6.41%*”¹⁰²⁹. This profitability was lower than the 7% rate foreseen by the 2005-2010 Spanish Renewable Energy Plan approved by the Council of Ministers Agreement of 26 August 2005¹⁰³⁰, a rate considered “*reasonable*” by Isolux Corsan, S.A. itself in its claim before the Spanish Supreme Court¹⁰³¹.

810. The Claimant could not have had legitimate expectations regarding the rate of return higher than 6.19% after taxes. The rate of 7.398% guaranteed by RD-1 9/2013 is a pre-tax rate, and to compare it with the rate of 6.19% it is necessary to assess, after taxes, the profitability guaranteed by RD-1 9/2013. The Respondent’s experts have done so based on the calculation methods used by Deloitte in 2011, updated taking into account the calculation methods foreseen by the latest legislative developments. They concluded that the “*weighted average internal rate of return after taxes of RD661/2007 plants amounts to 7.11% and for the 34 plants subject to the present arbitration process, to 7.19%*”¹⁰³². Neither the Claimant, nor its experts, Deloitte and KPMG, objected convincingly to this calculation.

811. Consequently, the Claimant who decided to invest when it knew that the plants had a profitability of 6.19% cannot maintain that by introducing the imposition of a yield limit of 7.19%, the Kingdom of Spain violated its legitimate expectations.

812. In order to reach a profitability rate of the plants of more than 7.1%, the Respondent’s experts took into account the effects of the IVPEE, which do not fall within the jurisdiction of the Arbitral Tribunal, when determining whether a violation of Article 10 (6) of the ECT occurred. That is, by ignoring these effects the rate of return after taxes would be higher. This confirms that the Claimant’s legitimate expectations regarding the profitability of its investment were not violated by the abolition of the Special Regime.

1028 Annex R-217: Deloitte expert report of 23 May 2011, p. 55.

1029 Annex R-217: Deloitte expert report of 23 May 2011, p. 54.

1030 Annex C-14: Renewable Energy Plan 2005-2010 approved by the Spanish Government by means of Agreement of the Council of Ministers, of 26 August 2005, p. 274.

1031 Annex R-214: Claim of Isolux Corsán, S.A. of 27 May 2011 filed before the Supreme Court against Royal Decree 1565/2010, administrative contentious appeal 60/2011, p. 50

1032 Mac Group Altran report of 28 July 2015, p. 38-39.

813. The Claimant also argues that the Specific Remuneration established by RDL 9/2013 not only projects its effects into the future, but also does so into the past, which gives it an unpredictable retroactive nature that violates Article 10(1) of the ECT. The Respondent, on the contrary, explains that this measure is not retroactive, and that the Claimant confuses the immediate application of this rule with the concept of retroactivity.

814. The Arbitral Tribunal does not share the Claimant's position. It considers, according to the distinction adopted by the tribunal in the Nations Energy v. Panama case,¹⁰³³ between retroactivity and immediate application, that the system established by RDL 9/2013 does not have a retroactive effect; but is of immediate application. The foregoing, given that it does not revoke the rights acquired by the Claimant in the exploitation of the plants, applies to the future. RDL 9/2013 does not entail the return of compensations received before 14 July 2013, which are intangible. The fact that the new compensation system takes into account existing and past parameters such as those enumerated by the Claimant¹⁰³⁴ is not anything unusual, since they apply to facilities built prior to the reform, while deploying their effects towards the future.

815. Based on the foregoing, the Tribunal finds that the Claimant has not established that the Kingdom of Spain violated its obligation to grant fair and equitable treatment (ECJ) to the Claimant's investments.

b. The alleged violation by the Respondent of the obligation to ensure full protection and security of the Claimant's investments.

816. For the Claimant, this standard would imply "*an obligation to maintain the stability of that legal framework. In the case in question, in which the Kingdom of Spain committed to a regime (a long-term fixed FIT, backed by the Special Regime), but very few years later it abolished it purely and simply, the Respondent's conduct does not comply with the concept of "stability", regardless of how one wants to understand this term*"¹⁰³⁵. The Claimant adds that "*there is a legitimate expectation of stability of the legal framework as an essential element of the ECJ standard*"¹⁰³⁶ and that "[l]ogically, the reasonableness and proportionality of the measure must

1033 Nations Energy Corporation, Electric Machinery Enterprises Inc., and Jamie Jurado v. the Republic of Panama, ICSID Case No. ARB/06/19, ¶¶ 642-648; Response, ¶895.

1034 Claim, ¶203.

1035 Counter-Argument, ¶ 614.

1036 Counter-Argument, ¶ 616.

*be considered in light of the legitimate expectations of the investor, which are protected by the ECJ standard.”*¹⁰³⁷

817. Finally, the Claimant makes a presentation based on the standard that confuses the ECJ and the issue of the predictability of the measures, when the main purpose of the standard is to guarantee the investor against harmful acts of third parties and agents of the State. The Claimant has not claimed that it was a victim of such acts. The protection and security standard cannot intervene to protect the investor against modifications of the legal framework in cases in which their protection is not justified by the ECJ's obligations. The Tribunal shares the position of the court in the AES Summit Case v. Hungary case, that mentioned:

“...the duty to provide most constant protection and security to investments is a state's obligation to take reasonable steps to protect its investors (or to enable its investors to protect themselves) against harassment by third parties and/or state actors. But the standard is certainly not one of strict liability. And while it can, in appropriate circumstances, extend beyond a protection of physical security it certainly does not protect against a state's right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals.”

818. Furthermore, if one wants to enter into the terrain of predictability raised by the Claimant, it is worth remembering that before the signing of the Investment Agreement, Isolux Corsan declared before the Spanish Supreme Court: *“More than five legislative changes in two years, with the consequent change of economic conditions for those affected, have turned Spain into a country lacking legal security for investors, which causes our international discredit”*¹⁰³⁸. A party that decides to invest in a country that, according to it, lacks legal certainty, cannot later complain that such security was not ensured.

819. The Tribunal concludes that the Claimant has not established the violation by the Respondent of its obligation to ensure full protection and security of the Claimant's investments.

1037 Counter-Argument, ¶ 619.

1038 Annex R-214: Claim of Isolux Corsán, S.A. of 27 May 2011 filed before the Supreme Court against Royal Decree 1565/2010, administrative contentious appeal 60/2011., p. 11.

c. The alleged violation by the Respondent of the obligation to not prejudice, by exorbitant or discriminatory measures, the management, maintenance, use, enjoyment or disposal of the investments of the Claimant

820. Article 10(1) of the ECT prohibits the Respondent from harming “*in any way, by means of exorbitant measures ..., the management, maintenance, use, enjoyment or liquidation*” of the investment of IIN. The Claimant, in the English version, uses the adjective “*exorbitant*”, which is translated as “*unreasonable*” and since the measures taken by the Respondent have not been reasonable, they have been “*exorbitant*” in the sense of Art. 10(1), and have prejudiced the management, maintenance, use, enjoyment or liquidation by IIN of its investment in Spain, in direct violation of Art. 10 (1) of the ECT¹⁰³⁹.

821. The Arbitral Tribunal notes that the obligation whose violation is alleged by the Claimant is, first of all, an obligation not to prejudice “... *the management, maintenance, use, enjoyment or liquidation*” of the investment. In order for the violation to take place, it would be necessary for the measures classified as exorbitant or discriminatory to have a negative effect on the investment. The Arbitral Tribunal is not convinced that this was the case since the incriminated measures did not negatively affect the profitability of the investment as it has been established¹⁰⁴⁰.

822. In addition, the Arbitral Tribunal does not consider that the measures taken were exorbitant, even in the sense of unreasonableness. The Arbitral Tribunal shares the criterion adopted in the Saluka Investments Award v. Czech Republic case,¹⁰⁴¹ to which the Claimant refers¹⁰⁴². In this case, the Court rightly indicated:

“The standard of “reasonableness” has no different meaning in this context than in the context of the “fair and equitable treatment” standard with which it is *associated; and* the same is true with regard to the standard of “non-discrimination”. The standard of “reasonableness” therefore requires, in this context as well, a showing that the State’s conduct bears a reasonable relationship *to some rational policy, whereas the standard of “non-discrimination” requires a rational justification of any differential treatment of a foreign investor.*

Insofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not therefore differ substantially from a violation of the “fair and equitable treatment” standard. The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation,

1039 Claim, ¶ 271.

1040 Supra ¶¶809-812

1041 Saluka Investments B.V. v. the Czech Republic, Ad Hoc, Partial Award, 17 March 2006, ¶¶ 460-461, Annex CLA-22.

1042 Counter-Argument, ¶ 640.

management, maintenance, use, enjoyment or disposal of the investment by the investor.”

823. In the present case, the measures adopted by the Kingdom of Spain can be criticised, considering that others, recommended by the National Energy Commission, would have been preferable and more favourable to the Claimant. If this were true, that would not be sufficient to conclude that the measures adopted were “*exorbitant*” or not reasonable in the sense of the ECT. The behaviour of the State was a rational policy that existed, like it or not, to protect the consumer. The Arbitral Tribunal has already decided that the incriminated measures did not violate the ECJ and cannot, independently, be a source of responsibility of the Kingdom of Spain towards the Claimant based on Article 10(1) of the ECT.

824. The Claimant considers that the Arbitral Tribunal has not established the violation by the Respondent of its obligation not to prejudice, through exorbitant or discriminatory measures, the management, maintenance, use, enjoyment or liquidation of the Claimant’s investments.

825. Based on the foregoing, the Arbitral Tribunal rejects the Claimant’s claim that the Respondent has violated its obligations under Article 10 of the ECT.

2. The alleged violation of Article 13 of the ECT

826. The Claimant alleges the violation of Article 13 of the ECT by the Kingdom of Spain on the basis of a series of arguments presented that can be summarised in the following way:

- The Claimant’s investment is protected by Article 13(1) of the ECT, which prohibits the expropriation of investments within the meaning of Article 1(6) of the ECT and is not limited to the protection of the acquired rights;
- The regulatory power of the Kingdom of Spain cannot escape its responsibility under Article 13 of the ECT;
- The measures adopted by the Kingdom of Spain had the effect of expropriating the investment of Isolux INBV, since it resulted in a substantial deprivation of the investment.

827. The Respondent, in response, argues that:

- The future returns that ISOLUX could expect do not constitute goods protected by Article 13(1) of the ECT;
- This analysis is confirmed by international law;
- It follows from the facts that the challenged measures did not have the effect of expropriating the Claimant’s investment.

828. In light of the nature of the arguments developed by the Parties, the Arbitral Tribunal will first decide whether the Claimant is requesting protection of an investment protected by Article 13 of the ECT (i), and whether the incriminated measures had an expropriatory effect (ii).

829. The Arbitral Tribunal considers that, in light of the clear explanations of the parties, it does not need to take into account the DGT report dated 29 March 2016, as permitted by Article 21 (5) (b) (iii) of the ECT.

a. The nature of the Claimant's investment and the scope of protection of Article 13 of the ECT

830. The Claimant maintains that an indirect expropriation of its investment occurred, which was protected by Article 13 of the ECT, and which consists of “*its shareholding in the capital of T-Solar, as well as in the income obtained from the activities of TSolar*”,¹⁰⁴³ while the economic value of its investment, which was diminished or wiped out by the incriminated measures, consists of the “*security of selling the electric power produced under the Special Regime, at a regulated tariff: the FIT*”,¹⁰⁴⁴. It considers that the concept of “*investment*” must be interpreted in light of Article 1(6) and that, moreover, this Article specifically includes returns without temporal specificity¹⁰⁴⁵. According to the Claimant, the Respondent confuses the investment subject of the protection of Article 13 of the ECT with its economic value, arguing that in light of section 13 (3), which provides an autonomous definition of the investment, only goods or rights acquired and within its equity may enjoy the protection of the aforementioned Article. Furthermore, in the present case “*the security*” of selling energy and receiving “*future returns*” does not constitute a tangible asset expropriable under Article 13 (3) of the ECT.

831. According to the Respondent, the alleged investment of the Claimant would be limited to its shareholding in T-Solar and, therefore, to the possible indirect possession, through the T-Solar subsidiaries, of the shares of the holding companies of the Plants¹⁰⁴⁶. Plant yields would in fact not be the investment of the Claimant¹⁰⁴⁷. The Respondent adds that to be susceptible to expropriation those yields would also have to be protected under Spanish law.

832. Article 13 of the ECT provides that:

“Expropriation

1043 Counter-Argument, ¶672.

1044 Claim, ¶282; Counter-Argument, ¶673.

1045 Counter-Argument, ¶686.

1046 Counter-Response, ¶ 877.

1047 Counter-Response, ¶ 878.

1. The investments of the investors of one Contracting Party in the territory of another Contracting Party will not be subject to nationalisation, expropriation or any measure or measures having equivalent effect to nationalisation or to expropriation (which will be referred to hereafter as “expropriation”), except if said expropriation is carried out:

a) for a reason of public interest;

b) in a non-discriminatory manner;

c) according to due legal procedure; and

d) by means of the payment of a rapid, adequate and effective compensation.

The amount of compensation will be equal to the fair market value of the investment expropriated immediately before the announcement of the expropriation or the intention to carry out the expropriation affected the value of the investment (hereinafter referred to as “date of valuation”).

This fair market value will be expressed, at the investor’s discretion, in a freely convertible currency, based on the exchange rate in the market for this currency on the date of valuation. The compensation will include interest according to a commercial rate fixed according to market criteria, from the date of the expropriation to the date of payment.

2) In accordance with the legislation of the Contracting Party that conducts the expropriation, the affected investor shall have the right for a court or other competent authority independent of that Party to promptly review its case, the payment of compensation and the valuation of its investment, in agreement with the principles enunciated in section 1).

3) For the sake of greater clarity, a situation will be considered an act of expropriation when a Contracting Party expropriates the assets of a company in its territory in which investors of any other Contracting Party have invested, even when it has been done through a share in the capital”.

833. From the reading of Article 13(1) of the ECT it is clear that “*the investments*” made by investors of a Contracting Party in the territory of another Party are protected under the ECT. The Arbitral Tribunal, in relation to jurisdictional objection C, interpreted

the concept of investment in light of Article 1(6) of the ECT and in accordance with the objective definition of the concept of investment, and does not consider that the concept of “*investment*” has to be interpreted differently since it is included within Article 13 of the ECT.

834. There is no doubt that, pursuant to Article 1(6) sections (b) and (e) of the ECT, and in accordance with the objective definition of the investment, the Claimant holds an investment, through its participation in the capital of T-Solar, which controls the Plants that generate the yields. In other words, in accordance with Article 13 of the ECT, and even with Article 13(3) of the ECT, the Claimant is entitled to protection of its shareholding in T-Solar, which implies the protection of both the ownership of the shares and the value of the same, against any substantial violation by the State, a concept that the Arbitral Tribunal will specify later.

835. There is no doubt that the Claimant did not invest in returns, but in shares. However, a decrease in investment returns as a result of measures adopted by the State may be representative of the decrease in the economic value of the investment and, if substantial and significant, reflect an indirect expropriation. In such a situation, it is not the yields that are subject to the expropriation. It is the tangible goods that produce the yields and that, when infringed, lose their economic value.

836. It results from those observations that the arguments developed by the Respondent regarding the protection by Article 13(3) of tangible “*property*”, and the alleged obligation that the rights or property susceptible to expropriation be protected by Spanish law, are unfounded. The only relevant aspect is the determination of whether the Claimant’s yields have suffered, as a consequence of the incriminated measures, a decline of such importance that this reflects an indirect expropriation of the investment.

b. The effects of the measures adopted by the Kingdom of Spain on the investment of the Claimant

837. The Parties agreed that, in order to determine the expropriatory effect of those measures, it is appropriate to assess whether there was a substantial or significant deprivation of the investment; and agreed to the use of the “*test*” used by the courts in the Electrabel v. Hungary case.¹⁰⁴⁸ In this case, the Tribunal considered that for characterisation as expropriation there must have been “*a substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual wiping out, effective neutralisation or de facto destruction of its investment, value or benefit*”¹⁰⁴⁹.

1048 Counter-Response, ¶887; Counter-Argument ¶735-738.

1049 Counter-Argument, ¶888.

838. However, the Parties do not agree on the interpretation of this test. The Claimant concludes that this test was considered passed when the measures had the effect of dispossessing the investor of its investment or of its control, and also when the loss suffered by the investor is “severe” or “radical”¹⁰⁵⁰. The Respondent considers that the Claimant’s interpretation of the Electrabel test is not correct and that the terms “severe” or “radical” do not describe the loss of value but the deprivation of rights. For there to be expropriation, the loss of value does not have to be “severe”, but the value has to be wiped out, neutralised or destroyed¹⁰⁵¹.

839. The Arbitral Tribunal considers that it is not necessary to enter into this debate since the position adopted both by the court in the Electrabel case and by many international arbitral tribunals in this regard is very clear and reflects the common conviction that illegal direct or indirect expropriation can affect both the investment and its control, and that the effect has to be substantial¹⁰⁵², that is, that the impact of the measures must be of such a magnitude on the rights or assets of the investor that its investment loses all or a very significant part of its value, which amounts to a deprivation of its property.

840. In the present case, the shareholder control of the Claimant over T-Solar and its Plants has not been affected in any way by the measures adopted by the Kingdom of Spain. T-Solar continues to control and fully operate its Plants, facts that are not disputed between the Parties. What the Claimant claims is compensation due to the loss of value of its shares caused by a loss of profitability of the Plants controlled by T-Solar.

841. In order to determine whether an expropriation of the Claimant’s investment occurred, in accordance with Article 13 of the ECT, the Arbitral Tribunal has to determine whether the incriminated measures resulted in a loss of profitability of those Plants of such a magnitude that the Claimant’s investment was substantially affected. The foregoing will be prior to determining the amount of damages suffered, as necessary.

842. To assess the existence of an indirect expropriation, the Arbitral Tribunal agrees with the methodology used by the Respondent, taking into account that the Deloitte experts,

1050 Counter-Argument, ¶738.

1051 Counter-Response, ¶¶891-892.

1052 Annex RLA-75: CMS Gas Transmission Company v. the Republic of Argentina, ICSID Case No. ARBI/01/8, Award of 12 May 2005, (“CMS”), paragraphs 262-264.; Annex RLA- 77: Marvin Roy Feldman Karpa v. Mexico, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, paragraphs 100-152-153.; Electrabel v. Hungary, paragraphs 6.53, 6.63; Annex RLA-76: Pope and Talbot, Inc v. Government of Canada, UNCITRAL/NAFTA, Interim Award of 26 June 2000, paragraph 102.; Annex RLA-78: Sempra Energy International v. the Republic of Argentina, ICSID Case No. ARB/02/16, Award of 28 September 2007, paragraph 285; AES Summit Generation Ltd and AES-Tisza Erőmű Kft v. Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010, paragraphs 14.3.1 – 14.3.4; UNCTAD Expropriation Report, page 69; Principles of International Investment Law Rudolph Dolzer and Christoph Schreuer, Oxford University Press, 2012, page 124.

at the request of the T-Solar Group, also resorted to this same methodology in their report of 23 May 2011 in order to “*quantify the impact on the profitability of the projects of the approval of Royal Decree 1565/2010*”¹⁰⁵³. The Arbitral Tribunal has difficulties in understanding the reasons that led the Claimant to not use this method in the current arbitration.

843. The Arbitral Tribunal considers that the report carried out by the experts of the T-Solar Group on 23 May 2011¹⁰⁵⁴ is of particular relevance for its analysis, insofar as the profitability expectations of the Plants are detailed by ISOLUX itself (i) prior to its investment and (ii) prior to the measures described as expropriatory by the Claimant and the subject of this arbitration. Specifically, the profitability evaluations were made after the adoption of RD 661/2007 and after RD 1565/2010. This expert report accompanied a claim before the Supreme Court in May 2011 by ISOLUX. Likewise, it accompanied another claim presented by T-Solar¹⁰⁵⁵ challenging changes introduced by RD 1565/2010 and the corresponding ruling notified on 29 September 2012¹⁰⁵⁶.

844. Using the Internal Rate of Return (“IRR”) to measure the profitability of the facilities, in May 2011 the Deloitte experts concluded that “*The after-tax return of the T-Solar facilities, due to Royal Decree 1565/2010, would have been reduced by 0.64% (it has decreased from 6.41% to 5.77%) in the oil price scenario of \$119 2005 (145 euros 2005/MWh) in 2030 and 0.98% (it has fallen from 6.41% to 5.43%) in the oil price scenario of \$63 2005 (85 euros 2005/MWh) in 2030*”¹⁰⁵⁷.

845. However, the experts specified that Royal Decree 1565/2010 was amended by Royal Decree Law 14/2010 (of December 23) and by Law 2/2011 (of March 4), extending the term to which photovoltaic installations have the right to the economic regime premium, from 25 years according to Royal Decree 1565/2010 to 30 years¹⁰⁵⁸. The experts added that: “*For illustrative purposes, the loss of the differential in IRR applying Royal Decree 1565/2010 with a 30-year time limit, is lessened compared to the previous 25-year scenario: applying the most favourable (highest) price scenario to the comparative scenario, there is still a reduction in profitability, 0.22% (going from 6.41% to 6.19%), which represents a 3.45%*

1053 Annex R-217: Deloitte report of 23 May 2011, page 7.

1054 Annex R-217: Deloitte report of 23 May 2011, page 52.

1055 Annex R-222: Claim of T-Solar and the Holding Companies of the Plants subject of this arbitration of 4 July 2011

1056 Annex R-220: Documentary support of the telematic notification made by the Supreme Court, from the Ruling of 24 September 2012 regarding ISOLUX, 27-09-2011, at 11:27:09”.

1057 Annex R-217: Deloitte report of 23 May 2011, p. 52. 1058 Annex R-217: Deloitte report of 23 May 2011, p. 54.

relative loss for the set of T-Solar facilities whose remuneration is established in Royal Decree 661/2007.”

846. With the adoption of Decree Law 14/2010 and Law 2/2011, which resulted in an increase in the payment of premiums from 25 to 30 years, the IRR initially set at 6.4% by RD 661/2007 increased to 6.19% after taxes¹⁰⁵⁹. It is on the basis of this IRR, quantified by Deloitte in 2011 at 6.19%, that the Claimant decided to invest, as the Arbitral Tribunal already established¹⁰⁶⁰. That was the level of return on its investment when it was made.

847. The Arbitral Tribunal reaches a first conclusion: the Claimant cannot argue that an expropriation of its investment occurred since the current IRR is above the IRR of 6.19%. In order to prove the expropriation of the Claimant’s investment, the current IRR would have to be less than 6.19% in a proportion that could be described as “substantial and significant”.

848. The Arbitral Tribunal determined that this was not the case when it examined the Claimant’s request regarding the violation of its legitimate expectations¹⁰⁶¹.

849. In the file it was established that the “reasonable profitability” enshrined in RDL 9/2013 and established by Royal Decree 413/2014, is 7.398%¹⁰⁶².

850. The actual and current IRR of the Plants was calculated by the Respondent’s experts based on the calculation methods used by the Deloitte experts in 2011, updated to take into consideration the calculation methods foreseen by the latest legislative developments. They concluded that the “*weighted average IRR of plants of RD 661/2007 amounts to 7.11% and for the 34 plants subject to the present arbitration process, to 7.19%*” and that this IRR “*is higher than the profitability established in the Spanish Regulations at the moment in which the promoters of the plants undertook their investment*”¹⁰⁶³.

851. The Arbitral Tribunal finds that neither the Deloitte experts nor the KPMG experts arrived at a contrary conclusion. The Claimant and its experts decided to devote few developments to the relevance and the evaluation of the reasonable profitability of the Plants in this arbitration, in such a way that they did not contradict in a precise or convincing manner the arguments of the Respondent.

852. In light of these observations, the Arbitral Tribunal finds that an expropriation of the Claimant’s investment did not occur, since the returns of which it enjoyed

1059 Counter-Response, ¶641; Annex R-217: Deloitte report of 23 May 2011, pp. 52-55.

1060 See supra, ¶ 811.

1061 See supra, ¶ 810

1062 See supra, ¶ 809

1063 Mac Group Altran report of 28 July 2015, p.38-39.

profitability at the time of investing were not higher than 6.19% and the current profitability of the plants is much higher than this profitability, reaching 7.11%. In no way can a “severe” or “radical loss” be spoken of, according to the criterion accepted by the Claimant¹⁰⁶⁴.

853. Taking into account that the Arbitral Tribunal concludes that the measures adopted by the Kingdom of Spain were not expropriatory, it is useless to decide on the exception regarding the State’s regulatory power as a prerogative that excludes the right to receive compensation. Nor is it necessary to examine the Parties’ arguments regarding the damages requested by the Claimant.

854. Based on the foregoing, the Arbitral Tribunal rejects the Claimant’s request regarding the violation by the Kingdom of Spain of Article 13 of the ECT.

C. COSTS

855. According to Article 43 of the SCC Arbitration Rules, the arbitration costs include the fees and expenses of the Arbitral Tribunal, the administrative fee and the expenses of the SCC, as well as the reasonable costs incurred by the parties.

856. Article 43(5) of the Regulations establishes that, unless otherwise agreed by the parties, the Arbitral Tribunal, at the request of a party, shall distribute the costs of the arbitration between the parties, taking into account the outcome of the case and other relevant circumstances.

857. In the present case, there is no agreement between the parties regarding the distribution of costs.

858. The Claimant requested that the Arbitral Tribunal order the Respondent to pay all of the costs and expenses arising from this arbitration proceeding. For its part, the Respondent requested that the Arbitral Tribunal order the Respondent to pay all of the costs and expenses incurred in this arbitration proceeding. The corresponding amounts are mentioned in Section VI.C of this Award.

859. On the one hand, the Claimant initiated this arbitration on the basis of alleged violations of the ECT by the Kingdom of Spain, an arbitration whose scope was extended by the same Claimant when it requested the accumulation of the aforementioned arbitration with the arbitration procedure initiated by it under the SCC number V 2014/074. However, it turns out that none of the arguments developed by the Claimant allowed the conclusion of the violation by the Kingdom of Spain of its obligations under the ECT.

1064 Counter-Argument, ¶738.

1065 Response, ¶¶1007 et seq.; Counter-Argument, ¶¶704 et seq.

860. On the other hand, the Respondent submitted, with very limited success, 7 objections to the jurisdiction of the Arbitral Tribunal, since five of those jurisdictional objections were rejected.
861. Due of the foregoing, the Arbitral Tribunal will declare in the operative part of this Award that the Respondent will have to pay 30% of the total costs and expenses derived from this proceeding, and the Claimant 70%.
862. The Respondent will assume 30% of the arbitration costs set by the SCC, which also include the fees and expenses of the arbitrators, to a total amount of 565,220.58 EUR. Taking into consideration the fact that the Respondent paid 50% of those cost in advance, the Claimant will have to reimburse 20% of the amount paid, or 113,044.11 EUR.
863. In relation to the costs incurred by the parties for their representation and defence in the proceeding, the Claimant, by letter of 22 January 2016, requested clarifications and justifications regarding the costs of the Respondent. The Arbitral Tribunal notes that the expenses declared by the Claimant are higher than those of the Respondent by more than €50,000. That does not mean that the Claimant's costs appear excessive to the Arbitral Tribunal, since this difference is explained by the fact that the Respondent did not hire lawyers from outside law firms. However, it is sufficient for the Arbitral Tribunal to consider that the expenses of the Respondent are reasonable, without the need for additional justification.
864. The Respondent has to pay 30% of the Claimant's expenses, that is EUR 1,368,606.00, without including the arbitration costs set by the SCC, and that the Claimant has to pay 70% of the expenses incurred by the Respondent, that is, EUR 785,690.00, without including the arbitration costs set by the SCC.
865. Consequently, the Claimant will have to pay the Respondent the amount of EUR 139,401.20, corresponding to the difference between 70% of EUR 785,690.00 and 30% of EUR 1,368,606.00
866. The Respondent requested interest on its expenses at "*a reasonable rate of interest from the date on which said costs are incurred up to the date of effective payment*"¹⁰⁶⁶. However, since it does not know the precise dates of payment of each of the corresponding amounts, the Arbitral Tribunal will order the Claimant to pay interest only as of the date of this award.
867. Since it regards the Kingdom of Spain, the application of Spanish legal interest seems reasonable.

1066 Counter-Response, ¶1000

VIII.

DECISION

868. For the reasons stated, the Arbitral Tribunal resolves to:

- a) Declare that it has no jurisdiction to rule on the dispute over the alleged violation by the Kingdom of Spain of obligations derived from section (1) of Article 10 of the ECT by means of the introduction of the IVPEE by Act 15/2012;
- b) Reject all other jurisdictional exceptions of the Respondent and to declare itself competent to resolve the present dispute, with the exception of the subject mentioned in a);
- c) Reject, whenever necessary, the inadmissibility exceptions of the Respondent;
- d) Reject the Claimant's Claims;
- e) Decide that the Parties are jointly and severally liable for the payment of the following arbitration costs:
 - Mr Yves Derains's fee of EUR 225,592.00, expenses of EUR 4,459.83 and travel costs of EUR 2,000.00;

In addition, the Claimant will be responsible for the 20% VAT payment applicable to the following amounts: EUR 67,677.60 (corresponding to 30% of the fee) and EUR 1,337.949 (corresponding to 30% of the expenses).
 - Prof. Guido Tawil's fee of EUR 135,355.00, expenses of EUR 5,948.09 and travel costs of EUR 2,500.00;
 - Mr Claus Von Wobeser's fee of EUR 135,355.00, expenses of EUR 12,161.66;
 - The SCC's administration fee of EUR 41,849.00;
 - In addition, the Claimant will be responsible for the 25% VAT payment applicable to the amount of EUR 12,554.70 (corresponding to 30% of the administration fee).

These sums will be paid through advances of funds paid by the Parties to the SCC.

Between the Parties, the Claimant must pay 70% of those costs and the Respondent 30%.

- f) Order the Claimant to pay the Respondent:
- For the costs of arbitration set by the SCC, the sum of EUR 113,044.11;
 - For reasonable expenses incurred by the Respondent, the sum of EUR 139,401.20.
- g) The amounts mentioned in section f) will accrue interest in favour of the Respondent at the legal rate in force in Spain as of the date of this award until the effective payment date.
- h) All other demands of the Parties are rejected.

APPEALS

Pursuant to Section 41 of the Swedish Arbitration Act (SFS 1999: 116), a party may bring an action against the award in relation to the arbitrators' decision on fees. Said action must be exercised within three months, counted from the date on which the party received the award, and must be filed with the court of first instance of Stockholm.

Signed in : Stockholm, Sweden

Date: 12 July 2016

[Signature]

Dr. Guido Tawil

Co-Arbitrator

(illegible)

[Signature]

Mr. Claus von Wobeser

Co-Arbitrator

[Signature]

Yves Derains

Chairman

**ARBITRATION UNDER THE REGULATIONS OF THE INSTITUTE OF
ARBITRATION OF THE CHAMBER OF COMMERCE OF STOCKHOLM**

Isolux Infrastructure Netherlands B.V.

Claimant

v.

The Kingdom of Spain

Respondent

Arbitration SSC V2013/153

Dissenting opinion of the Arbitrator

Prof. Dr Guido Santiago Tawil

1. I agree with the conclusions of my distinguished arbitrator colleagues regarding the recognition of the jurisdiction of this Arbitral Tribunal to resolve the present dispute between the Claimant and the Kingdom of Spain.

2. With regard to the merits of the case, I agree with my co-arbitrators that the existence of an indirect expropriation of the Claimant's investment under Article 13 (1) of the Energy Charter Treaty ("ECT") following the measures adopted by the Kingdom of Spain has not been proven in this case. On this point, I agree with the standard applied by the majority vote in paragraph 839 of the Award in that, for there to be an indirect expropriation, a substantial or significant effect on the investor's rights or assets must be proven that equals a deprivation of their property, a situation that has not been duly proven in this case.

3. Regrettably, I cannot agree with the view expressed by the majority on the treatment, in the specific case, of the "*legitimate expectations*" that make up the standard of "*fair and equitable treatment*" established in Article 10(1) of the ECT.

4. Firstly, I do not agree with the conclusions set forth in paragraphs 772 and 775 of the Award, according to which the Kingdom of Spain would not have entered into commitments with investors because of the "*general nature*" of the applicable norms or the potential recipients thereof. Although the incentive regime implemented by Royal Decrees 661/2007 and 1578/2008 was not aimed at an indeterminate "*generality*" but at a reduced number of interested parties (as I have expressed it on another occasion),¹ I am of the opinion that the legitimate expectations can be generated from the legal system in force at the time of investment, especially when the norms pronounced - as in this case with Royal Decrees 661/2007 and 1578/2008 - had the stated purpose of attracting investments in a certain sector of the economy (that is, in the generation of renewable energies). In this aspect, my position is coincident with the conclusions expressed by the UNCTAD on this point.²

¹ See: My Dissenting Opinion in the case SCC V 062/2012, *Charanne B.V. & Construction Investments S.A.R.L. v. the Kingdom of Spain*, of 21 December 2015, ¶ 8.

² See: United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment*, 2012, p. 69: "*Arbitral decisions suggest [...] that an investor may derive legitimate expectations either from (a) specific commitments addressed to it, for example, in the form of a stabilisation clause, or (b) rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment*". In the same sense, Rudolph Dolzer and Christoph Schreuer, "*Principles of International Investment Law*", Oxford University Press, Second Edition, 2012, p.145.

5. Secondly, I do not consider sound the above conclusion of the majority vote that the date to be adopted as a reference to determine whether legitimate expectations were generated in the specific case should be 29 October 2012. In my opinion, the relevant date for this purpose was the date of 29 June 2012, that is, the day on which the Claimant entered into the Investment Agreement (and when it became effective).³ The existence of suspensive conditions in the Investment Agreement or the possibility that the Claimant could retract its investment decision without penalties until 29 October 2012 are not convincing reasons for determining the time from which the legitimate expectations could have been generated. The date of 29 October 2012 could be a valid limit in relation to possible actions or claims between shareholders but does not acquire similar relevance with regards the host State of the investment and regarding whose conduct this date should be evaluated in order to determine whether or not legitimate expectations were generated.

6. My main discrepancy with the majority decision lies, however, in the way in which factual circumstances were assessed to determine the “predictability” of the measures adopted by the Kingdom of Spain. In other words, if the change of legal regime which occurred in Spain after the investment was made was predictable for the Claimant, a circumstance that - in the affirmative case - would prevent it from invoking legitimate expectations as the basis of its claim.

7. Whether the date of 29 June or 29 October 2012 is adopted for this purpose, at the time of the investment, the regulatory scheme under the special regime put into operation by Royal Decrees 661/2007 and 1578/2008 was fully in force, with the fixing a “*Feed in Tariff*” (“FIT”) with a temporary validity, which was declared not reached by future tariff revisions. The Claimant made its investment - obtaining the rights acquired from a previous investment - under a specific regulatory framework that guaranteed a special remuneration regime and the measures questioned by the Claimant (Law 15/2012, RDL 2/2013 and, fundamentally, RDL 9/2013) were, in all cases, subsequent to the date of the investment.⁴

³ Both the majority and the minority of the Arbitral Tribunal agree that, in the case, the existence of an investment was verified and that it qualifies to be protected by international law. See, similarly, Award, ¶¶ 687 to 693 and 834.

⁴ In this regard, both the majority vote and this dissenting opinion agree that the origin of the conflict is after the date of the investment. The discrepancy arises in relation to the date that should be considered as a reference in order to determine whether the previous action of the Kingdom of Spain allowed the investor or not to invoke

8. Although the regime established by Royal Decrees 661/2007 and 1578/2008 had been partially modified by RD 1565/2010 and RDL 14/2010 and the National Energy Commission's (CNE)⁵ report of 7 March 2012 showed certain difficulties in the financing of the system and the need to adopt reforms, no elements have been provided that would suggest, on 29 June or 29 October 2012, that the Kingdom of Spain would completely eliminate the FIT - which happened just one year later with the sanction of RDL 9/2013 of 12 July 2013 -, without recognising compensation for the eventual holders of rights affected by that measure. Between 29 June and 29 October 2012 the only relevant event that occurred in regulatory matters was the beginning of the process that, several months later, would result in Law 15/2012 on fiscal measures for energy sustainability of 27 December 2012, which established, among others things, a tax on the value of the production of electric energy ("IPVEE") and in respect of which the Arbitral Tribunal has declared its lack of jurisdiction.⁶

9. The power of the host State to modify its legislation at any time is not under discussion, as no one has an acquired right to maintain the laws and regulations. The host State can always modify a legal regime of general or particular scope for reasons of public interest, but that does not prevent the recognition that, if with said legitimate action, acquired rights or legitimate expectations are affected, it is necessary to compensate the damages caused. It is a typical assumption of state responsibility for legal activity, widely recognised in academic legal opinion and comparative jurisprudence and in relation to which Spanish law has deservedly been transformed, since at least the mid-twentieth century, into a source of knowledge of particular value.

the legitimate expectations alleged by it and their consequences. See, in this regard, Award, ¶¶ 704 and 781/804, especially 787.

⁵ See: Report of the National Energy Commission on the Spanish Electricity Sector, 7 March 2012, Annex R-69.

⁶ Award, ¶ 741.

⁷ While some cases of recognition of state responsibility for legal activity can already be traced in the Law of 9 April 1842, which - as a consequence of the First Carlist War - declared the obligation of the Nation "to compensate the material damage caused in the attack, as in the defence of the squares, towns, buildings, etc.", the sanction of the Law of Forced Expropriation of 16 December 1954 ("LFE") imported the legislative consecration in Spain of the patrimonial responsibility of the Administration for both its lawful and illicit activity. The LFE - a law advanced at the time of its sanction in comparative law - enshrined in Article 121.1 of its original text a principle of general scope of singular importance, stating that "It will also give rise to compensation under the same procedure for any injury that individuals suffer with regards

10. Consequently, once the Claimant made its investment, acquiring the right to the FIT under the regulations then in force, it is not reasonable to assume that the State would eliminate that right without adequate compensation.

11. On the contrary, having to foresee that the State will eliminate an acquired right without the corresponding compensation does not seem to be a conduct reasonably required of an investor prior to the actual knowledge of the rules involved, which in no way could have happened, in this case, prior to 29 June 2012 or, in any event, 29 October 2012.

12. If it is admitted, as a hypothesis, that the system of special remuneration (FIT) could be eliminated by the Kingdom of Spain without compensation, the same could possibly be alleged, in the future, in relation to the possibility that the State decides to eliminate the reasonable profitability guarantee contained in article 30.4 of the Electricity Sector Law (ESL). Faced with the potential exercise of legislative or regulatory power, I find no valid reason to distinguish, against the majority vote, between one guarantee (the right to FIT) and another (the right to a reasonable return) for compensatory purposes.⁸

13. In summary, when an investor complies with the requirements established by current legislation to be entitled to a specific and determined benefit, the subsequent ignorance of the investment on the part of the host State violates a legitimate expectation. The Kingdom of Spain was empowered to modify or eliminate the established promotional regime. Nevertheless, eliminating the benefit granted to those who had invested in accordance with this special regime without recognising adequate compensation represents, in my opinion, a violation of the legitimate expectations created and, with that, of the fair and equitable treatment protected in article 10 of the ECT.

the goods and rights to which this Law refers, provided that this is a consequence of the *normal* or abnormal operation of public services or of the adoption of discretionary measures not subject to litigation, without prejudice to the responsibilities that the Administration may demand of its officials with such motive” (my italics). See, in a concordant sense, the general principle consecrated in Article 106.2 of the Spanish Constitution of 1978.

⁸ I do not maintain that this last point would be valid, but rather that - as a hypothesis and in order to show the problems that this construction presents to me - the elimination of one or another right without compensation would find support and analogous objections.

14. Based on the decision adopted by the majority of the Arbitral Tribunal, it is not appropriate for me to rule on the existence or non-existence of the alleged damage, the method of valuation used, or the *quantum* of the compensation required.

[Signature]

Prof. Dr Guido Santiago Tawil

Arbitrator

Date: 6 July 2016